The Jury Selection in the Mitchell-Stans Conspiracy Trial

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This is a study of the *voir dire* proceedings in the trial of the *United States v. John Mitchell and Maurice Stans* in the U.S. District Court for the Southern District of New York in the spring of 1974 (docket no. 73 Cr. 439). The major charge was conspiracy to impede a Securities and Exchange Commission investigation of Robert L. Vesco, a financier, a fugitive at the time of the trial, in return for a $200,000 cash contribution to President Nixon's reelection campaign.[1]

The sheer scope of the proceedings was unusual; 196 prospective jurors were examined, producing a record of over 2,000 pages. A great amount of statistical data and an unusual report on the jury's deliberations[2] promised insights of some value.

In other ways too, the case was not an ordinary one. Both defendants had been members of President Nixon's cabinet, as attorney general and secretary of commerce, respectively. Some of their alleged misdeeds, not totally unrelated to the ones under indictment in the case, had been aired before nationwide television audiences; both defendants and their main accuser, John Dean, had testified before Senator Ervin's Watergate Committee.

Because of its public exposure, the judge desired to sequester the jury. This decision seemed to have been prompted by an expected

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1. The Hon. Lee P. Gagliardi was the judge, John R. Wing, chief counsel for the government, Peter E. Fleming, Jr., chief counsel for John N. Mitchell, Walter J. Bonner, chief counsel for Maurice Stans.

2. A few days after the trial had ended, the *New York Times* published an article, How Mitchell-Stans Jury Reached Acquittal Verdict, by Martin Arnold, May 5, 1974, at 1, col. 5. The piece was based on interviews with some of the jurors. The article, as far as we were able to ascertain, has remained uncontradicted.

second indictment of the defendants during the course of the trial. Actually, the decision was reached earlier.

Another feature removed this jury selection from the ordinary. The defense was assisted in its selection of jurors by a public opinion survey. And since the defense won the case, which many spectators and court reporters thought they should have lost, speculation was rife as to the part played by the survey in this victory.

We shall discuss all of these problems. The main purpose of this study, however, is to examine the jury selection process that preceded the trial, to report how this process affected the composition of the jury that was eventually impaneled, and to trace the effect, if any, of the jury's composition on the verdict it rendered.

THE SELECTION PROCESS IN OUTLINE

Prospective jurors were brought into the courtroom in groups of 48. The judge, in his introductory address, informed them that the trial was expected to last five to six weeks[3] and that the jury would be sequestered. He then asked those prospective jurors to rise on whom this lengthy sequestration would impose undue hardship. After listening to their reasons, he decided, either immediately or after some delay, on their claim to be excused.

In the second phase of questioning, the jurors not excused for hardship were asked first, one by one, to state their name, address, occupation, and, for some unexplained, traditional reason, their military service, if any. Afterward, they were asked, still publicly and this time jointly, a set of routine questions designed to reveal actual prejudice or potential cause for suspicion of prejudice: whether any member of the panel, or any close relative or friend, knew or had had dealings with any of the parties, their attorneys, the law firms and the offices they had been associated with, the U.S. attorney's office and other law enforcement agencies; whether there had been former jury service, appearances as a witness, involvement in legal actions with the U.S. government, and so forth. If any of these questions elicited a positive answer, but the connection with the case was not close, the judge asked whether this would prejudice the juror in favor of either side. If the answer was affirmative, the juror was excused. If it was negative, questioning continued. The last question asked by the judge in open court went directly to the issue of prejudice: whether any juror had formed

3. It lasted ten weeks.

any preconceived ideas or prejudices that would preclude him or her from following the court's instructions on the law in this case; an affirmative response led to immediate excuse.

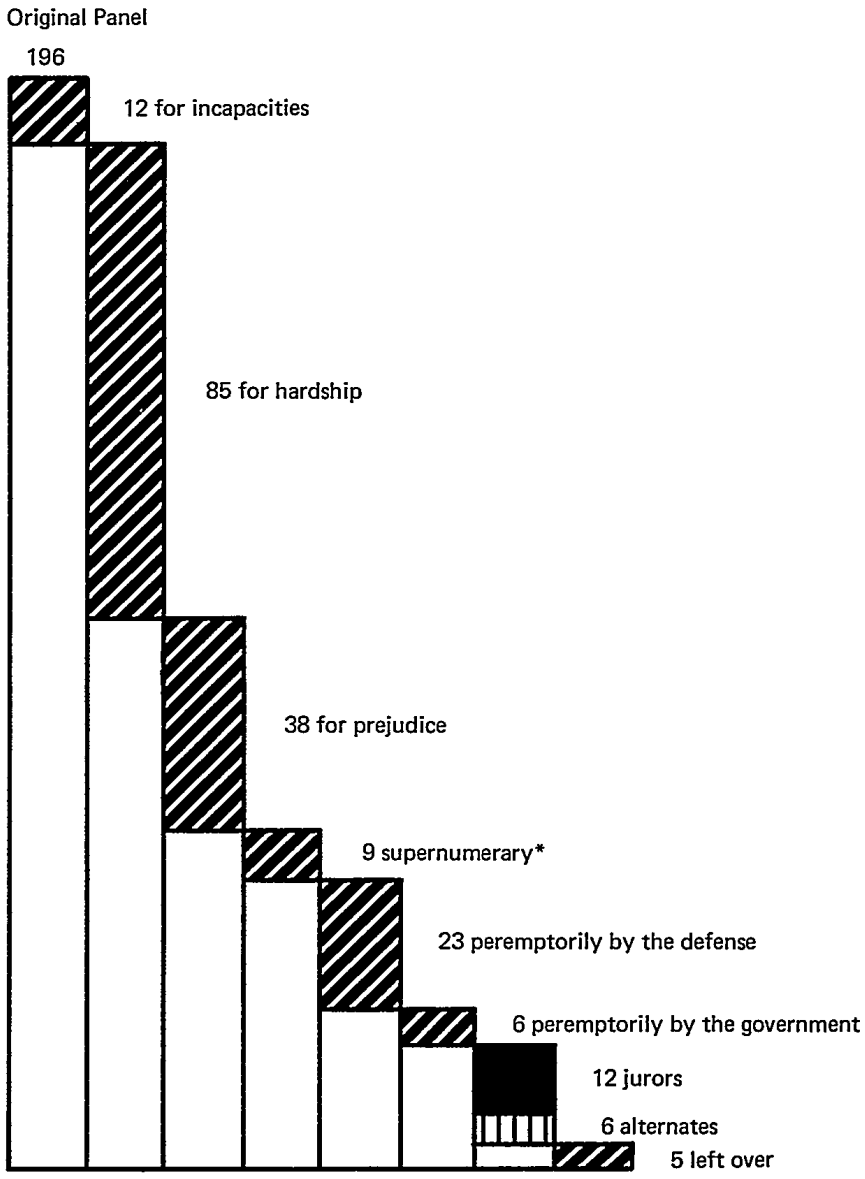
The jurors who survived this second round of questioning were then examined individually and privately in the judge's robing room in the presence of the clerk, the prosecutors, and a varying number of defense attorneys. This private questioning covered three major areas: politics—party registration, involvement in campaign activities such as rallies, demonstrations, or fund raising; Watergate—degree of exposure, knowledge of main figures, opinions of them and of public officials' honesty in general; media—newspapers, magazines, and network news to which they were regularly exposed. In addition, the court explored issues more specifically connected with the case: Had the prospective juror ever asked assistance from a person in public life? Had he prejudices against hunting? (One of the defense witnesses would testify on events during a hunt, and the defense wanted to make sure that prejudice against hunting would not rub off on the defendants.) At the very end of this private questioning period, the judge asked each prospective juror whether, if he were prosecutor or defendant in this case, he would be satisfied with himself as a juror. All questions were asked by the judge. His own questions were occasionally supplemented by follow-up questions suggested for the particular juror by defense attorneys or prosecutor.

There was one other deviation from the prearranged schedule. Sometimes, if the panel members gave more than a simple yes or no answer, the judge, a fine trial lawyer before he came to the bench, would pursue the point through questions that arose naturally in the ensuing dialogue. Counsel on neither side objected to these occasional digressions, acknowledging instinctively the greater naturalness of this type of questioning.

During these three phases of questioning, the court excused 138 jurors for cause:[4] 85 for hardship, 38 for lack of impartiality, 12 for various incapacities, mostly hearing or language difficulties, and 2 because of a high state of anxiety; 1 prospective juror fell ill. (See graph 1.)

4. The use of the term "for cause" is sometimes limited to excuses for actual or expected prejudice; we use the term here in its broadest application to all excuses based on a specific cause, be it prejudice or hardship, in contrast to peremptory excuses, which do not require a "cause."

GRAPH 1. Patterns of excuses



*Only 52 prospective jurors were needed at this point; see note 7 in text.

EXCUSES FOR HARDSHIP

The 85 panel members excused for hardship after they were informed of the expected length of the trial and the need for sequestration constituted 43 percent of all examined prospective jurors. Since the court raised the hardship question jointly with respect to sequestration and trial length, it was not possible to determine how many of these claims arose from the impending sequestration, although in some cases the distinction was clear if the member referred to the long absence from a job or to the need for taking care of a family member in the evening. The reasons for the claimed hardships were, as one might expect, quite varied. Certain claims, including care of children or aged or sick family members, were granted immediately. Jurors with less poignant claims were put "on hold" and asked in the meantime to reconsider their requests. Table 1 shows the nature of the successful claims.

Table 1
Nature of the Successful Claims to Be Excused for Hardship

	No. of Jurors
Employment related	24
Mother of small children	18
Family illness requiring care	17
Personal health	9
Other home situations	10
Religious observance	4
School related	3
Total	85

In the end, 85 of the 96 jurors who had claimed hardship were excused. Eleven either made arrangements for their absence or simply resigned themselves to not being excused. For example, a diabetic was assured that her insulin supply could be refrigerated, and a postal employee was assured that he would be able to take his civil service examination during a weekend.

EXCUSES FOR PREJUDICE

Altogether, 38 prospective jurors were excused for evidence of prejudice; 16 during the public en banc phase of questioning. Of these, 12 prospective jurors confessed to some sort of prejudice, while for 2 the prejudice was inferred: 1 had been found guilty of unlawful refusal to testify before a grand jury, and the other reported he had been "harassed by the FBI."

Although the public questioning gave ample opportunity to the prospective jurors to confess prejudice, the private, individual question-

ing elicited prejudice in 22 more cases, one and a half times as many as had been excused during the public questioning. Prejudice was inferred for two of these jurors: one juror's close relative had been investigated by the state prosecutor; another juror was a member of Common Cause, an organization that had filed a civil suit against one of the defendants.

In three excuses, one during the public phase and two during the private one, the "cause" appeared somewhat remote. One woman had first claimed hardship for fear that a prolonged absence might create difficulties in her job. The judge suggested that she try to resolve them by talking to her employer, which she was able to do. But when the marshal, who had overheard her saying on the telephone to her employer, "Yes, I should like to serve as juror on this case," reported this remark to the court, the juror was excused. The other two prospective jurors were excused because they disliked hunting and because Mr. Stans was a hunter.

The excuses for hardship, incapacity, and prejudice, and the dismissal of 9 supernumerary jurors, left 52 prospective jurors in the panel from which the two sides were to exercise their peremptory challenges. But before turning to that phase, we present a puzzling statistical interlude.

THE SHORT ALPHABET

The law allows a challenge to the jury panel on the grounds of substantial noncompliance with the selection procedures prescribed by statute. Normally, such noncompliance comes to light through abnormalities in the composition of the panel: an absence of blacks, of young people, of women. When such abnormal distributions appear, the court may investigate the selection process that produced this allegedly biased panel, usually by hearing testimony from the officials who did the selecting. Occasionally, the abnormality will be so glaring that the court may find it sufficient proof of bias without further exploration, especially when statistical calculus suggests a very low likelihood that the abnormality could have arisen by chance. In the Mitchell-Stans trial, such an abnormality arose. But because of its unusual character, it was not perceived at the time of trial and only accidentally discovered during this study. Ninety-five percent of the 196 jurors in the Mitchell-Stans array came from the first half of the alphabet, namely the letters A through J, with only 5 percent from the letters K through Z.

Lacking access to the distribution of the aggregate voter lists for the area from which the court draws its jurors, we used the telephone directories of Manhattan and the Bronx, the two New York City bor-

oughs that lie in the court's district. To be sure, only about 70 percent of all jurors in the court come from New York City, and not all voters have telephones. The discrepancies, however, are sufficiently startling so as to leave no doubt that something went wrong with the juror selection for this panel. Table 2 shows the overall comparison. The likelihood that such a distorted array of 196 jurors would emerge by chance from a random selection conducted in an orderly manner is on the order of 1 in 100 million.[5]

Table 2
Surnames of the Panel and of the Population

Names Beginning with Letters	Manhattan and Bronx Telephone Directories	196 Members in the Panel
	%	%
A through J	46	95
K through Z ...	54	5
Total	100	100

In situations where the random rule has been so drastically violated, there should be no legal need to show which strata of the population were thereby disadvantaged; it is the essence of random selection that it avoids all bias, known or unknown.

THE PEREMPTORY CHALLENGES

The court, in its understandable desire to compensate for the considerable, one-sided pretrial publicity, allowed the defense 23 peremptory challenges (20 for the jury and 3 for the alternates) as against only 11 (8 and 3) for the government.[6]

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5. The error is curiously reminiscent of another faulty random selection, that of the first military draft lottery of 1971, where not the first letter of the alphabet but the first months of the calendar year of birth received more than their share of low draft numbers; the names were taken from the top of the heap under the false assumption that it was well mixed. *Cf.* Stephen E. Fienberg, Randomization and Social Affairs: The 1970 Draft Lottery, 171 Science 255 (1971).

6. Rule 24 (b) of the Federal Rules of Criminal Procedure entitles the defense to 10 peremptory challenges. As a rule, multiple defendants are deemed a single party for purposes of challenges. The court, however, in its discretion, may allow each defendant 10 challenges, which it did in the present case to counteract adverse pretrial publicity (U.S. v. Bonanno, 177 F. Supp. 106 (1956)). The rule allows 6 challenges to the government. When the judge announced his intention to allow 20 challenges to the defense, the prosecution argued that the disparity between 6 and 20 challenges could not be justified and would predetermine the outcome of the case. Thereupon, apparently in an effort to secure the 20 challenges for its side, the defense offered to see the government challenges increased to 8—to which the court agreed.

Rule 24 (c) entitles both sides to three peremptory challenges if, as in this case, six alternate jurors are to be selected.

The panel of prospective jurors now exposed to these challenges had shrunk to 52 members. Of the original 196, the court had excused 135 for cause, which left 61; since only 52 were needed for this last phase,[7] the court dismissed the 9 supernumerary jurors without further questioning.

The government exercised only 6 of its 8 available jury challenges. The defense exercised all of its 20 available challenges. Each side then had 3 more peremptory challenges for the selection of the six alternate jurors. The defense again used all of its challenges; the government used none, a decision it would come to regret.

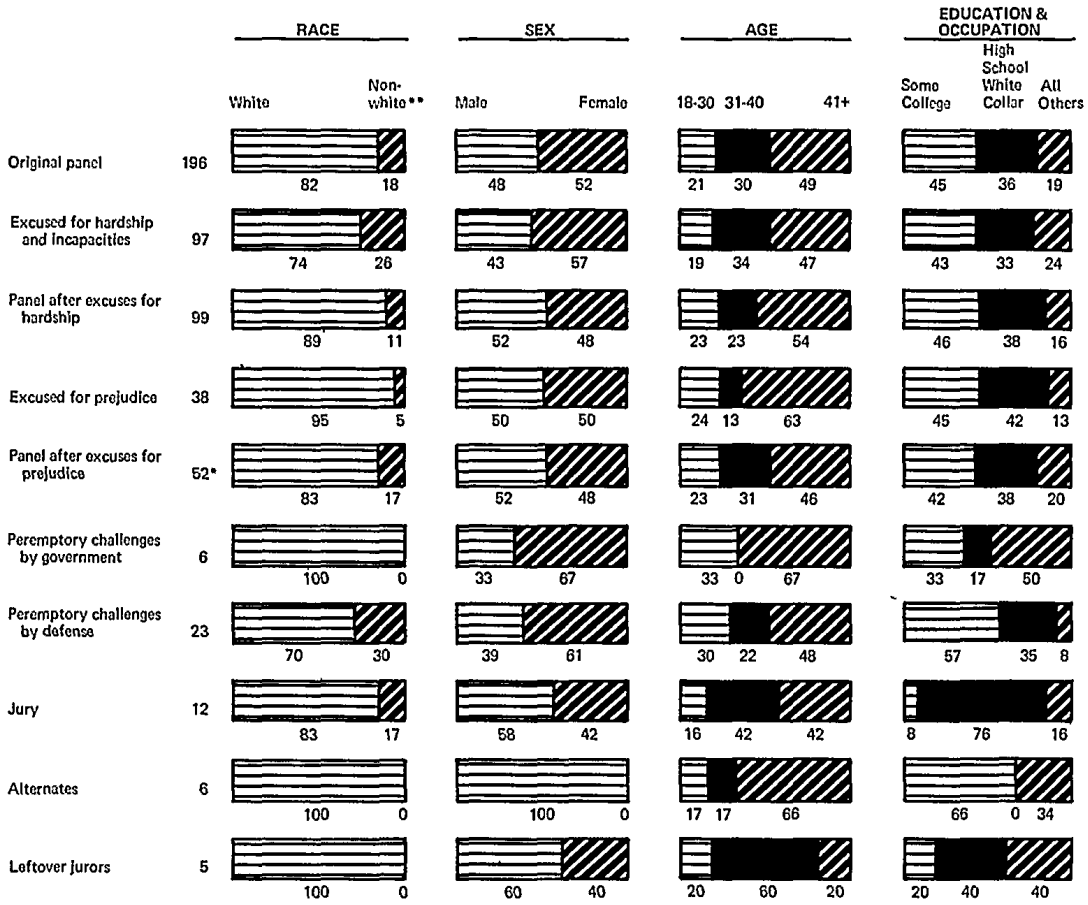
Three graphs show how these challenges were executed and how they affected the composition of the jury. Graph 1 (*supra*) shows the overall structure of the selection process, graph 2 the resulting successive shifts in the composition of the juror panel in terms of its demographic characteristics, graph 3 the resulting shifts in terms of characteristics more specifically related to the issues in the trial.

Graph 2 shows how the various selection phases affected the composition of the jury panel in terms of the jurors' basic demographic characteristics: race, sex, age, education, and occupation. It shows the composition of the juror groups excused during each phase, as well as the composition of the panel that survived the previous phase of excuses. The racial composition of the jury panel hardly varies from the original distribution down to the jury eventually selected. In the original panel the proportion of nonwhites was 18 percent; on the jury it was 17 percent, the equivalent of two jurors. There were no nonwhite jurors among the alternates. Neither did the composition by sex and age undergo significant changes. What did change was the composition by education and occupation. Forty-five percent of the original panel had some college education. On the jury their proportion was reduced to 8 percent: one juror with one year of college. In their stead, the middle group—white-collar occupations with at least some high school—had expanded from 36 percent in the original panel to 76 percent on the jury. The dramatic shift can be traced to the very last of the selection phases, the peremptory challenges by the defense.[8]

7. Twelve jurors, 6 alternates, and (23 + 11 =) 34 potential challenges.

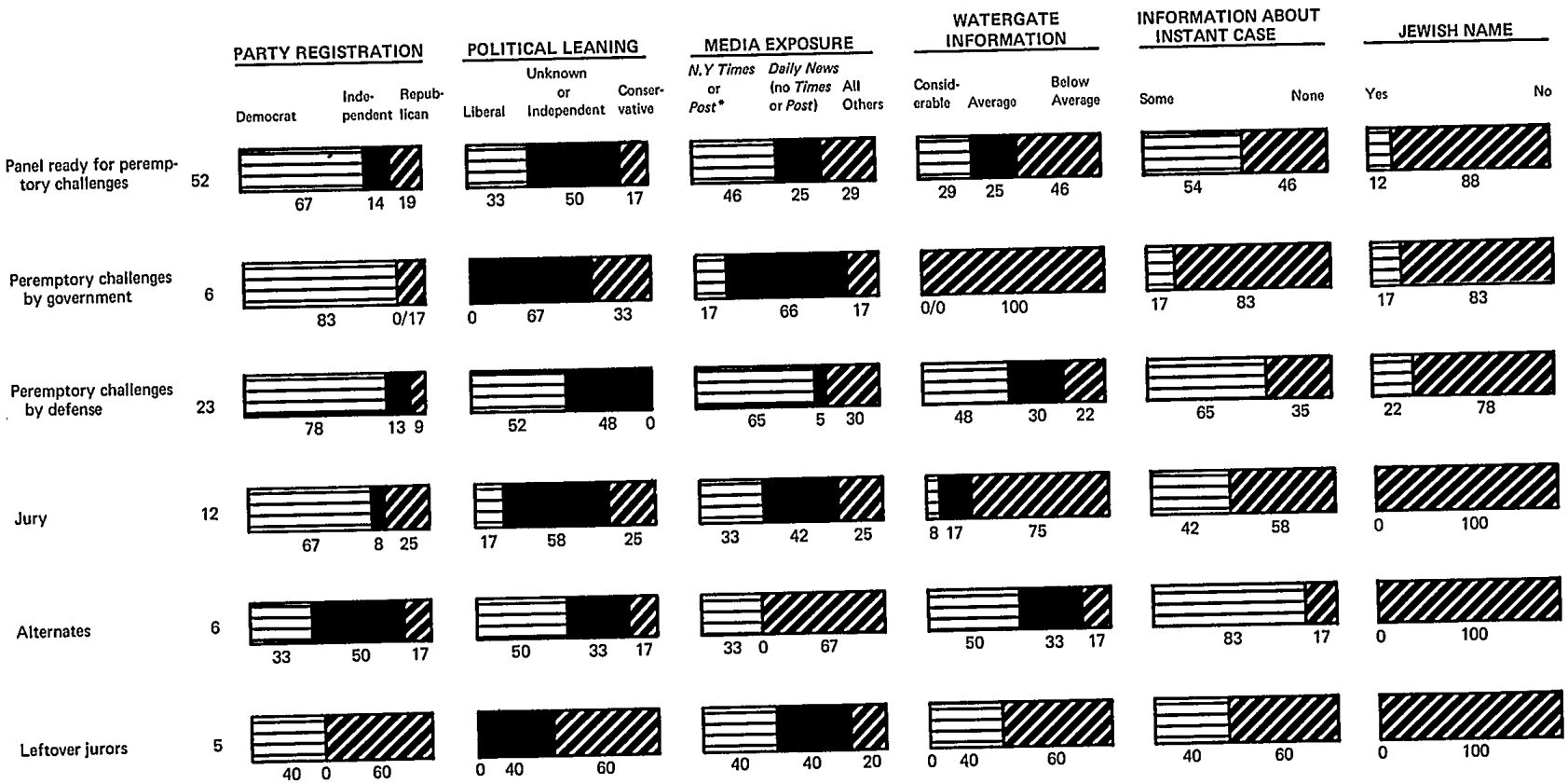
8. The difficulties in obtaining some of these data underscore the need for research exemptions from statutes such as 28 U.S.C. sec. 1867(f) (1970), which forbids disclosure of the "contents of records or papers used by the jury commission or clerk in connection with the jury selection process . . . " until after a certain time. The statute's clear purpose is to prevent interested litigants from learning prematurely the identity of potential jurors. Eventually, at the suggestion of the jury commissioner, Thomas E. Andrews, to whom we are greatly indebted, a solution was worked out that gave us part of what we needed: the clerk's office, on our instructions, compiled some of the needed statistics for groups of jurors, thus avoiding information about individuals.

GRAPH 2. Composition of the juror panel at the various stages of the selection process



*See note on Graph 1.

** 94% Black



*Considered "liberal" newspapers.

Graph 3 shows additional characteristics of the 52 prospective jurors who entered the last selection phase. During the private questioning period the prospective jurors revealed details about their political leanings, their media exposure, and what they knew about Watergate and the instant trial. The graph shows how that information affected the peremptory challenges and thereby the composition of the jury and the panel of alternate jurors.

Party registration, media exposure, and information about the instant case are recorded as reported by the juror; the other classifications involved some inferences on our part. Thus political leaning was inferred from reported activities, associations, and views. Whether or not a name was "Jewish" was perhaps our least reliable classification.[9]

Party registration offered little choice to counsel; 70 percent of the panel that survived the excuses for cause were Democrats. Even so, the jury had a higher percentage of Republicans (25 percent) than the total panel had (15 percent). The political leaning sharply divided the strategies; the government challenged no liberals, the defense no conservatives. Again the jury had a higher percentage of conservatives (25 percent) than the total remaining panel (13 percent). The defense also effectively curtailed readers of the *New York Times* or *Post*. Its major achievement, though, was to reduce the number of jurors well informed about Watergate from 32 percent in the total panel to 8 percent, a single juror.

The government excused six jurors. One of the jurors had never heard of Watergate and had voted for Nixon; one had never heard of the Watergate Committee; two more, both readers of the *Daily News*, one a member of the American Legion, had never followed Watergate. Two of these jurors were unsure of themselves: "I feel stupid . . . ." and, "I don't know if I am capable. . . ."; the latter juror also had difficulty answering the judge's questions. The sixth juror the government excused had claimed earlier to have been unjustly convicted of a crime; there was, moreover, a link between his son and John Mitchell's brother. The government had earlier unsuccessfully challenged this juror for cause.

Eventually the trial began, and ten weeks later, after hearing the evidence, the summations by counsel, and the instructions on the law by the court, the jury retired to its deliberation. We are informed that at one point, as most juries do, this one took an informal ballot. There were eight hands for conviction, four for acquittal.[10] We know by now

9. The reason we included this statistic will become apparent later on (*infra* p. 167).
10. See Arnold, *supra* note 2.

that the jury's first ballot is a crucial indicator from which the verdict can be predicted with surprising accuracy. The relevant statistics are shown in table 3.[11]

Table 3
First Ballot and Verdict

	Number of Guilty Votes on First Ballot				
	%	%	%	%	%
Likelihood that verdict will be:	0	1-5	6	7-11	12
Not guilty	100	91	50	5	-
Hung jury	-	7	-	9	-
Guilty	-	2	50	86	100
Total	100	100	100	100	100
Share of cases (N = 225 = 100%)	(12%)	(18%)	(4%)	(47%)	(19%)

It is the fourth column of this table that interests us: if on the first ballot the majority votes for guilty, the likelihood that the defendant will be acquitted is about 5 percent, or 1 in 20. This unlikely event took place in this case. Through the curiosity of the *New York Times* reporter, we know how it came about. This jury came as close to the film story in *Twelve Angry Men* as one is likely to see in real life. In the film, Henry Fonda, one of the jurors, succeeded in reversing a first ballot that stood 11 to 1 for conviction. It seems the Mitchell-Stans jury gained its Henry Fonda when, some weeks into the trial, juror Violet Humbert fell sick, and alternate Andrew Choa, a vice-president of the First National City Bank, took her place.

ENTER ALTERNATE JUROR ANDREW CHOA

On the day after the jury was selected, Assistant U.S. Attorney John Kenney (who had not been on the case) read in the *New York Times* that Mr. Choa was one of the alternate jurors. He knew the man and the man knew him, and knowing the routine question asked of all prospective jurors as to whether they were acquainted with anyone in the U.S. attorney's office, Kenney was puzzled. In due order, he informed the executive assistant U.S. attorney as follows: that when he had first met his wife, Charlotte, she was working for Choa (she still worked for the bank); that, through his wife, he had known Choa for about five years; that they were "John" and "Andy" to one another; that they had met repeatedly, once when he, Mrs. Kenney, and Mr. Choa had dinner alone in an identified restaurant; that they had talked

11. Harry Kalven, Jr., & Hans Zeisel, The American Jury, table 139, at 488 (Chicago: University of Chicago Press, 1971).

about their respective jobs; that at several social occasions, Choa had introduced him as "an assistant United States attorney"; and that Mrs. Kenney, when she learned of Mr. Choa's being in court, had a conversation with him that ended with Choa saying, "I will call him [John] and maybe we can go to Chinatown for lunch." This information was brought to the attention of the court, partly in an affidavit by the executive assistant U.S. attorney and partly later through Kenney's personal examination. The government reminded the court that Mr. Choa had remained silent when the court inquired as to whether " . . . any member of the panel . . . know any of these attorneys or had any dealings with the U.S. Attorney's Office for the Southern District of New York," and "Is any member of the panel, again, a close relative or a close friend, friendly with anybody employed in the U.S. Attorney's Office . . . ? " Choa, under oath, had failed to respond to either question, although two prospective jurors in the same panel revealed at that point that they knew somebody in that office. Nor did he mention this acquaintanceship at three further occasions when it would have been responsive to the court's questions. The government expressed concern over Choa's veracity and asked the judge to dismiss him. The judge hesitated, remarking that "the question was in such broad context that he may very well not have ascertained that he was that friendly, that it called for anything, or that it may well have been a momentary mental lapse" and decided to hear Mr. Choa.

Neither side objected, but there was disagreement over what should be asked. The situation was delicate; the questioning had to be done so that, if Mr. Choa were allowed to serve, it would not prejudice him against the side that had suspected his veracity. The government suggested that the court simply inquire into the details of the alleged acquaintance without raising the issue of veracity. The defense suggested the opposite approach, namely, that Choa be asked, "why he did not bring this to the attention of the court"; if he answered satisfactorily, there would be no need to go into details. The government argued that "it would be difficult to come here and admit to the court that he willfully lied." The court did not take the government's advice and asked Choa instead: "Now, it's been a long time since I asked you some questions, and I am going to ask you one that was asked before, and see if your recollection is refreshed in any way: Do you know or have you any acquaintances, business or social or otherwise, with anybody in the United States attorney's office?" In view of the alleged closeness of Choa's acquaintance with Mrs. Kenney and her husband, his reply was interesting: "I used to have a girl that worked for me: She still works in the bank. . . . She is married to a gentleman who works here, I believe,

Assistant U.S. Attorney John Kenney. I have met him twice at social parties."

And later when the court asked him: "You would not consider in any way that you were that friendly; that it is a matter that should be called to our attention?" Mr. Choa answered: "No, I have never spoken to him [John Kenney] . . . there were usually 20 people there." Since the court had ruled that there would be no direct questioning by counsel, the government reminded the judge that Choa's answers, far from clearing up the matter of veracity, raised new unresolved questions. The court, however, saw no need for further exploration and allowed Choa to serve.[12]

He stood out from the rest of the sitting jurors in several respects. He was one of six prospective jurors who answered affirmatively the question whether he had ever asked for assistance from a person in public life. The first time, he had asked then Congressman John Lindsay to rectify a technical defect in his immigration papers. "The second time was, from time to time, I would seek the assistance of a senator or somebody from New York to assist in obtaining immigration papers for household help. This sort of thing." He was also one of the two jurors[13] with whom the court, during the *voir dire,* had established something like a social bond. Some question had been raised about Choa's ability to absent himself for two months from his bank responsibilities. When the judge asked at some point, "Have you found anything more out about your First National City Bank, what you can do here?" Mr. Choa answered, "Well, I don't think I can add to what I said yesterday. I tried to get hold of Bill Spencer this morning." At which the judge remarks, "Don't mention any name, will you?" One is slightly puzzled as to why Choa refers to his superior at the bank by name and as "Bill" and about the judge's stricture—until the end of Choa's examination, when the judge remarks: "If you get hold of Mr. Spencer, the only thing I want you to do is to tell him that he still owes my wife the bet on the Riggs-Billie Jean match."

The judge, who throughout the selection process had acted with scrupulous fairness, probably thought Choa a desirable addition to a

12. We sent to Mr. Choa (and to the judge, government, and defense) galley proofs of this article with the invitation to comment and received a letter from him on his role during *voir dire,* trial, and deliberation. We wanted to publish it and so informed Mr. Choa. However, he insisted that we not publish his letter either in full or in part. Of course, we abide by his decision. Mr. Choa's comment explicitly contradicts our narrative only once: he reports that the *voir dire* transcript we rely on is inaccurate with respect to his answer to one question. In some other respects the letter provides a different perspective on certain events, and we have reflected that additional perspective as far as it seemed appropriate to do so.

13. The other had a father who had been a neighbor of the judge.

jury that consisted entirely of poorly educated and poorly informed persons. Here was an educated, informed man, versed in financial matters, and because of his position in the country's second largest bank, likely a man of integrity. It was not an entirely unreasonable thought.

Perhaps the most interesting aspect of the fight over Choa was the reversal of roles that had taken place. When he was first questioned, the defense had challenged him for cause, the routine challenge it had raised against all prospective jurors well informed about Watergate. By the time he was to become a juror, and the government suspected his veracity, the defense fought tooth and nail to retain him, in spite of the fact that he did not fit the "profile" of the good defense juror in four important respects: he was college educated; he probably knew more about Watergate than any other member of the panel; he regularly read the *New York Times;*[14] and he was clearly a member of the upper class.

In any event, the court allowed Choa to become the twelfth juror and thereby set into motion a series of strange and improbable events. Choa's role in this trial fell into two parts: what he did while the trial was in progress and what he did during the deliberation. The one role, it will be seen, is connected to the other.[15]

During the many and long evenings, Choa had helped to break the monotony. Occasionally, he took his fellow jurors to the movies in the private auditorium of the bank. When the jurors asked to see the St. Patrick's Day parade and were told they could not go since this meant mingling with the street crowds, he arranged for them to watch it from one of the bank's branch offices. On one or more occasions when money was not readily available for minor jury expenses such as for entertainment, "Andrew paid and then the Government paid him back." Choa's bank also loaned baseball bats to the jury.[16] He became, as the *New York Times* reporter put it, the jury's "social director." His fellow jurors could hardly help being obliged to the man who had used his high social position to make their sequestration more bearable.

Came the hour of reckoning, when the jury retired to begin its deliberation: a bank teller, who was chosen as forelady, a steel cutter, a

14. The *New York Times* (with columns and editorials), *Newsweek,* and *New York Magazine;* he had watched the Watergate hearings (he deposed that he had seen about 60 percent of Mitchell's and Stans's testimony) and was familiar with the names of Kalmbach, Sloan, Magruder, and Ehrlichman.

15. Here we follow the uncontradicted *New York Times* report (*supra* note 2) based on, among other interviews, a conversation with Mr. Choa.

16. Neither judge nor prosecutor knew of these goings-on before they learned of them from the *Times* report. They interestingly enlarge the inventory of unexpected relationships which sequestration of a jury may engender.

telephone installer, a Western Union messenger, a mailroom supervisor, a Post Office supervisor, a city highway department employee, a shipping clerk foreman, a subway conductor, and two elderly ladies, one retired and the other an insurance company clerk, and a vice-president of the First National City Bank, a man, as it turned out, of rather conservative political views.

Mr. Choa was circumspect. As he told the *New York Times* reporter, he purposely chose a seat in a position that would insure his being called on last: "I did not want to influence my fellow jurors"—but the person to speak last in an assembly is often also the voice of authority. We know that Choa was one of the four jurors who from the outset voted for acquittal and, one must presume, began the arduous task of converting the majority to his view. We know no details, but are told that he persuaded the jury at several points to have testimony as well as the judge's instructions reread. We do not know what testimony, but are told that these requests were drafted by Choa for the forelady's signature.

When it came to the jury's appraisal of the memorandum written by Vesco (or an associate) to Nixon's brother, in which Vesco threatened to disclose his secret $200,000 cash contribution unless the SEC dropped his case, Choa said he considered it "trash"—and the jury seemed to have agreed. The end is known. The unlikely event did happen; the eight jurors, who at one point thought the defendants guilty, changed their minds. Both defendants were acquitted on all counts.

THE SURVEY

The defense was to some extent guided in its selection of the jury by a public opinion survey, originally commissioned to support a motion for change of venue from New York City. The survey established that a considerable part of the potential juror population believed in advance of the trial that the two defendants had violated the law, even if not directly as charged in the case. When the motion for change of venue was denied, counsel thought that with some more work the survey findings could provide guidance for the impending selection of trial jurors. By determining the profile of persons who in the poll emerged as most prejudiced against the defendants, counsel might learn how to increase the chances of their acquittal. From what transpired,[17]

17. From the newspaper reports and from a stimulating panel discussion at St. John's Law School in New York in which Mr. Fleming (see note 1 *supra*) and the senior author took part. We asked whether we could have a copy of the survey, were promised one, but never received it.

the profile of the "worst possible juror" looked as follows: A liberal, Jewish Democrat, who reads the *New York Times* or the *Post*, listens to Walter Cronkite, is interested in political affairs, and is well informed about Watergate.

The use of public opinion surveys for the purpose of jury selection is of relatively recent origin.[18] It first came to public attention in the trial of the Reverend Philip Berrigan and others in Harrisburg, Pennsylvania, and later in the trial of Angela Davis in California. In both cases, the use of surveys was discussed without noticeable emotion. It came, therefore, as somewhat of a surprise that this same effort in the Mitchell-Stans trial aroused considerable concern and critical comment. It would seem that it was the survey in conjunction with the verdict in the Mitchell-Stans trial that caused the commotion among some of the observers who had followed the trial closely. The gist of the concern was perhaps best formulated in an extreme piece written by Amitai Etzioni, chairman of the Department of Sociology at Columbia University, who thought that this type of intrusion would allow sociologists to manipulate the jury.[19] This prospect is not alluring. But is there such a danger?

Before answering the question, it will be useful to see more clearly what this survey activity consists of. As practiced in those earlier trials, and it would seem also in this one, it consists in fact of two surveys: a public opinion survey conducted among the general population of potential jurors and a more specific if more indirect survey of the jurors called into court for the particular trial. We assume that this second survey was based on interviews with neighbors, friends, or employers, an investigation that relies primarily on the resourcefulness of the particular investigator.

The problems of the public opinion survey are more structured. The first task is to develop criteria that distinguish "good" from "bad" jurors. In the present case, it could have been a question such as this: "From what you have read, heard, or seen about the two men, do you

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18. The use of public opinion surveys in support of a motion for change of venue is an established tradition. The first effort of this kind was made in the Scottsboro trial, when Elmo Roper, one of the early practitioners of the craft, conducted such a survey. The courts there, as later, held that proof of a large majority of prejudiced potential jurors is not by itself a cause for a change of venue, as long as there remains a sufficiently large reservoir of unprejudiced panel members from among whom an impartial jury can be selected.

19. Science: Threatening the Jury Trial, Washington Post, May 26, 1974, sec. C, at. 3. One of the present authors happened to express a different view on that same day on the Op-Ed page of the *New York Times*. Hans Zeisel, Mitchell-Stans Judged, sec. E, at 15, col. 3. Thanks are due to Howard Goldberg of the *New York Times* for having asked for that piece, thereby sparking an effort that led to the present study.

believe John Mitchell and Maurice Stans are likely to have promised an illegal favor to somebody in return for a $200,000 gift for President Nixon's campaign?" The respondent who says "no" would make a "good" juror; the one who says "yes" would make a "bad" juror.

The second task is to develop criteria by which counsel can recognize the "good" and "bad" juror in court, since it will surely not be possible to ask such a direct question during the *voir dire.* Ideally, the criteria should be such that they can be perceived without questioning, simply by noting the prospective juror's sex, age, race, and perhaps his surname. Next best are criteria which can be elicited even during a severely limited *voir dire,* such as occupation and marital status. As a rule, however, only more specific criteria will allow reasonably precise identification. In the present trial, much leeway was allowed to the development of such criteria: detailed information on exposure to the media, and more specifically, knowledge about Watergate. By cumulating such related criteria, more refined gradations can be developed: persons who have no college education *and* do not read the *New York Times and* do not listen to network television news *and* are uninformed about Watergate are likely to be the "best" jurors.

Two questions arise in connection with such a survey: "Does it help?" "And is it proper?" The second question is easier to answer than the first. If it is the task of counsel, as it undoubtedly is, to assist the court in obtaining a "fair and impartial" jury, then there can be no objection to counsel's seeking aid for his task in an established scientific device.

The more interesting question is, how helpful is the device? The answer must depend on how good the survey is, and how good the lawyer is without it. We know something about counsel's ability to discern a juror's potential leaning from a large-scale experiment recently concluded in the U.S. District Court for the Northern District of Illinois.[20] Significantly more jurors eliminated by the defense convicted

20. Under a grant from the National Science Foundation, with the cooperation of three federal judges, a series of cases was tried in the presence of three juries: the real jury and two experimental juries. The first experimental jury, the "English" jury, was composed of jurors chosen at random from the jury pool and seated without being questioned by either the court or the attorneys. The second experimental jury consisted of the jurors who had been challenged peremptorily by either the prosecution or the defense. The attorneys submitted their challenges on specially provided forms so that the jurors did not learn which side had excused them.

During the trial, all three juries were present in the courtroom throughout the trial; they were removed from the courtroom whenever the real jury was sent out; and they were paid the standard juror fee by the courts. At the end of the trial, each jury went to its own deliberation room and deliberated until a verdict was reached. If any jury had a question on a point of law during deliberation, the judge answered it. In short, the experimental juries were treated as nearly as possible as though they were real juries. And further, the judge impressed upon them the importance of their job in a special session before the case began. The only differences

than did the jurors removed by the prosecution. We asked the lawyers why they had a particular juror excused. The answers were a mixture of idiosyncratic impressions and application of vaguely perceived rules. Counsel would say: "He gave his last name first, sounded as if he were in the Army and liked it"; "Looked mean and grim"; "Foreign born, looked afraid, easily intimidated"; "Catered to the judge in response to questions"; "German extraction, too bossy"; "Insurance company executive, generally progovernment." Prosecutors would say "Worked in criminal law in college, drifter, unmarried, lack of community ties"; "Lack of schooling, won't understand complexity of conspiracy charge"; "Membership in large number of liberal organizations reflects prejudice against government"; "Juror appeared too anxious to serve."

Whatever their source of recognition was, both defense counsel and prosecutor were able effectively to distinguish to some extent jurors who subsequently turned out to lean against their side.

Earlier, the University of Chicago jury project had conducted experiments to explore the ability of civil trial lawyers to recognize "good" and "bad" jurors in personal injury cases. Lawyers were asked to rank jurors sitting on a simulated trial according to the size of the award they were expected to propose to their fellow jurors. Table 4 shows the results of one such experiment.[21]

Table 4
Rating on a Ten-Point Scale as to Size of the Expected Award

Rating by 80 Plaintiff Lawyers[a]	Rating by 38 Defense Lawyers[b]	*Juror* Ethnicity	Occupation	Mean Award
8.7	8.8	Black	Laborer	$57,000
8.6	8.5	Polish	Laborer	49,000
6.9	6.9	Black	Skilled worker or clerical	51,000
6.1	5.6	Polish	Skilled worker or clerical	43,000
4.5	5.2	Black	Business	48,000
3.4	4.2	Scandinavian	Laborer	41,000
3.7	3.1	Polish	Business	40,000
2.0	2.1	Scandinavian	Skilled worker or clerical	35,000
1.3	0.6	Scandinavian	Business	32,000

[a]Members of NACCA.
[b]Members of Society of Trial Lawyers.

were: (1) the experimental jurors knew that their verdict would not decide the case; (2) they sat in the spectators' seats rather than in the jury box; (3) each experimental juror filled out a brief questionnaire before deliberations indicating his verdict preference at that point; and (4) the deliberations of the experimental juries were tape-recorded.

Thirteen criminal cases lasting from several hours to three weeks, with offenses varying from draft evasion to conspiracy and extortion, were tried in this manner.

21. These experiments were conducted by Professor Fred L. Strodtbeck to whom we are indebted for table 4.

Both plaintiff and defense lawyers were fairly good predictors of the likely award size. It is probably easier to distinguish "good" and "bad" jurors in civil trials than in criminal trials, primarily because the issue in personal injury trials is more homogeneous. Often, the issue in these trials, moreover, is not liability but only which jurors will give larger or smaller awards.[22]

Compared with such intuitive knowledge, guidelines suggested by a public opinion survey appear to be more precise. But they are precise only in form; in fact they too are but percentage plays, very much like baseball rules, such as the one suggesting a right-handed batter against a left-handed pitcher. Such rules often fail in baseball and often fail in court. There was, for instance, the woman juror in the Berrigan trial who was the mother of four conscientious objectors, and the defense thought they could not have a better juror. In the end, she was one of the two jurors who held out for conviction of the antiwar activists.

Before trying to answer the question as to what good the survey commissioned by the Mitchell-Stans defense did, one must know that this survey was by no means the only outside guidance the defense had. At two points, the *voir dire* record discloses that the defense had specific outside information about the prospective jurors in the panel.

At her first questioning, Mrs. N. G. told the court that she was married and had two children, and gave her own and her husband's occupations, and her husband's service record.

After her second appearance, for the private questioning in the judge's chambers, the defense informed the court: "We have heard that she has a relation to someone who is a reporter for the *New York Post.* I wonder if you might inquire whether any relative of hers is a news reporter."

The judge first balked at asking such a question but eventually asked it, to learn that Mrs. G's sister indeed worked for the *New York Post.*[23]

And again, after the private examination of Mrs. R. H., the defense suggested the court ask a series of additional questions:

> Mr. Fleming: And finally, the question whether she is a plaintiff in a class action on behalf of women alleging discriminatory activity.
>
> The Court: What's your information on that point. You say you have reason to believe that that's so?

22. It would be interesting to learn more about the special circumstances under which lawyers are able to make good predictions, and also whether some lawyers are better at that job than others.

23. Record at 1194, 1195.

Mr. Fleming: I can't reveal my source, your Honor.[24]

It appears that in combining the two sources, the survey and the background data on the particular jurors, the defense followed the sound bridge player's rule that one peek is worth two finesses and allowed the specific information to override the "profile" rules of the survey whenever the two contradicted each other.[25]

To what extent, then, did the public opinion survey influence the defense strategy of selecting the jury? Much of what it suggested were probably commonsensical inferences which the defense would have made in any event. The question is difficult to answer. Yet it is perhaps significant that the government, without a survey, seemed to have followed the same guidelines, if in the opposite direction.

But what about the broader question as to the effect, if any, of the survey on the outcome of the trial? The answer must be given on two levels. On the simplest level, the answer is—the survey did not help. Since the survey-selected jurors stood at one point eight to four for conviction, a constellation that normally assures a guilty verdict, one must conclude that the evidence overrode whatever latent preconditions there were in the jury.

On a more complicated and unexpected level, the survey paid off handsomely. The eight "profile" jurors who eventually were to be persuaded to give up their guilty vote were perfectly selected for such persuasion. Their coming throughout from the lower and middle social strata, only one of them with as much as one year of college, made it easier for the one nonprofile juror who came from the upper class and was at home in the world of high finance to explain to his fellow jurors that the evidence in the case did not warrant conviction.

On hindsight, the government must have regretted that it had not used one of its three unused peremptory challenges on Choa. But what foresight did it have on Choa?

He had revealed himself as one of a handful of jurors who had asked for help from a public official. He was a Republican and had contributed a modest amount to Nixon's election campaign.

On the other hand, he was an educated man and better informed about Watergate than any other juror.

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24. Record at 960, 961. Nothing, incidentally, in the record indicated that the government had any such outside information on the prospective jurors. Mr. Fleming reports that this outside information did not come from any systematic search on the part of the defense but was brought to him by two reporters.

25. In the Berrigan trial, it seems, the lawyers based their challenge strategy on a formal system of according each juror "points" for his survey profile for the specific information and for the intuitive impression he made on the lawyers. *Cf.* Jay Schulman *et al.*, Recipe for a Jury, Psychology Today 37 (May 1973).

The government's decision to forgo challenges of the alternates was probably also motivated by the bleak prospect offered by the remaining five replacement jurors, the "leftover" jurors in graph 3: a majority were registered Republicans, a majority with conservative political leanings; none of them could be called well informed about Watergate.[26]

What, perhaps, should have tipped the government's balance against him is that the defense wanted him. By that time the government knew that the defense had been collecting outside information on the prospective jurors, and that the lawyers for Maurice Stans probably needed not more than a phone call to obtain information about the political leanings of a vice-president of the country's second largest bank.[27]

VOIR DIRE IN PERSPECTIVE

During the past two decades, *voir dire* proceedings[28] in our courts have undergone major changes. At the beginning of that time span, some trial judges, even in the federal system, albeit primarily in civil cases, would allow the *voir dire* to proceed in their absence; the judge would retire to his chambers and be notified by counsel when a satisfactory jury was selected.[29]

Traditionally, lawyers on both sides will try to use their right to question the prospective jurors as a means of beginning to plead their case, by making forward references to crucial points along the expected trial route. Today, *voir dire* proceedings are rarely accorded such latitude, particularly not in the federal courts where the judge generally does all the questioning. What questions may be asked on *voir dire,* and whether they will be asked by the judge or by counsel, by the judge at

26. The replacement expectations from such a limited reservoir of prospective jurors are decidedly different from what these expectations would be if the replacement were to come from the general jury pool. The difference is somewhat analogous to what statisticians call sampling with and without replacement.

27. Especially since Mr. Choa's political views, according to the *New York Times* reporter (*supra* note 2) had remained no secret among his friends and associates. One of these acquaintances described his position as "to the right of Ivan the Terrible." *Id.* at 41, col. 3. Mr. Fleming reported in a telephone conversation that no such inquiry was made; what tipped him off and made him want Mr. Choa as a juror, Mr. Fleming reports, was Mr. Choa's remark about the political scene: "I feel that this is a case where . . . the, you might say, administration are powers on one side and members, former members of the administration, are powers on the other side." Record at 329.

28. The French name seems to mean "see them talk" but in fact means "truth talk," *voir* being a corruption of the Latin *verus*.

29. In the absence of the judge, counsel would agree on any challenges "for cause" and thereby considerably expand the number of peremptory challenges that the law made available to them.

the suggestion of counsel, or by both, is subject to judicial discretion. The tendency is toward restricting direct questioning by counsel.

Voir dire is not part of the British system. There, although challenges both for and without cause are allowed, they are hardly ever exercised. As a rule, the first 12 jurors called into the jury box, without questioning or other ado, will form the trial jury.[30]

Trial lawyers occasionally claim that they win their cases on *voir dire.* If this were true, it would not be a desirable state of affairs, however attractive it may sound to the client. One should prefer a system in which the merits of the case and not counsel's superior ability to select a jury will win the verdict.[31] There is, however, a line of reasoning backed up by what we know about juries, which provides a persuasive rationale for retaining a vigorous *voir dire.*

It is undoubtedly true that to some extent the verdict in a jury trial depends on the composition of the jury, even though we do not know as yet the extent to which this is true. Nor do we know the conditions that make the composition of the jury more or less important. But there are good data supporting the lawyer's belief, however exaggerated, that the composition of the jury may affect the verdict. These data support the law's concern, expressed in statutes and court decisions, that jurors be carefully selected so as to obtain, as far as this is possible, what the law calls a fair and impartial jury.

The data we are referring to show that in about two-thirds of all cases the jurors are likely to differ over the significance of the evidence presented to them in the trial. In only about one-third of the trials is the jury unanimous on the first ballot; in two-thirds of the cases the jurors differ in their vote.[32] This finding has far-reaching implications. The jurors have all heard and seen the very same evidence, very same judge, prosecutor, and defense counsel, and they have all heard the same instruction on the law. If they differ in their vote, such difference can be ascribed only to differences among the jurors themselves, because everything else was the same for all of them. Differences among jurors here mean differences in perception or evaluation or both, as the case may be. And since we also know that such differences are unlikely

30. I once asked the late Chief Justice, Lord Parker of Waddington, "What if one of the jurors were a cousin of the defendant?" With just the hint of a smile, he answered, "Wouldn't that be awkward?" (H.Z.) See also the reference to the "English" jury in note 20 *supra.*

31. Fortunately, the evidence suggests that lawyers have a tendency to overestimate their ability to turn a jury verdict in their direction. Kalven & Zeisel (*supra* note 11, chapter 28) found that in only about 1 percent of all trials is the jury's verdict swayed by the superiority of counsel; the major reason is that in eight out of ten cases, counsel on both sides are evenly matched.

32. *Cf.:* In 12 percent of the cases the jury is unanimous for acquittal, in 19 percent unanimous for conviction. *Cf.* table 3 *supra.*

to arise because of lack of understanding of the case, it must be the differences in the values and perceptions that cause them to differ on the first ballot in two-thirds of the cases. Such differences suggest that jurors form a sort of spectrum; at the one end will be jurors who will unhesitatingly find guilty on the first ballot, and at the other end there will be those who, equally determined, will vote not guilty. In between the extremes, there will be the less certain positions.

The spectrum will be narrow, even zero, if the evidence in the case is very clear, and it will be correspondingly wider if the evidence is controversial. It is the function of the *voir dire* proceedings to narrow this spectrum by eliminating the extremes.[33] And yet, as a shrewd foreign observer remarked, we first labor hard to make the juries representative of the community from which they are drawn, and at the very last moment we allow this representativeness to be destroyed.[34]

Our *voir dire* undoubtedly has this effect to some extent. The danger of such destruction is particularly great with respect to demographically defined groups—young people, ethnic minorities, women. Such groups are distinguishable on sight or by their names and thereby become easy prey to the side that wants to eliminate them. The danger is aggravated if the size of the jury is reduced.[35]

On the other hand, American juries may be in greater need of *voir dire* proceedings than juries in England or Sweden.[36] Juries reflect the society from which they are drawn, and at this point in history American society remains distinctly heterogeneous.[37]

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33. Kalven & Zeisel, *supra* note 11, chapter 11, The Jury Understands the Case.

34. The Swedish Judge Lars Molin at the 1974 Cropwood Conference on Jury Trials, held in Cambridge, England under the auspices of the Cambridge Institute of Criminology.

35. *Cf.* Hans Zeisel, . . . And Then There Were None: The Diminution of the American Jury, 38 U. Chi. L. Rev. 710, 720 (1971).

36. It would be interesting to learn whether the first ballot distribution of English juries differs from that of American juries as reported in table 3. If our supposition is correct, they should have more unanimous first ballots than our juries have.

37. Ancientness of a rule of law is not by itself a recommendation. We are nevertheless impressed by the usually unacknowledged depth of the roots of our federal rules. In the year 7 B.C., the Roman emperor Augustus issued an edict concerning the selection of jurors in capital cases in the city of Cyrene on the Lybian coast (the modern Shahhat); even the references to the ethnic problems in that city, then under Roman rule, have a modern flavor:

> A Greek under indictment shall be given the right to decide, the day before the prosecution opens its case, whether he wants his jurors to be all Roman or half Greeks; and if he chooses half Greeks, then the balls shall be checked for equal weight [to prevent cheating] and the names shall be written on them, and from one urn the names of the Romans and from the other those of the Greeks shall be drawn until a total of twenty-five is obtained in each group. Of these the prosecutor may, if he wishes, dismiss one from each group, and the accused three out of the total, provided he does not dismiss either all Romans or all Greeks.

Naphtali Lewis & Meyer Reinhold, eds., 2 Roman Civilization 37 (2 vols. New York: Harper & Row, 1966).