Peremptory Challenge - Divining Rod for a Sympathetic Jury?

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PEREMPTORY CHALLENGE — DIVINING ROD FOR A SYMPATHETIC JURY?*

At one time it was believed the best jurors were those who witnessed the crime or wrongs of which the defendant was accused of having committed. As these people were most familiar with the facts, a more accurate and fair determination was expected.¹ Today, under the influence of the concept of impartiality and fundamental fairness, the opposite approach is adopted. The best jurors are deemed to be those possessing the least prior knowledge of the facts, and their determination is expected to rest solely upon the evidence presented at trial.²

The concept of an impartial jury is a critical element in fulfilling the due process requirements mandated of civil and criminal trials.³ To rid the panel of biased jurors, attorneys for both parties have been given the right to peremptorily challenge prospective panelists for any or no reason.⁴ Although the device is available in both the civil and criminal spheres, the nature of a criminal proceeding and the tendency of human nature to pronounce judgment based upon what we know rather than what we are told makes the peremptory challenge more valuable during a criminal trial.

Employment of the peremptory challenge, however, has not escaped criticism. Opponents have predicated the destruction of the impartial jury through misuse of peremptory challenges. The number of peremptories allotted to a defendant has been attacked as enabling the defendant to

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¹ Trial by jury was initially trial by witness. Jurors originally "were men chosen as being likely to be already informed" concerning the matter to be tried, and were drawn from the neighborhood wherein these matters occurred or the land in question was situated.

F. JAMES, CIVIL PROCEDURE 238 (1965) (footnotes omitted), quoting J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 90 (1898).

² F. JAMES, CIVIL PROCEDURE 239 (1965).

³ The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. The fourteenth amendment applies the right to an impartial jury to the states as a matter of due process. See Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

form a jury that is likely to acquit or at least split its decision. Moreover, it is claimed that investigative techniques available to an attorney for obtaining information about prospective jurors has enabled defense counsel to exercise his peremptory challenges with greater foresight. This has been regarded as an unfair advantage for defendants who can afford specialists or who can easily attract volunteers to aid in their investigations.

Disfavor of the peremptory challenge by prosecuting attorneys has erupted with great fervor with the discovery of the sophisticated techniques employed by defendants in recent political trials. For example, media expert Marty Herbst was employed by the defense counsel in the trial of former Cabinet officials John Mitchell and Maurice Stans (Mitchell-Stans trial) to ascertain the trial district's demographic composition. The jury's acquittal on conspiracy, obstruction of justice, and perjury charges was linked to Mr. Herbst's pretrial studies. Defense attorneys for Angela Davis, a radical political activist tried for murder, kidnapping, and conspiracy, enlisted the aid of five black psychologists to study and evaluate prospective jurors during the voir dire examination. A verdict of acquittal was returned. A team of professionals, led by a sociologist and psychologist, also assisted defense attorneys in selecting juries that ultimately entered verdicts of acquittal in the political trials of the Camden 28 and Gainesville Eight. Critics have compared the chosen jurors to

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1 See United States v. Randall, 27 F. Cas. 696 (No. 16, 118) (D. Ore. 1869) (Deady, J.), wherein the defendant was convicted for unlawfully opening a registered package and stealing gold dust contained therein. On appeal, the defendant excepted to the lower court's refusal to allow him to exercise his peremptory challenge against a prospective juror. The court, in holding that the defendant had already exhausted his maximum number of peremptory challenges, noted: In modern times, in most of the United States, the practice of law has gone to the other extreme, so that the number of peremptory challenges allowed a defendant enables him, in many cases, to form a jury that is morally certain to acquit or at least disagree. Id. at 705.

4 Wall Street Journal, Aug. 12, 1974, at 19, col. 6. Professor Etzioni, the Director of the Center of Policy Research at Columbia University and a professor of sociology, claimed that defense lawyers have learned that by “using social science techniques, they can manipulate the composition of juries to significantly increase the likelihood that their clients will be acquitted.” Shapley, Jury Selection: Social Scientists Gamble in an Already Loaded Game, 185 Science 1033 (1974) [hereinafter cited as Jury Selection].

7 Mitchell and Stans allegedly tried to curb an investigation by the Securities and Exchange Commission into the financial affairs of Robert Vesco in exchange for a contribution to the re-election campaign of President Nixon. 171 N.Y.L.J. 83, Apr. 30, 1974, at 1, col. 3.

9 Robinson, How Psychology Helped Free Angela, EbonY, Feb. 1973, at 44, 46 [hereinafter cited as Robinson]. Legally registered guns belonging to Miss Davis were used in a courthouse shootout, in an abortive attempt to free a group of prisoners. Miss Davis denied having knowledge that the guns had been taken from her possession. Id. at 44.

10 See note 63 infra. This same team worked with the attorneys in the Harrisburg Seven and Wounded Knee trials, neither of which resulted in conviction. Time, Jan. 28, 1974, at 60. The team is currently engaged in the Attica Prison trial in New York. Id. Based on their findings, the defense successfully moved to have a portion of Erie County's jury pool struck because it
"sociologically loaded dice" in a scheme of "social science jury stacking." The following discussion will outline the problems caused by the use of professionals in the exercise of peremptory challenges and will attempt to dispel the notion that a defendant's collaboration with social scientists and psychologists will inevitably result in a handpicked group of sympathetic jurors. It will be demonstrated that a number of substantial obstacles confront a criminal defendant, thereby preventing him from realizing an overwhelming advantage over the prosecution through the use of scientific techniques. First, he is permitted only a limited number of challenges, and secondly, there is a lack of certainty and precision in social science and psychology. In light of these shortcomings, the collaboration of professionals and counsel may be viewed as merely another line of defense, not as a weapon of offense. Perhaps the most promising aspect of this new joint venture is its utility in reducing the prosecution's often more favorable position.

PEREMPTORY CHALLENGES AND SOCIAL PROFILES

The peremptory challenge is an "arbitrary and capricious species" of challenge directed at a legally qualified juror by an attorney. The attorney is able to remove a prospective juror from the panel without giving a stated reason, on grounds that may be irrelevant to the proceeding, for a real or imagined partiality. The challenge, derived from English
common law, has a twofold purpose. It seeks to eliminate extremes of partiality which may be rooted in the prospective jurors' sociological or psychological characteristics. Additionally, to preserve impartiality, it seeks to select jurors who will decide the case solely on the basis of the evidence adduced at trial, and who will not harbor preordained conclusions or prejudices. The right to peremptorily challenge does not arise from the Constitu-

examination. See 28 U.S.C. § 1870 (1970); Mont. Rev. Codes Ann. § 95-1909(d)(2) (1947); N.Y. Crim. Pro. Law § 270.20(l) (McKinney 1971). It has also been held that where there is a possibility that the crime charged may be punished by death, a prospective juror's established opinion for or against capital punishment is sufficient grounds for challenge. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).

Courts have been reluctant to sustain challenges for cause on the grounds of race, religion, and nationality. Comment, The Right of Peremptory Challenge, 24 U. Chi. L. Rev. 751, 762 (1957) [hereinafter cited as Peremptory Right]. However, there are cases in which beliefs generated by race or religion have constituted grounds for cause. See, e.g., State v. Sanders, 103 S.C. 216, 88 S.E. 10 (1916) (exclusion of a juror in a murder trial who admitted a natural resentment against Negro lawyers); Potter v. State, 86 Tex. Cr. 380, 216 S.W. 886 (1919) (the court indicated that jurors who were members of the Jewish faith could be disqualified for cause in a case involving libel of Jewish persons).

Although challenges for cause are unlimited, attorneys are hesitant to employ them for fear of prejudicing jurors on unsuccessful challenges or raising the distrust of the remaining panelists. See Challenge, supra, at 642.

Under English common law, peremptory challenges were initially allowed only in capital felony cases. However, a statutory change extended the right to all common law felony trials. Thirty-five challenges were given the defendant, Swain v. Alabama, 380 U.S. 202, 212 (1965), but none were designated for the prosecution. 33 Edw. 1, Stat. 4 (1306). Subsequent construction of the statute permitted the prosecution to "stand aside" any juror. The prosecution instructed a juror to remove himself until the entire panel had been examined and the defendant had exercised his challenges. If there was a deficiency of jurors to constitute a panel the prosecutor would have to show cause as to those jurors he had "stood aside." If he was unable to do so, they would be recalled to fill the panel vacancies in the order in which they were removed. 380 U.S. at 213.

In the United States, Congress, in 1790, codified the criminal defendant's right of peremptory challenge. In a federal trial, the number of challenges allotted to a defendant was 35 in treason cases, 20 in capital felonies, Act of April 30, 1790, ch. 9, § 30, 1 Stat. 112, and 35 for all other offenses made capital after 1790, Orfield, Trial Jurors in Federal Criminal Cases, 29 F.R.D. 43, 93 (1962) [hereinafter cited as Orfield]. Although the prosecution inherited the English right to "stand a jury aside," its right of peremptory challenge was not recognized until 1865. See Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500. The right of challenge was later extended to all felonies, misdemeanors, and civil cases, for both the defendant and the Government. Act of June 8, 1872, ch. 333, § 2, 17 Stat. 282. For a more detailed historical account, see Orfield, supra, at 93-97.

The development of the peremptory challenge in the states paralleled its federal development. The number of challenges afforded the defendant was often the same as in the English system. State prosecutors retained the right to "stand aside" jurors. By 1870, however, most of the states conferred the right of peremptory challenge upon the prosecution, allowing a number equal to or at least one-half the number granted the defendant. See Swain v. Alabama, 380 U.S. at 216.

See 380 U.S. at 219.
tion. Yet, it is recognized as "one of the most important of the rights secured to the accused," as well as an important right of the prosecution. Regarded primarily as a right of rejection and not as a technique for selection, the peremptory challenge has been characterized as "a necessary part of trial by jury." As might be expected, therefore, such challenges are available in criminal trials in federal courts, and in all state courts not adopting the peremptory strike procedure as a substitute.

Attorneys, particularly defense attorneys, have long recognized the importance of the right. Louis Nizer has viewed the peremptory tool as a "precious opportunity and it should be used with all the resourcefulness at [an attorney's] command." Relying upon his knowledge of human nature, his experience in examining jurors, and his ability to perceive

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19 See Stilson v. United States, 250 U.S. 583, 586 (1919). In Stilson, the defendants were convicted of conspiracy under federal law. On appeal, they contended that the failure of the trial court to allot each of them 10 peremptories was prejudicial error. The Court held that the trial court did not err by treating all of the defendants as a single party and allotting them 10 challenges in total.

20 Pointer v. United States, 151 U.S. 396, 408 (1894). In Pointer, the trial court had instructed the parties to exercise their peremptory challenges simultaneously in writing. The Supreme Court rejected the defendant's contention that such procedure infringed upon his rights. The Court held that the defendant was not entitled to have the Government exercise its challenges first, or to be informed which names were struck. In absence of a court rule or statute, the manner of exercise is in the court's discretion. Id. at 410.

21 The Supreme Court has stated:

"Experience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted."

Hayes v. Missouri, 120 U.S. 68, 70 (1887).

22 See United States v. Marchant, 25 U.S. (12 Wheat.) 480, 482 (1827). However, the use of peremptory challenge to systematically exclude a particular class of persons from jury service is an unconstitutional exercise of the right. For a discussion of possible unconstitutional results if the right to challenge is abused, see notes 115-18 and accompanying text infra.


The peremptory challenge has been criticized as impractical in the twentieth century. Continental jurists have attacked peremptory challenges as being "only an historical remnant without any modern justification." Orfield, supra note 17, at 129. Actual use of peremptory challenges in England has been rare for a century. This, however, may be attributed to the English courts' greater control over pretrial publicity and prejudgment of pending cases. This factor gives both court and counsel more confidence in the impartiality of the jurors. See 380 U.S. at 218 & n.24. Peremptory challenges have also been identified as the reason for the delay in completing a trial and for the increase in expenses by the elimination of qualified jurors. Id. at 216 & n.19.


hostility in a juror, the defense attorney is able to recognize certain characteristics of the juror which would affect his reaction to the defendant, himself, or the case. Recognition of undesirable characteristics would lead to the prospective juror’s exclusion from the panel. Nearly a century ago, trial lawyer J.W. Donovan advised his colleagues to scrutinize a juror with the aid of personal background information. Donovan advocated that persons who appear to have been mistreated by life should be avoided because they are prone to seek comfort in the defendant’s hardship.

Lawyers have similarly applied the laws of physiognomy or phrenology in their voir dire examination. Relying solely on physical characteristics, they have sought to separate the sensitive, emotional, and generous juror from the pessimistic, narrow-minded individualist. For example, a short upper lip has been viewed as indicative of sensitivity, but a long upper lip reveals a strong individualist. F. Lee Bailey has advocated an examination of the prospective juror’s ethnic background and physical characteristics. Factors such as age, occupation and skills, marital status, and

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28 See generally id.
29 Donovan advised attorneys to note the candor, humor, intelligence, social status, occupation, and age of the veniremen, as well as the character reflected by their faces. R. Simon, The Jury and the Defense of Insanity 103 (1967) [hereinafter cited as Simon], quoting J. Donovan, Modern Jury Trials and Advocates 227 (1887).
30 Donovan warned:
There is a little man deformed, narrow, selfish, opinionated; yonder is a captious, caustic, witty man, of stale jokes and street corner argument; and further on is a hard man, grim faced and cold, grey look, white blood and glassy eyes. Rule them all off, if possible. The world has used them ill. They will spread their misery for company's sake.
31 S. McCART, Trial by Jury 35 (1964). Several other physical features have been linked with personality characteristics, e.g., eyebrows meet and eyes close together—narrow-mindedness; round, wide eyes—creduulous; small eyes—lacking in emotion; lobeless and pointed ears—dishonesty. Id.
Another method that has been considered by some attorneys has been the study of anthropometry, which divides the human race into three classifications based on the physical aspects of the body: 1) endomorphs—believed to be more responsive to a criminal defendant; 2) mesomorphs—believed to give particular attention to facts, therefore advantageous to the side with a strong factual case; 3) ectomorphs—believed to be less responsive to a criminal defendant. Id. See also J. Appleman, Preparation and Trial 162-63 (1967) [hereinafter cited as Appleman].
32 Jurors of Italian, Irish, Jewish, Latin American, and Southern European extractions are considered to be more desirable to a defendant's position. However, strong cross-examination of a Jewish or Italian witness may generate resentment from jurors of the same descent. F. Bailey & H. Rothblatt, Successful Techniques for Criminal Trials § 106 (1971) [hereinafter cited as Bailey & Rothblatt].
33 A jovial and corpulent juror, with a round-shaped face, has been recognized as being more sympathetic toward the defendant. Id. § 103.
34 Bailey and Rothblatt found that jurors between 28 and 55 years of age are alert and responsive to complex defenses. Id. § 105.
35 People with broad experiences and worldly exposure, such as salesmen, actors, artists, and writers, may be preferred because they are not likely to be shocked by crime. Id. § 107.
36 Married persons have been found to be more favorable to the defense than unmarried persons. Id. § 105.
the sex of the individual must be evaluated to discover latent biases of a prospective juror that could be prejudicial to a criminal defendant. Mr. Bailey also suggests focusing upon the prospective juror’s body language when responding to questions directed at him during the voir dire.

Defense attorney Clarence Darrow had his own formula for choosing jurors. He sought those who would have a kind ear for the “underdog” defendant. Thus, Irishmen and Jews were selected whenever possible, for he believed them to be lenient. Englishmen and Scandinavians, on the other hand, were avoided because of their strong regard for law enforcement. Catholics, Episcopalians, and Presbyterians were preferred over Baptists and Methodists, because the former were more tolerant of human frailty.

Through their studies on jury composition and deliberation, social scientists and psychologists have confirmed the beliefs of these attorneys that there is a correlation between juror characteristics and juror behavior. These studies have indicated that a juror’s race, nationality, or religion have affected his verdict and his reaction to an insanity plea. The juror’s response to forms of testimony has been found to be influenced by the extent of his education. The sex of a juror has affected his weighing of

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37 Bailey and Rothblatt have cautioned the defense counsel to avoid women where the defendant is also a woman. Id. § 104.
38 Similar traits are also important in civil cases. See, e.g., Appleman, supra note 31, at 161-65 (on the issue of damages); J. Frank, Courts on Trial 121 (1949), quoting I. Goldstein, Trial Techniques (1935).
40 Eliciting the prospective juror’s attitudes about crime and personal opinions of the case have also been suggested as guidelines in selecting jurors. Bailey & Rothblatt, supra note 32, §§ 109, 111.
42 Negroes and persons of Slavic and Italian origin were found more likely to vote not guilty than persons of German and British backgrounds. Broeder, The University of Chicago Jury Project, 38 Neb. L. Rev. 744, 748 (1959). A juror’s identification or familiarity with the occupation of the defendant has also resulted in a verdict of acquittal. Broeder, Occupational Expertise and Bias As Affecting Juror Behavior: A Preliminary Look, 40 N.Y.U. L. Rev. 1079, 1099 (1965). Furthermore, the likelihood of conviction has been shown to increase when there is a greater discrepancy between the socio-economic level of the juror and the defendant. Adler, Socio-economic Factors Influencing Jury Verdicts, 3 N.Y.U. Rev. of Law and Soc. Change 1, 6-10 (1973) [hereinafter cited as Adler].
43 Rita James Simon researched the reaction of jurors from various sociological backgrounds to verdicts of not guilty by reason of insanity. She concluded that Negroes are more likely than others to acquit on grounds of insanity. Negroes were more inclined than other minority groups to see themselves as political victims of police or law enforcement institutions and thereby more inclined to identify with the defendant. Simon, supra note 29, at 111.
44 Grade school educated jurors placed more emphasis on testimony, personal life experiences, and opinions presented at the trial than higher educated jurors, who emphasized
evidence. It has been discovered that previous jury experience tends to
color the juror's attitudes and often results in the formulation of preor-
dained conclusions in all future trials. Additionally, psychologists have
focused on personality traits of the juror, placing particular emphasis on
examining authoritarian and anti-authoritarian personalities. The former
have been found to be more inclined to convict.

To peremptorily challenge prospective jurors who have latent biases
detrimental to the defense, the attorney must obtain sufficient personal
background information. There is a wide range of investigative tech-
niques available to private counsel. The only apparent limitations are the
attorney's time, money, and ingenuity. Some attorneys have employed
private investigators as part of their permanent legal staff. Others have
resorted to commercial jury investigating services for their information.
Private detective agencies have also been utilized. In some instances, at-
torneys have pooled their information, consulted with politicians, or con-
tacted state agencies. Investigators have interviewed the juror's neighbors
or associates. The type of information canvassed is equally as broad.

procedure and instruction. Adler, supra note 41, at 3, citing James, Status and Competence
"There is a tendency among male jurors to reach the verdict on the basis of whether or not
they want to see the accused punished rather than upon the assessment of the facts. Adler,
supra note 41, at 3.
Previous jury experience has also resulted in emotionally exhausting a juror's ambition to
fight for what he believes to be just. Id. at 140.
"Authoritarian personalities were found to be more inclined to distort evidence in favor of
conviction. Their decision to convict was usually made before all the evidence was presented.
Boehm, Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application
of Psychological Measuring Techniques to the Problem of Jury Bias, 1968 Wis. L. REV. 734,
746.
"APPLEMAN, supra note 31, at 160. Sources of information frequently used are the city
directory, local salesmen, the family physician, and professional jury services. Id.
Geo. L.J. 839, 851 (1968) [hereinafter cited as Okun], citing White, Selecting the Jury, in
SUCCESSFUL JURY TRIALS 121 (J. Appleman ed. 1952). There is no pretrial investigation in the
English system. Okun, supra, at 865-66.
"Okun, supra note 48, at 851. Professional jury services provide the attorney with a complete
background of the juror, including the manner in which he or she voted in previous cases.
APPLEMAN, supra note 31, at 160. Some attorneys, however, prefer their own personnel hand-
ling the investigation since this affords the attorney greater control of methods used. Okun,
supra note 48, at 851 n.46.
"Leading attorneys in Philadelphia have in the past pooled their efforts to amass juror
information, each bearing his share of the expenses. Okun, supra note 48, at 851 n.47, citing C.
CALLENDER, THE SELECTION OF JURORS 30 (1924).
"APPLEMAN, supra note 31, at 160. Credit bureaus, police departments, banks, and township
supervisors are also likely sources of information. Heyl, Selection of the Jury, 40 ILL. B.J. 328,
333-34 (1952) [hereinafter cited as Heyl].
"Such practices were used in pretrial investigation by the defense in the Wounded Knee
Facts such as age, employment, marital status, previous court litigation, religion, and political affiliations have been gathered. Attorneys have also requested the investigators to obtain information regarding a prospective juror’s reputation, social affiliations, and standard of living. As part of their pretrial investigations, defense attorneys have formed alliances with professionals to assist them in the actual exercise of their peremptory challenges. Hypnotists have been employed in detecting the subconscious motivations of prospective jurors. In the trial of Angela Davis, five black psychologists visited the courtroom daily and observed the veniremen throughout the voir dire questioning. Consultations were held with the defense attorneys during recess and in the evenings to discuss their findings and to suggest areas of questioning that might prove helpful. The psychologists observed the veniremen’s attitudes toward the image of Angela Davis as a black militant Communist. They studied the jurors’ personality characteristics and assessed the jurors’ ability to support their convictions. Body language was also carefully observed and recorded. After the jury was selected, the defense believed that there were only four pro-prosecution jurors. The psychologists were confident, however, that they would not hang the jury, but would yield to the sentiment of the others. The jury’s verdict of acquittal proved the psychologists to be correct.

In the criminal conspiracy trial of John Mitchell and Maurice Stans, Herbst, a media expert, constructed a demographic profile of 500 New Yorkers utilizing principles of marketing research. The profile indicated

Okun, supra note 48, at 851. See Heyl, supra note 51, at 333, which contains a reprint of an extensive questionnaire used to screen jurors. The author describes the utility of this method in the exercise of peremptory challenges. Id. at 334-36.

Dr. William Bryan contends that a male juror who loosens his collar while the death penalty is discussed during the voir dire is subconsciously against the death penalty, regardless of his conscious admissions. Dr. Bryan claims that he is capable of predicting a juror’s behavior in a jury room over 90% of the time. Wall Street Journal, Aug. 12, 1974, at 19, col. 4.

In addition, a telephone survey was conducted by Jeffrey M. Paige, a sociologist at the University of California at Berkeley, to gather sufficient evidence that the local population had formed an opinion as to the guilt of Miss Davis so as to support a change of venue motion. The effort was successful. Schulman, Shaver, Colman, Emrich & Christie, Recipe for a Jury, Psychology Today, May 1973, at 37, 39 [hereinafter cited as Recipe for a Jury].

Robinson, supra note 9, at 46.

Id. at 48, 50. Psychologists identified three traits likely to influence the jury: Miss Davis’ beauty, determination, and friendliness. They sought to find jurors who would react to Miss Davis on a rational human level rather than on one of prejudicial emotion. See Sage, Psychology and the Angela Davis Jury, 2 Human Behavior 56 (1973).

Robinson, supra note 9, at 50.

Angela Davis, charged with murder, kidnapping, and conspiracy, was acquitted in 1972 after a three-month trial. Id. at 44, 50.

Wall Street Journal, Aug. 12, 1974, at 19, col. 4. Mitchell and Stans were acquitted of obstruction of justice, perjury, and conspiracy charges in April 1974. Id. at 1, col. 1.
that middle-income, high-school educated jurors of the Catholic faith would be most sympathetic to the defense. In recent political trials, defense attorneys have been assisted by sociologists attempting to identify those sociological characteristics of the trial district which would be most favorable to the defendant. Their techniques were first applied in the trial of the Harrisburg Seven. Personal interviews were conducted with a sample of 252 potential jurors in the Harrisburg area. To determine their

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61 Id. Mr. Herbst stated, “We wanted people who are home established, to the right, more concerned with inflation than Watergate . . . .” N.Y. Times, May 5, 1974, at 41, col. 1.

62 The analysis is usually divided into three states: 1) a sociological profile of the community; 2) an in-court observation of jurors; and 3) an investigation of jurors’ backgrounds. There is also consideration of juror group dynamics and anticipation of the individual prospective juror’s reaction to evidence and issues that are to be presented at trial. See Recipe for a Jury, supra note 55, at 39-42.

63 The Harrisburg Seven, which included Father Philip Berrigan, were indicted for conspiring to raid draft boards and destroy records, to kidnap presidential adviser Henry Kissinger, and to explode Washington, D.C. heating tunnels. See Recipe for a Jury, supra note 55, at 37.

Sociologists were again enlisted by anti-war dissidents defending in the Camden 28 and Gainesville Eight trials. Jury Selection, supra note 6, at 1033. In the Gainesville Eight trial, the jury, which included some men of draft age, acquitted militant members of the Vietnam Veterans Against the War who were accused of having organized teams to attack police station vehicles and stores in Miami Beach. Similarly, the seventeen defendants in the Camden 28 trial, charged with breaking into a federal building in 1971 and destroying draft files, were acquitted. In the Camden 28 trial, 1,561 registered voters in southern New Jersey were canvassed for purposes of gathering demographic data. The interviewers sought information on the subject’s view of the war in Indochina, amnesty for draft evaders and deserters, and the Presidency. Memorandum from Friedel Ungeheuer to Time Magazine, May 22, 1973.

Sociologists also participated extensively in the trial preparation for defendants involved in the incidents at Wounded Knee. Russell Means, a Sioux, and Dennis Banks, a Chippewa, were charged with burglary, assault, larceny, and conspiracy in connection with the seizure of the Indian hamlet of Wounded Knee in the Pine Ridge Reservation, South Dakota. The two defendants led 300 Indians and sympathizers into the town and took control at gunpoint, holding it for 73 days. N.Y. Times, Jan. 9, 1974, at 18, col. 1. Sixty volunteers conducted telephone interviews with 575 potential jurors who were selected at random in the federal trial district of St. Paul, Minnesota. The interviewees’ attitudes toward government, police, and Indians were collected to uncover prejudices. Their responses were correlated with demographic material to ascertain the type of person best suited for the defense. Wall Street Journal, Aug. 12, 1974, at 1, col. 1. The results filled 1,000 pages of computer print. Time, Jan. 28, 1974, at 60. During the voir dire, a team of 10, including an Indian psychologist, a tribal medicine man, and a body language specialist observed the jurors. Meanwhile, fifty defendant sympathizers investigated the background of each panel member by speaking to neighbors, acquaintances, and co-workers. Consideration was also given to juror interaction. Id. The collected data was analyzed by the social scientists, lawyers, and defendants the night before the twenty peremptory challenges were to be exercised. Wall Street Journal, Aug. 12, 1974, at 1, col. 1.

After jury deliberations had commenced, one of the jurors suffered a stroke. Federal Judge Nichol, refusing to declare a mistrial, dismissed the charges against the two leaders of the American Indian Movement. However, Judge Nichol admitted that he expected a verdict of acquittal. Later, several jurors disclosed that they would have acquitted the defendants. Newsweek, Sept. 30, 1974, at 54-55.

64 Recipe for a Jury, supra note 55, at 40. Prior to this, the researchers surveyed the Harris-
impartiality, inquiry was made into the prospective jurors' political attitudes, their exposure to the media, and the ages and activities of their children. Religion was discovered to be a key factor and significantly related to all other attitudes under investigation. The ideal juror emerged as a woman employed in a white collar or skilled blue collar job, with Democratic political affiliation and having no religious preference.

**Prosecutorial Reaction to Scientific Jury Selection**

Traditionally, intensive pretrial investigations have not evoked an unfavorable response from the judiciary. So long as out-of-court investigations do not interfere with the jury system, they are not subject to challenge as violating the constitutional protection of an impartial jury. For example, in *Dow v. Carnegie-Illinois Steel Corp.*, the Third Circuit found that a defense attorney's hiring of a third party to obtain background information about the prospective jurors was necessary to effectively exercise his peremptory challenges. Even though direct contact was made with neighbors of the prospective jurors, the *Dow* court viewed the investigative activities as a necessary tool whereby the attorneys could seek information without purporting to intimidate jurors.

The investigators telephoned friends and neighbors and inquired about the prospective juror's age, occupation, marital status, children, religion, and politics. They were also asked whether they knew if the juror owned property, was ever engaged in litigation, or injured in an accident. Id. at 431.

*Recipe for a Jury*, supra note 55, at 40. The ideal juror varies with the area and the nature of the case. In the *Gainesville Eight* trial, Episcopalian and Presbyterian professionals were favorable for the defense. Women were found to be unsympathetic. In both the *Harrisburg Seven* and *Camden 28* trials, however, women were sympathetic to the defense. In the *Wounded Knee* trial, women were found to be no more favorable than were men to the defendants. *Time*, Jan. 28, 1974, at 60.

The importance of extensive pretrial investigation has intensified where the voir dire has become more restricted. Okun, *supra* note 48, at 849. For further discussion of the voir dire and its relation to peremptory challenges, see notes 138-45 and accompanying text infra.


224 F.2d at 431.

*Dow* is distinguishable from *Sinclair v. United States*, 279 U.S. 749 (1929), wherein the Supreme Court condemned the investigation practices of a criminal defendant.
Courts have given great latitude to the scope of the investigation and the type of materials that can be used in preparation for the voir dire examination. F.B.I. reports,74 special reports prepared by the I.R.S.,75 as well as jury books which detail how particular jurors voted in prior trials have been used by the prosecution.76 Most recently, courts have acquiesced in the collaboration between defense counsel and social scientists or psychologists.77

Not surprisingly, prosecuting attorneys have been less than exuberant over the newfound application of social sciences and computer technology. Government attorneys assert that the defendant’s substantial allotment of peremptory challenges enables him to “dominate and control” jury selection.78 With the assistance of social sciences and demographic profiles to direct the exercise of peremptory challenges, they hypothesize the loss of the impartial jury system.79 The fear expressed by prosecutors rests on two assumptions: first, that the defendant has too substantial a number of peremptory challenges at his disposal, and second, that the social sciences are accurate in their analyses. The accuracy of these assumptions is debatable.

In *Sinclair*, the defendant hired private detectives to keep all jurors under surveillance throughout the trial. Such activities “destroy[ed] the equilibrium of the average juror and render[ed] impossible the exercise of calm judgment upon patient consideration.” Id. at 765.

In *McCready*, Challenging Jurors, 58 DICK. L. Rev. 384, 385 (1954), the author, a Pennsylvania judge, indicated that proper investigations may be made by counsel provided he does not directly contact veniremen.

74 See Best v. United States, 184 F.2d 131, 141 (1st Cir. 1950), cert. denied, 340 U.S. 939 (1951).
77 Judge Fred Nichol, who conducted the *Wounded Knee* trial, was impressed by the techniques of the team of sociologists and psychologists. He declared that he could perceive the system being adopted by the Government in the future. *Time*, Jan. 28, 1974, at 60.

Judge Leonard Braman, of the District of Columbia Superior Court, utilized social science techniques to assist him in selecting the panel for the trial of five Black Muslims charged with the slaying of seven Hanafi Muslims. A three-page questionnaire was distributed to an oversized panel of 650 prospective jurors. The completed questionnaires were fed into a computer, and the resulting print-out indicated 389 potential jurors had no fixed opinion of the case and were willing to be sequestered. This number was reduced to 270 by random selection, from which the jury was chosen. N.Y. Times, Feb. 24, 1974, at 29, col. 1.

In Florida, a Dade County investigation firm assists attorneys by investigating the entire panel. The service, in operation for over twenty years, has received the sanction of the Dade County courts. See notes 133-34 and accompanying text infra. It is believed that attorneys should be equipped with such background information to sensibly exercise their peremptories. In addition, jury selection is hastened. 172 N.Y.L.J. 89, Nov. 6, 1974, at 1, cols. 1-2, & at 6, cols. 7-8.

78 The *Watergate* prosecution, for example, maintained that the 20 peremptory challenges awarded the defendants enabled them to dominate the selection of jurors. N.Y. Times, May 5, 1974, at 41, col. 1.
79 Wall Street Journal, Aug. 12, 1974, at 19, col. 5.
The Number of Peremptory Challenges

In response to the prosecutors' protests, it is contended that defense attorneys are not equipped with sufficient peremptories to eliminate prospective jurors who fit their profiles.\(^1\) Although the number of peremptory challenges allotted to a defendant varies with each state, in the usual instance, a criminal defendant is not generously provided with the device. The defendant may have as few as four and rarely more than ten peremptories in cases involving felonies punishable by a sentence less than life imprisonment.\(^2\) With respect to capital offenses or crimes punishable by life imprisonment, as many as twenty peremptories have been assigned to a single defendant because of the severity of the punishment.\(^3\) Under the federal system, the defendant is entitled to twenty peremptory challenges for a capital offense, ten for a felony, and three for a misdemeanor.\(^4\)

Proponents of the present system further point out that the number of peremptories allowed the defendant is balanced by the number allotted the state. The prosecution, in most states, is accorded an amount equal to that available for the defendant.\(^5\) In jurisdictions where an unequal number of challenges is prescribed, the prosecution has at least one-half the amount awarded the defendant.\(^6\) Although seemingly inequitable, this unequal distribution of challenges has been upheld as constitutional.\(^7\)

\(^{10}\) Id.

\(^{11}\) See Cal. Penal Code § 1070 (West 1970); Ill. Ann. Stat. ch. 38, § 115-4(e) (Smith-Hurd 1970) (10 peremptory challenges); Mass. Gen. Laws Ann. ch. 234, § 29 (Supp. 1974) (4 peremptory challenges); Mont. Rev. Codes Ann. § 95-1904(f) (Supp. 1974) (6 peremptory challenges). But see Ga. Code Ann. § 59-805 (1965) (12 peremptory challenges if the crime is punishable by less than four years in the penitentiary, 20 peremptory challenges if the crime is punishable by more than four years in the penitentiary or by death). New York law permits the defendant 15 peremptory challenges when charged with a class B or C felony and 20 peremptory challenges when charged with a class A felony. N.Y. Crim. Pro. Law § 270.25(2)(a), (b) (McKinney 1971). These comparatively large numbers may be attributed to the fact that New York does not provide for additional challenges in multi-defendant trials. Id. § 270.25(3).


\(^{13}\) Fed. R. Crim. P. 24(b).


\(^{16}\) Jones v. Georgia, 1 Ga. 610, 617 (1846). It is interesting to note that the prosecution has rarely raised the question of unconstitutionality. This may be attributed to the fact that the right to an impartial jury is a right of the defendant, not the prosecution. Additionally, from a historical perspective, the peremptory challenge was primarily a weapon of the defendant to shield him from jurors anxious to convict. Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All White Jury, 52 Va. L. Rev. 1157, 1172 (1966) [hereinafter cited as Comment, Swain v. Alabama]. Thus, the claims of the prosecution and the defendant to the right to peremptorily challenge do not have the same weight. Id. at 1173.
THE PEREMPTORY CHALLENGE

Justification for this procedure is based on the theory that the prosecution has adequate resources for investigating prospective jurors, and therefore, does not require the same number of challenges. In the federal courts, the prosecution is entitled to an equal number of challenges in trials involving capital offenses or misdemeanors. The Government is limited, however, to six peremptories in a felony trial. Where there is an unequal number, the challenges are exercised alternatively so that the prosecution is not at a disadvantage.

In multi-defendant trials, the majority of states allot additional peremptories either by statute or through judicial discretion. By so doing, these jurisdictions attempt to protect a particular defendant from prospective jurors who may be biased specifically against him. Where an additional allotment is provided, the majority of states increase the prosecu-

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87 Trial by Jury, supra note 82, commentary at 75.
88 Fed. R. Crim. P. 24(b). The rationale for the difference in this allocation is unclear.
89 For example, where the prosecution has six and the defense has twelve peremptories, the court could instruct the defendant to exercise two challenges to every one challenge exercised by the prosecution. See generally Challenge, supra note 16, at 641-43, for methods of exercising peremptory challenges where there is an unequal distribution.
90 Some states, such as New York, prohibit additional challenges to defendants joined in a single trial. N.Y. Crim. Pro. Law § 270.25(3) (McKinney 1971).

Statutes or rules granting additional peremptory challenges in multi-defendant trials may be classified into two general categories. The first are those which require the co-defendants to jointly exercise those peremptory challenges which would have been available in a single defendant trial. In addition, such statutes or rules may 1) allow the trial judge the discretion to permit each defendant additional challenges to be exercised separately or jointly, see, e.g., Fed. R. Crim. P. 24(b); 2) allow the trial judge the discretion to grant additional challenges which must be separately exercised, see, e.g., Md. Ann. Code, rule 746 § a(2) (1971); 3) mandate the trial judge to give a few additional challenges which must be separately exercised, see, e.g., Cal. Penal Code § 1070.5 (West 1970).

The second category includes those statutes which specify that no joint challenges may be exercised in a multi-defendant trial. Instead, a specific scheme of distribution may provide that 1) each defendant be given a specific amount that does not exceed the amount he would be given if tried alone, see, e.g., Ill. Ann. Stat. ch. 38, § 115-4(e) (Smith-Hurd 1970); 2) the statutory number be equally divided among the defendants, allowing the trial judge the discretionary authority to grant more, see, e.g., Wis. Stat. Ann. § 972.03 (1971); or 3) each defendant be given an amount equal to the amount he would have received if he had been tried alone, see, e.g., Mass. Gen. Laws Ann. ch. 234, § 29 (Supp. 1974). See Trial by Jury, supra note 82, at 72-74.

This method seeks to protect the rights of a defendant who is joined with others whose interests are adverse to his. Wis. Stat. Ann. § 972.03 (1971). Some jurisdictions require a showing of prejudice or adverse interest before additional challenges are awarded. See Peremptory Right, supra note 16, at 755. Other jurisdictions provide for a standard scheme applicable in all multi-defendant trials, Cal. Penal Code § 1070 (West 1970). Accordingly, the decision to grant more challenges is not dependent upon a reasonable explanation by the defendant seeking the increased allotment. To require otherwise would be contradictory to the very essence of the peremptory challenge—a challenge to be exercised without disclosing a reason. Moreover, the judge should not be forced to speculate for reasons. Thus, a scheme of general applicability appears to be more desirable. Id.
tion's number of peremptories to equal the total afforded the defendants.\(^2\) In the federal system, additional challenges may be granted to the defendants in the court's discretion.\(^3\) There would appear to be two grounds for the increment: (1) evidence must exist indicating a conflict of interest among the defendants,\(^4\) or (2) the additional challenges may be necessary to counter adverse publicity.\(^5\) Although the discretion of the court is not liberally exercised,\(^6\) where defendants are allotted an increased number of peremptories, additional challenges need not be conferred upon the prosecution.\(^7\) Thus, to the extent there will be a discrepancy in the number of peremptories allotted each side, reform measures, designed to rectify this situation, should be forthcoming.\(^8\) It should be noted, however, that certain federal judges, sensitive to the potential danger of an unbalanced situation, have refused to grant defendants additional challenges without concurrently increasing the Government's amount. In the Watergate trial, for example, Judge Sirica refused the defense's request for 25 challenges and a restriction of the Government to its allotted six. To grant the request, Judge Sirica believed, would effectively enable the defense to select the jury.\(^9\)

**The Accuracy of Social Profiles**

It is readily apparent, therefore, that the defendant's ability to dis-
cover his ideal juror is substantially impaired by the limited number of peremptories accorded him. Rarely will he possess sufficient peremptory challenges in excess of those available to the prosecution to tailor the jury to his needs. Undismayed, however, prosecutors argue that the defense maintains an unfair advantage due to the accuracy of social scientists and psychologists in determining which prospective jurors should be peremptorily challenged. As with the first contention, this fear of accuracy appears to be unjustified.

Defense attorney F. Lee Bailey refers to jury selection by attorneys as random guessing, analogous to the whirl of a roulette wheel. One commentator has claimed that jury selection is futile without an accompanying ability to read minds, and another views it as shrewd-guessing, finding the results as reliable as stock market analysis. The attorney's unaided natural instinct and judgment may be neither more nor less effective when augmented by the findings of social scientists. Hans Zeisel, professor of law and sociology at the University of Chicago, conducted studies of experienced trial lawyers, unassisted by social scientists, to prove that attorneys were singularly capable of accurately predicting the jury verdict in mock trials. Along these same lines, attorney Peter Flemming, chief defense counsel in the Mitchell-Stans trial, claimed that the demographic material utilized by the defense merely confirmed the attorney's own judgment and conclusions.

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100 Wall Street Journal, Aug. 12, 1974, at 1, col. 1. He regards it as the "most unscientific part of any trial." Id.
102 Brody, Selecting A Jury—Art or Blind-Man's Buff?, 4 CRIM. L. REV. 67, 78 (1957) [hereinafter cited as Brody]. The author, in discussing the approaches of great trial lawyers, analytically reduces their efforts to speculation and hunches.

Dependence upon intuition and past experience in rejecting panelists has had its consequences. One United States Attorney placed strong confidence in a kind and matronly woman, whom he described as attentive and approving throughout the trial. The case resulted in a hung jury of 11 to 1 for conviction, the sole opponent being the supposed partisan. The attorney admitted that such results tend to ruin the belief that one can accurately judge jurors. N.Y. Times, May 7, 1950, § 6 (Magazine), at 22. A more vivid display of the uncertainty of juror prediction was demonstrated in the murder trial of four Harlem teenagers in the early sixties. The prosecution had considered one Blanche Schutz to be a good juror for its case because she was white, middle-class, and the wife of a corporation lawyer. There were no clues as to Mrs. Schutz's sympathies for the defendants and many on the defense had abandoned attempts to enlist her support. In the end, Mrs. Schutz voted for acquittal. Blumenfeld, Harlem Four: The Minds of a Jury, 214 NATION 262, 263 (Feb. 28, 1972). The prosecution had further reassured itself with the unusual maturity of the jury. The average age of the jurors was 57 years old. One elderly gentleman, Charles Bitter, age 71, had been categorized by the defense as the "villain of the jury," and as one who would surely vote to convict. He voted for acquittal on the first ballot. Two other elderly jurors also surprised the prosecution by voting for acquittal. For the prosecution, at least, the limitations of human perception and intuition became manifest. Id. at 263-64.
103 Wall Street Journal, Aug. 12, 1974, at 19, col. 5.
104 Id.
An examination of some of the celebrated cases wherein attorneys have collaborated with sociologists and psychologists demonstrates the limited effect that nonlegal professionals have had in determining the trial’s outcome. In the *Mitchell-Stans* trial, Andrew Choa was the only juror who did not fit the defendants’ jury profile. Choa was neither middle-class nor merely a high school graduate. He was vice-president of First National City Bank and a graduate of Harvard University. He had strong political beliefs and was fully aware of the importance of John Mitchell and Maurice Stans in President Nixon’s re-election campaign. Nevertheless, it was Mr. Choa who proved instrumental in leading the jury to a verdict of acquittal. In the *Harrisburg Seven* trial, involving, in part, a prosecution for conspiracy to raid draft centers, the defense calculated the potential juror behavior of two jurors and assumed both to be favorable to their side. Mrs. Kathryn Schwartz, 68, mother of six, including four sons who were conscientious objectors on religious grounds, was considered one of their “benign seven.” Furthermore, although his occupational status as a business owner was thought to be unfavorable, Lawrence Evans was deemed acceptable, based upon his answers during the voire dire examination. Ultimately, it was these two jurors who, by voting for conviction, were responsible for a hung jury.

The success of these trials, from the defendant’s standpoint, would not

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103 N.Y. Times, May 5, 1974, at 41, col. 2. Mr. Choa further failed to meet the defendant’s ideal profile in that he was not “home established”, see note 61 supra, but an international banker and world traveler. He was born and reared in Hong Kong where he served in the British Embassy. *Id.*

104 *Id.* at 41, cols. 4-5. Mr. Choa initiated much of the communication between the judge and the jurors in an effort to have a clarification of the law. For example, he drafted the jury’s request for a re-reading of part of the testimony. It was Mr. Choa’s opinion regarding certain documentary evidence which caused the jury to discard it as evidence of guilt.

105 The defense, having learned of the conscientious objector status of her sons, decided to halt further questioning of Mrs. Schwartz. *Recipe for a Jury,* supra note 55, at 43. The “benign seven” refers to those jurors whom the defense classified as their second choice. *Id.* at 79.

106 Evans responded favorably to three important questions posed to him during the voir dire. With regard to the hippy culture, he stated that he “couldn’t be against hippies because I have some sons who look like that.” *Id.* at 43. On the war, he expressed that “[m]ore could be done and should be done to end the war . . . . I don’t know whether we should be there or not.” *Id.* His comment on the clergy’s participation in opposing the war was that “church people should do more of that.” *Id.*

107 A sociologist on the team, Professor Shulman, admitted that “while we argued and debated for hours about third-choice jurors, it was two of our second choices who hung the jury.” *Id.* at 79.

Evans’ guilty determination was manifested at the outset of the jury deliberations and remained constant for the duration. Evans proclaimed that the defendants must be guilty, otherwise the Government would not have brought them to trial. Becoming more adamant with the passage of time, he announced that he was commissioned by God to see that the defendants were convicted. *Id.* at 80. Evans apparently appealed to Mrs. Schwartz’s religious fervor and conservative tendencies, influencing her to vote for conviction. *Id.* at 81.
appear to be dependent upon the results of scientific jury analysis. Moreover, there may be another far more essential cause independently accounting for the juries’ verdicts. Professor Zeisel points out that many of the acquittals in cases wherein social scientists have been employed can be attributed to the weakness of the Government’s cases. For example, conspiracy charges, which have been in issue in a number of political trials, are by their nature difficult to prove. Professor Zeisel believes that such cases are won or lost on the evidence, without regard to the composition of the jury.\footnote{Jury Selection, supra note 6, at 1034.}

Other Potential Abuses

As the impact of social sciences appears to be slight, prosecutors’ objections are unjustifiably strenuous. This does not mean, however, that their criticisms should be completely overlooked. The collaboration of social scientists and other nonlegal professions in the exercise of peremptory challenges can lead to abuses which in turn may result in the destruction of the impartial jury.

As a matter of national policy, jurors are drawn at random from a cross-section of the trial forum’s community.\footnote{28 U.S.C. § 1861 (1970). See Glasser v. United States, 315 U.S. 60, 85-86 (1942) (defendant, charged with conspiracy to defraud, successfully moved to quash the indictment because women were excluded from the grand jury); Smith v. Texas, 311 U.S. 128, 129 (1940) (defendant successfully contended he was denied equal protection because Negroes were systematically excluded from the grand jury solely on account of their race).} This policy seeks to assure the defendant of a trial by his peers, and to secure for all citizens the opportunity of participating in the judicial process.\footnote{Chief Judge Kaufman has indicated that:}

Chief Judge Kaufman has indicated that:

[w]hen the question of guilt is a close one, the composition of the jury and the attitude of jurors toward the prosecutor and defendant may affect the outcome. . . . The ideal is to select a jury that represents a cross-section of the community from which it is drawn. Although no group should have a veto power over convictions, each should have the right to participate in the process of determining guilt or innocence. Kaufman, Harbingers of Jury Reform, 58 A.B.A.J. 695, 696 (1972).

This common law policy is reflected in The Jury Selection and Service Act of 1968, which mandates that no citizen be excluded from serving as a grand or petit juror in a federal district court because of race, color, religion, sex, national origin, or economic status. 28 U.S.C. § 1862 (1970). See Comment, Challenging the Juror Selection System in New York, 36 ALBANY L. REV. 305, 318 (1972).

Systematic and calculated use of peremptory challenges to discriminate on the basis of
The validity of this criticism, however, is questionable. First, the requirement is that the pool of potential jurors be from a cross-section of the community. This does not mean that the actual trial jury must be reflective of a cross-section of the trial forum's populus. Second, it is systematic and purposeful discrimination that is prohibited. To sustain a claim of discriminatory exclusion, purposeful exclusion of one class from the panel in a particular case is insufficient. A course of conduct directed at a particular class over a period of time must be demonstrated. The defendant exercises his challenges in one particular case, and thus, exclusion by him does not preclude a juror's participation in subsequent cases. The possibility that class members may be considered undesirable by criminal defendants in a majority of criminal cases of a similar or dissimilar nature does not establish the calculated intent to deprive the class of an opportunity to participate in the judicial process. Finally, the defense's use of social profiles is aimed at the exclusion of individual characteristics believed unfavorable in the case at hand and not at the continuing rejection of homogeneous class.

Another potential abuse that could arise from a generous award of peremptory challenges is the ability of the defendant to change the nature of the peremptory challenge. By repeated rejection of jurors possessing traits identified by the social profile as undesirable, the defendant could...

race, religion, or national origin "[re-introduces into the jury selection system an opportunity for the very kind of prejudice and bias which the [1968] Act proscribes." Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 LOYOLA (L.A.) L. REV. 247, 289 (1973).

The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (1970), specifies that "grand or petit juries [shall be] selected at random from a fair cross-section of the community" where the trial convenes. A precise proportional representation of the trial district's community is not required. See United States v. Jenkins, 496 F.2d 57, 65 (2d Cir. 1974). Consequently, it does not require a cross-section of the community on the final panel selected as the jury for trial.


Cases in this area have been concerned with the exclusion of jurors based on race. See United States v. Carlton, 456 F.2d 207 (5th Cir. 1972) (per curiam) (prosecutor used its six challenges to obtain an all white jury in trial of a Negro for assault of a white man); Hall v. United States, 168 F.2d 161 (D.C. Cir.), cert. denied, 334 U.S. 853 (1948) (prosecutor used 19 of his 20 challenges to remove all Negroes from a jury panel in a case involving 3 Negroes accused of robbery and murder of a white man); People v. Roxborough, 307 Mich. 575, 12 N.W.2d 486 (1943) (prosecution admitted that its purpose was to obtain an all white jury because the illegal numbers game was so widespread among Negroes in Detroit that few, if any, were likely to convict). In all these cases, the court failed to find a systematic exclusion of a class of jurors by the prosecution. See Comment, Swain v. Alabama, supra note 86, et 1166.

Systematic exclusion has been raised as an issue only by criminal defendants asserting the prosecution has continually challenged a class of jurors, thereby allegedly depriving the defendant of an impartial jury. See cases cited in note 116 supra.

For example, in the Harrisburg Seven trial, the defense believed that the following juror characteristics were favorable to them: being under 30 years of age, having a strong opposition to the Vietnam War, having a child of or approaching draft age, and possessing traits of a
convert the peremptory right into one of selection, rather than rejection.119 This, however, may be viewed as only an argument in semantics. The right of peremptory challenge, as a practical matter, contains elements of both rejection and selection. When demographic profiles are employed, the rejection-selection component becomes even more evident. It is submitted that this selection aspect is not an abuse.120 The defendant is not equipped with sufficient peremptory challenges nor assured of accuracy by the use of social technology to achieve selection.121

ENSURING JUSTICE THROUGH THE USE OF SOCIAL PROFILES

While the employment of social sciences does not create a demonstrable advantage for the defendant, it may serve to lessen his disadvantaged position in a government prosecution. By thoughtful utilization of these challenges, the defendant can counter some of the inequities that have crept into the judicial system. For example, in a federal prosecution, the Government initially controls the trial's location. For the trial of the Harrisburg Seven, the Government selected the Middle District of Pennsylvania, a politically conservative area consisting of several military installations and war related industries.122 The use of demographic materials allowed the defense to isolate favorable factors to neutralize the adverse atmosphere of the forum.123

The defendant may be further disadvantaged where the jury pool or jury panel does not represent the population of the trial district. In this regard, social profiles may also be of substantial assistance. Social scientists, in canvassing the community, seek to insure jury impartiality by uncovering jury pools which do not reflect a cross-section of the trial district. This technique was successfully used by the Harrisburg defense committee. The jury panel was struck after it was discovered that the popula-

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119 It must be admitted, however, that social technology might be misapplied by a defendant who is seeking to select the “hanging juror.” In such a case, the defendant will not exercise his peremptory challenge because his goal will be retention of one specific juror. Counsel will thereafter attempt to win his favor during the course of the trial. Trial attorney William Fallon was the master of the “hung jury.” He aimed at the lone dissenter, claiming that one juror is easier to convince than twelve. Brody, supra note 102, at 71. The handing or dissenting juror can be identified as argumentative and prone to automatically adopting the negative side of each issue. Appleman, supra note 31, at 163.

120 See cases cited in note 22 supra.

121 See Recipe for a Jury, supra note 55, at 37. The area also had an unusually low proportion of Catholics and a very high proportion of members of the Fundamentalist sects, all factors considered highly unfavorable to the defendants' position. See notes 66-67 and accompanying text supra.

122 See text accompanying notes 64-67 supra.
tion of the community was younger than the persons represented in the available panel. A new panel, more representative of the venire, was then drawn.\textsuperscript{124}

Profiles can also serve as effective tools in countering the effects of adverse publicity. They have been used with the greatest frequency and success in such political trials as Mitchell-Stans, Angela Davis, Camden 28, Gainesville Eight, Harrisburg Seven, and Wounded Knee.\textsuperscript{125} Oftentimes, the defendant in a political trial has the burden of resisting adverse publicity created by the communications media. Consequently, the goal in applying social sciences is to secure jurors who have not become predisposed to the defendant’s guilt by the media.\textsuperscript{126}

Furthermore, the use of social profiles aids in alleviating the inequities caused by the courts’ refusal to permit defendants to inspect pretrial juror investigation information obtained by the prosecution. United States v. Costello,\textsuperscript{127} which involved a prosecution for income tax evasion, illustrates the Government’s advantage in this area. The United States Attorney sought information from the Internal Revenue Service concerning the personal income tax of each panelist. The prosecution’s objective was to discover whether a prospective juror had tax problems of his own. Despite the defendant’s inability to similarly engage the Internal Revenue Service, the court upheld the prosecution’s activities.\textsuperscript{128} Likewise, Hamer v. United

\textsuperscript{124} Recipe for a Jury, supra note 55, at 40. In the New York case of People v. Attica Bros., 79 Misc. 2d 492, 498-99, 359 N.Y.S.2d 689, 706-07 (Sup. Ct. Erie County 1974) (mem.), the defendants’ motion to strike a portion of the jury pool as not representative of a cross-section of the community was granted. Although women comprised 53% of the Erie County population, the jury pool contained only 17% women. Under N.Y. JUDICIARY LAW § 665(7) (McKinney 1968), women were entitled to an unqualified right to claim an exemption. This exemption was found to be a violation of § 13 of the New York Civil Rights Law, N.Y. Civ. Rights Law § 13 (McKinney 1948), and rule 1025.2 of the Appellate Division Fourth Department’s Rules, 22A N.Y.C.R.R. 1025.2 (1968), both of which prohibit disqualification or discrimination from jury service by reason of sex. 79 Misc. 2d at 498, 359 N.Y.S.2d at 706.

Automatic exemption for women from jury duty was struck down in People v. Moss, 173 N.Y.L.J. 2, Feb. 4, 1975, at 1, col. 3 (Sup. Ct. Kings County Feb. 3, 1975). Justice Irwin Braunstein found the exemption to be violative of due process and equal protection. The only compelling state interest justifying continuation of this exemption was the premise that a majority of women are so occupied with domestic responsibilities that societal interest in the care of children would suffer by the presence of women on juries. This was regarded as an anachronism in modern society. Id. at 5, col. 5.

In reaching its decision the court relied on the recent United States Supreme Court decision of Taylor v. Louisiana, 95 S. Ct. 692 (1975). Taylor involved a Louisiana statute granting women automatic exemptions from jury service, unlike their male counterparts. The Supreme Court held that the special exemption accorded women violated the rights of the defendant under the sixth and fourteenth amendments. Id. at 701-02.

\textsuperscript{125} See notes 7, 9, & 63 supra.

\textsuperscript{126} Wall Street Journal, Aug. 12, 1974, at 19, col. 6. In the Mitchell-Stans trial, the Government was penalized two peremptory challenges for the widespread pretrial publicity the case received. N.Y. Times, May 5, 1974, at 41, col. 1.

\textsuperscript{127} 255 F.2d 876 (2d Cir.), cert. denied, 357 U.S. 937 (1958), discussed in Okun, supra note 48, at 867-77.

\textsuperscript{128} 255 F.2d at 882-83.
States held the inability of the defendant to gain access to information about a juror's background did not constitute a deprivation of the right to a jury trial, even though the prosecution possessed this information.

It is evident that, in many instances, the Government's wider access to information, as well as its financially superior position, serves to place the defendant in an inferior position with respect to juror selection. The Government has the monetary means available to employ third parties or private agencies to conduct investigations. Seldom will the defendant be in so fortunate a position as to engage a staff of technicians. The services rendered by the psychologists in the Angela Davis and Harrisburg Seven trials were donated. The surveys and interviews necessary to gather information were conducted by volunteers and defense sympathizers. Professor Schulman, who was one of the leaders of the Harrisburg team of investigators, estimates that such services would have a market value of $150,000. Where such services are available to a defendant on either a voluntary or compensated basis, he would appear more than justified in using the acquired information.

It must be remembered that the Government can neutralize the efforts of the defendant through the exercise of its own peremptory challenges. In the Harrisburg Seven trial, for example, the Government used its six challenges to rid the panel of six of the eight first choices of the defendants. In light of the advantages accruing to the prosecution, social technology would appear at most to be a meager concession to offset a defendant's otherwise limited capabilities in investigating prospective jurors.

Areas for Reform in Jury Selection

Although the utilization of social profiles in juror selection has argua-

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129 259 F.2d 274, 281 (9th Cir.), cert. denied, 359 U.S. 916 (1958).
130 Wall Street Journal, Aug. 12, 1974, at 19, col. 6. Professor Schulman stated that the profile poll alone would cost $20,000. Time, Jan. 28, 1974, at 60. Corporations have made offers to Professor Schulman of as much as $35,000 for assistance in commercial litigation. Id.
131 Attorneys using social scientists contend that the judicial system is based on an adversary principle where fairness is achieved when each side does whatever it can to strengthen its case.
132 According to one Legal Aid attorney, it is foolish to believe that the defense attorneys aim to pick an impartial jury. Wall Street Journal, Aug. 12, 1974, at 19, col. 6. Similar sentiments have also been advanced by the prosecution. In a syllabus distributed by the Dallas County District Attorney's office, Jon Sparling, an Assistant District Attorney, advised prosecutors to secure "a strong, biased and sometimes hypocritical individual who believes that defendants are different in kind, rather than degree." Time, June 4, 1973, at 67.
133 Recipe for a Jury, supra note 55, at 42.
134 The Government has access to vast sources of information and material, particularly in political trials. The prosecution can avail itself of F.B.I. records, selective service files, industry security files, and military files in gathering data on the background of prospective jurors. Jury Selection, supra note 6, at 1034, 1071. Further investigatory advantages of Government counsel are discussed in Okun, supra note 48, at 851-54.
bly served to ensure a more equitable criminal trial, certain impediments still attach to the defendant's use of these techniques. There is a danger that the defendant who has the greatest need for the benefits of social science to compensate for his disadvantaged position may be unable to afford its purchase. The bench and bar should encourage the development of private investigation services providing defense counsel with pertinent pretrial information at a modest fee. Such a service, privately operated and self-supporting, would provide the defendant with juror background information which he might otherwise be unable to acquire. In this regard, the Florida experience can serve as a prototype. A private investigation firm in Dade County, Florida, is regularly engaged by attorneys to research and provide information on members of jury panels. For a charge of $375, the firm probes into the background of the prospective jurors and prepares a card on each for the attorney.

In assessing the efficacy of the program, its patrons have credited it with producing a more effective voir dire examination and reducing jury selection time.

Judicial and legislative reform would appear appropriate in eliminating some of the demonstrated shortcomings of current jury selection procedures. Rule 24(b) of the Federal Rules of Criminal Procedure permits federal courts to grant additional peremptory challenges to multiple defendants joined in a single trial. At present, no corresponding increase is guaranteed the prosecution. To assure a balance between prosecution and defense, rule 24(b) should be amended to provide that where defendants are accorded additional challenges, the prosecution should be similarly provided with either an equal amount or an amount determined by fixed ratio. Through this revision, the prosecution would be able to remove a number of undesirable jurors comparable to that eliminated by the defendant. Consequently, any threat of the defendant controlling the jury selection process would be effectively removed.

Further reform in the Federal Rules may be forthcoming with respect to the participation of the attorneys in the voir dire examination. Presently, unlike the procedures adopted in the majority of states, the attorney...
ney's participation in the federal voir dire is determined by the particular judge involved. In most federal districts, the judge conducts the entire examination. By so acting, the federal courts deny counsel an opportunity to form an understanding of the attitudes and attributes of the prospective jurors. Accordingly, the attorney's intelligent exercise of his peremptory challenges is substantially restricted.

An attorney profits from conducting his own examination of prospective jurors. In the active exchange between attorney and venireman, counsel can glean, from the venireman's verbal responses and demeanor, information which is relevant to the exercise of a peremptory challenge. Where a court restricts the attorney's ability to acquaint himself with the panel, parties feel pressured to incur the added expense and task of conducting out-of-court investigations of the prospective jurors. It is not in criminal cases, to participate in the voir dire to some degree. McGuirk & Tober, *Attorney Conducted Voir Dire: Securing an Impartial Jury*, 15 N.H.B.J. 1, 5 (1973) [hereinafter cited as *Voir Dire*]. New Hampshire was one of the first jurisdictions to allow an attorney-conducted voir dire by judicial discretion. Id. at 2. New York, which provides by statute for an attorney-conducted voir dire, N.Y. CRIM. P. LAW § 270.15 (McKinney 1971), may soon see an amendment to the statute which would empower the judge to interrupt the attorney's examination and continue the examination himself if he finds the attorney's questions irrelevant or repetitious. 172 N.Y.L.J. 65, Oct. 1, 1974, at 1, cols. 1-2. The text of the proposed amendment is reprinted in 172 N.Y.L.J. 51, Sept. 11, 1974, at 4, col. 7.

This procedure has been recommended by the Judicial Conference of the United States. See 2 C. WRIGHT, FEDERAL RULES OF CRIMINAL PROCEDURE § 383, at 30 (1969). The voir dire is conducted by the judge in 51 districts, by the attorney in 12 districts, and by both in 22 districts. Id. at 30 n.11.

The voir dire is regarded as a necessary element of the constitutional guarantee of an impartial jury trial. See United States v. Dellinger, 472 F.2d 340, 366 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). It is at this stage of the litigation that prospective jurors are examined to establish their qualifications as impartial jurors. The purpose of the voir dire examination is twofold: 1) to discover any facts about the juror which would permit the attorney to challenge him for cause, and 2) to allow counsel to acquaint himself with the juror's background in order to intelligently exercise his peremptory challenges. Note, *The Limitations on Voir Dire Examination of Jurors in Criminal Prosecutions*, 1950 WASH. U.L.Q. 381. It has been criticized, however, on the grounds that extended examinations can result in an unnecessary waste of court time, and it presents an opportunity for unethical lawyers to prematurely acquaint the jury with their case. *Voir Dire*, supra note 139, at 2.

At the voir dire stage, an attorney is more familiar with the issues and evidence of the case than is the judge. He can, therefore, be more effective in exploring the veniremen's thought processes. Additionally, questions submitted by the attorney on paper to the court are not effective in extracting the attorney's desired response. Often, information is forthcoming only after a line of vigorous questioning, and can be lost in one isolated inquiry conveyed by a judge. *Voir Dire*, supra note 139, at 6.

Orfield, supra note 17, at 115. It has been held that the availability of jury investigative services cannot preclude the attorney from conducting a full voir dire examination. The impartiality of the prospective jurors should be determined under the auspices of the court. See Kiernan v. Van Schaik, 347 F.2d 775, 780 (3d Cir. 1965). Furthermore, it is important that the findings of the investigators be tested in court at the voir dire, since misleading or
difficult to perceive that a defendant, restricted at the voir dire because of the lack of investigative power, is at a grave disadvantage in the exercise of his challenge. A more intensive voir dire examination would place the defendant on a more equal footing with the Government. Consequently, the Federal Rules should be revised to permit the attorney to conduct or freely participate in the voir dire.

One final area for change would seem appropriate in both federal and state courts. The necessity for pretrial investigation would be significantly diminished were courts to adopt the procedure of striking as the method of exercising the peremptory challenges. Only a minority of states have enacted statutes governing the method of exercising peremptory challenges. In the absence of statute, the matter is left to the court's discretion. Challenge, supra note 16, at 641 & n.13.

At the federal level, the method of exercise is left to the discretion of the court. However, several districts have adopted a system of striking. Trial by Jury, supra note 82, commentary at 77.

Constitutional rights can be costly to an attorney and his client. 172 N.Y.L.J. 89, Nov. 6, 1974, at 6, col. 7.

"The trial court may require that each venireman be accepted or challenged immediately after his examination. This procedure deprives counsel the opportunity to intelligently compare several panelists before he exercises his peremptory challenges. Peremptory Right, supra note 16, at 757-58."

A procedure that requires both parties to simultaneously submit their peremptory challenges in writing has been favored by some courts. This would prevent prospective jurors from ascertaining which party challenged particular jurymen and consequently eliminate potential prejudice resulting from separate oral challenges made by each party. Challenge, supra note 16, at 644. This system was employed in the Wounded Knee trial. Time, Jan. 28, 1974, at 60.
predict, even with the assistance of social science techniques, a juror's unexpected reaction to events as they develop during the trial. The defendant's use of social technology, however, can be a useful tool in neutralizing the advantaged position of his adversary. This is particularly significant in highly publicized criminal trials of political figures wherein several external factors operate to further diminish the value of the peremptory challenge. Potential jurors' attitudes are severely affected by their views on political and sociological issues which are inherently interwoven in such cases, thereby frustrating the defendant's search for an unbiased juror.¹⁰⁶

The right to peremptorily challenge should be viewed not as a means to enable defendants to select desirable jurors, but rather, as a method for rejecting undesirables. To this end, a defendant requires sufficient information to make effective his use of peremptory challenges. Thus, his recent collaboration with social scientists and psychologists in gathering information of prospective jurors' backgrounds should not be regarded as a threat to the impartiality of the jury system. On the contrary, the union of social scientists and attorneys serves to ensure the impartiality and fundamental fairness expected of our judicial machinery.
