Jury Selection: Social Scientists Gamble in an Already Loaded Game

A spate of recent newspaper and television stories have reported, almost as though they were uncovering a scandal, that teams of social scientists have helped defense attorneys pick sympathetic juries in a number of celebrated criminal trials. Actually, the techniques of jury selection that are involved have been in use for several years. But ever since the *New York Times* discovered their use in the defense of John Mitchell and Maurice Stans, the subject has become "news."

In the ensuing debate, the charges have been made that the jurors thus chosen are "sociologically loaded dice" and that the procedure amounts to "social science jury stacking."

The individual who has principally sounded the alarm is Amitai Etzioni, director of the Center for Policy Research at Columbia University. "Defense attorneys have discovered," Etzioni wrote some time ago in the Washington *Post*, "that, by using social science techniques, they can manipulate the composition of juries to significantly increase the likelihood that their clients will be acquitted." He went on to wonder what would happen if the prosecution took this same "bite from the apple of knowledge."

The question, of course, is whether the social scientists are really manipulating juries. There is some opinion among observers of the jury system that, even if the social scientists have added a weapon to the defense's arsenal in some cases, they are at best compensating for the greater capabilities of the prosecution to investigate prospective jurors in those trials. Moreover, observers note, it is no small boon that in the course of their activities the social scientists have brought about fairer jury selection procedures in several districts.

The chief architect of social science jury surveys is Jay Schulman, a former City College of New York sociologist who is now a consultant to the defense in the series of trials growing out of the Attica prison revolt of 1971. As Schulman explains, what he has done is to apply proven social science and psychological techniques in a way that had not been done previously.

The first effort to make systematic use of the social sciences in jury selection was made in federal court at Harrisburg, Pennsylvania, in 1971 and 1972. It provides a good example of how Schulman's technique works.* At this trial, eight Catholic radicals, including Father Philip Berrigan, were charged with, among other things, conspiring to kidnap Henry Kissinger. Schulman, who was then an unemployed academic (or, in his phrase, "a Marxist in search of a discipline"), became interested because some of his friends were among the defendants and their lawyers. Schulman, Columbia social psychologist Richard Christie, and some associates worked with about 45 volunteers for the four-stage project. First, they surveyed the area, completing 840 phone calls in a random sample of the community to see if the current list, or pool, of prospective jurors for the trial actually represented a cross section of the population. They found that the jury list was disproportionately older than the Harrisburg community, and successfully moved to have a more representative jury pool drawn.

The second stage involved in-depth interviews with 252 people from the group of 840 to determine the attitudes and characteristics of the types of people likely to show up in the jury pool. Questions asked were meant to determine the individual's political affiliation, ethnic background, and newspaper habits as well as his attitudes, such as his trust in government or acceptance of antiwar protests. Thus, when it came time for the attorneys for the defense and the prosecution to question the prospective jurors and recommend the elimination of some—a procedure known as voir dire—the defense lawyers could literally rate prospective jurors in terms of their likelihood to sympathize with the defendants. Generally, those who were college educated were considered likely to be conservative politically and hence hostile to the antiwar defendants. Democrats, women, and blacks were held likely to be friendly, and so forth. The third phase involved observing the jurors during the trial, and in the fourth there was a follow-up study made after the jury was disbanded, to reconstruct how each juror had felt about the defendants and how he had voted.

Schulman admits that during the Harrisburg trial the methods used were far from perfect. The two jurors who held out for conviction—and thus "hung" the jury—were among those whom the social scientists thought would vote for the defense!

Indians and Veterans

Jury survey techniques similar to those applied in Harrisburg were also used in these other much publicized trials:

► The trial and aquittal of Angela Davis, where five black psychologists observed the jurors during voir dire.

► The trial and aquittal in Camden, New Jersey, of 28 radical Catholics in connection with a draft board raid.

► The trial in Gainesville, Florida, of some militant members of Vietnam Veterans Against the War, where a jury that included some men of draft age voted for acquittal.

► A series of trials arising out of the Indian takeover at Wounded Knee, South Dakota, including one of Dennis Banks and Russell Means, leaders of the American Indian Movement, which is still in progress.

► A civil damages suit brought on behalf of 650 survivors of the Buffalo Creek, West Virginia, dam disaster who won $13.5 million.

► The trial of Daniel Ellsberg and Anthony Russo, where the case was dismissed part way through, but where a follow-up study showed that the jury was likely to have voted for aquittal.

► The trial and aquittal of John Mitchell and Maurice Stans, where Long Island consultant Martin Herbst helped the defense lawyers select the jury.

► The Attica trials, where more than 1000 counts are being charged against inmates of Attica prison. So far, the defense has moved to have Erie County's jury selection procedures made more representative of the county.

Whether Schulman and his co-workers accurately deserve the headline awarded by the *Christian Science Monitor*—"Social Scientists Win Jury Trials"—remains

* The most comprehensive description of the technique used at Harrisburg appeared in *Psychology Today*, May 1973.

an open question, even to them. Much of the debate is on whether the social scientists can produce better results than lawyers working by themselves.

Hans Zeisel, a law professor at the University of Chicago, says that the social scientists' technique is comparable to predicting the batting average of baseball players. "You may predict an overall average," he says, "but you can't say what any individual will do any one time he's up at bat." Zeisel believes that, after seeing a prospective juror in the voir dire, an experienced trial lawyer can often predict whether the juror will be favorably inclined toward his client. In the case of personal injury claims, some lawyers can predict how much money a juror will vote to award, Zeisel says.

Zeisel says that his research shows that the vast majority of cases are won on the evidence, rather than on who was on the jury. The string of aquittals in the trials of prominent radical leaders, several observers say, could have been due not to the fact that social scientists aided the defense, but to the weakness of the case brought by the government. Zeisel points out that conspiracy charges, which were crucial to several of the trials, are notoriously hard to prove.

Leonard Boudin, one of the Harrisburg defense lawyers and the chief counsel in the Ellsberg defense, says that the social scientists' techniques are "useful, but not essential" if the lawyers involved are experienced and know the community. Christie, the social psychologist who has worked with Schulman, says that in the trials he worked on, "We did a little better than the local lawyers, but we were pretty much in the same ball park."

But, for his part, Schulman says that he has no doubt that the social scientists have done better than the local trial lawyers. "We have a pretty good track record, but I would be loathe to assume any relation between this technique and the aquittals. But my assumption is that the technique had value. How much, I don't know."

In terming the technique "social science jury stacking," the media have made the implication that the social scientists are capable of controlling the outcome of trials. But, Schulman says, "Of course we can't predict the behavior of every individual juror. So we aren't even trying to do that." The aim is merely to increase the chances that the jury chosen will be sympathetic. "The main weakness of the Etzioni view," he says, "is that he regards the social scientist as a god who can do all kinds of things. I don't have that kind of feeling about social science."

Some of the lawyers, who had read Etzioni's piece in the *Post* or who were told of his objections, characterized his statements as "naive" as to the realities of trial practice. For example, Charles Morgan, Jr., director of the Washington national office of the American Civil Liberties Union and the attorney in a series of cases during the 1960's that led to the opening of Southern juries to blacks and women, says, "In many jurisdictions, the prosecutor has the police department go over the list to tell him who the prospective jurors are. . . . In some cities, law firms that have practiced for a long time will have developed file systems . . . where jurors' names are listed and the verdicts they have rendered are recorded. . . . When they come to try a case, the lawyers can go over the list of prospective jurors and single out, by name, the ones they want."

Boudin says that the advantages of the government in big political trials like the Ellsberg case are vast. The government, he explains, has access to data on individuals in the form of FBI records, selective service files, industrial security files, and military files. He says, "I have no knowledge at all as to whether the government used its files [in choosing the Ellsberg trial's jury], or

(Continued on page 1071)

POINT OF VIEW:

High Cost of Energy Independence

Project Independence, the Republican administration's still vaguely defined national program to make the United States wholly or largely self-sufficient in energy by the 1980's, appears thus far to command substantial support in Congress and the public at large. But the support is far from unanimous. J. Michael McCloskey, executive director of the Sierra Club, expressed a strong dissent at a regional hearing on Project Independence held in Denver on 6 August by the Federal Energy Administration. For one thing, McCloskey said that to achieve energy self-sufficiency by the 1980's—or even to limit oil imports to 15 percent of total oil demand—was simply "impractical" because the necessary capital, labor, and material would be lacking. Beyond that, he felt, as the excerpts below from his testimony bear out, that even the goal of energy independence was unwise.

The environmental, social, and economic costs of attempted independence would be exhorbitant. We *cannot* continue to ignore and to assign to society as a whole the very real costs in human health of air and water pollution, nor can we any longer ignore the loss of other valuable public resources caused by overly rapid energy resource exploitation. . . .

"Project Independence" may also mean replacing cheaper imported energy with higher priced, less economical, domestically produced energy. Thus, it could result in rapidly pricing energy beyond the means of many of our people. . . . Moreover, the public would be forced to lease valuable national resources and land at far below an optimal rate of return. . . . The latest Gulf [coast oil] leases brought less than $1000 an acre in contrast to the recent average of $3000 an acre. . . .

Project Independence, judging its content from what we have seen and heard so far, would only serve to postpone massive foreign dependence for a while and make such dependence, when it arrived, more severe and disruptive because we would have used up our easily accessible and higher grade domestic resources and would still remain dependent on nonrenewable resources for much of our energy needs. . . .

What we should be focusing on is a long-range strategy and the creation of steady-state energy systems, both within the U.S. and in the world. We hardly become more secure by depleting our domestic fuel reserves in the fastest time possible, in triggering even more ruinous inflation, and in befouling our environment in a mad rush to devour all our domestic reserves. . . .

(Continued from page 1034)

made a study of individual backgrounds. But from what I've seen of government in the last few years, it would seem incredible to me if the government did not go to those files." In Boudin's view, the use of official files on individual prospective jurors would be a violation of privacy—whereas the use of general sociological information on groups in the community would not.

In the interest of fair play in the selection of juries, Morgan would like to see enacted a federal law requiring that all information on prospective jurors possessed by one side be made available to the other. "So at least when the lawyers went in after the deck had been shuffled and the deal was to start, they would all know what was on the backs of the cards and the marking code," Morgan says.

Several lawyers and social scientists interviewed felt that the flurry of news stories have missed one important aspect of the matter: whereas social scientists have participated in less than a dozen cases, there are perhaps 150,000 jury trials in the United States every year. Despite some reform of the federal court system, methods of jury selection remain a patchwork of different rules and customs. The classic example of how inequitable jury selection can be was allegedly cited by the former Attorney General Nicholas Katzenbach to the effect that, in at least one federal district, the names in the jury pool were predominantly members of the local Parent Teacher Association. By law, jury pools should represent a cross section of an area's voters, but in some districts, the local sheriff calls on middle-income neighborhoods repeatedly to make up jury pools because it is simpler and more convenient than drawing on poor ones. These and other practices are believed to persist, hidden in the maze of different court systems and jurisdictions.

Hence, instead of trying to stack the deck, as some media presentations have implied, the social scientists who have been working with juries have been finding out how inequitable the much-vaunted American jury system is. For Schulman, at least, this has become another cause. "What has taken hold of my imagination" he says, "is that the jury system can be revitalized. It is one element in the administration of justice that is open to the input of people."—DEBORAH SHAPLEY

APPOINTMENTS

Russell R. O'Neill, acting dean, School of Engineering and Applied Science, University of California, Los Angeles, appointed dean. . . . **George S. Ansell**, chairman, materials division, Rensselaer Polytechnic Institute, to dean, School of Engineering at the institute. . . . **Charles L. Ralph**, chairman, biology department, University of Pittsburgh, to chairman, zoology and entomology department, Colorado State University. . . . **Richard P. Gousha**, superintendent of schools, Milwaukee, to dean, School of Education, Indiana University. . . . **Robert R. Raymo**, chairman, English department, New York University, to dean, Graduate School of Arts and Sciences at the university. . . . **William A. Dunnagan**, radiologist, Amarillo, Texas, to chairman, radiology department, Texas Tech University. . . . **Sanford N. Cohen**, associate professor of pharmacology and pediatrics, College of Medicine, New York University, to chairman, pediatrics department, Wayne State University. . . . **Leonard D. Goodstein**, professor of psychology, University of Cincinnati, to chairman, psychology department, Arizona State University. . . . **Thomas L. Martin, Jr.**, dean, Institute of Technology, Southern Methodist University, to president, Illinois Institute of Technology. . . . **Thomas W. Langfitt**, acting vice president for health affairs, University of Pennsylvania, appointed vice president. . . . **Fred Landis**, dean of intercampus programs, Polytechnic Institute of New York, to dean, College of Engineering and Applied Science, University of Wisconsin, Milwaukee. . . . **Elmer B. Hadley**, chairman of biological sciences, University of Illinois, Chicago Circle, to dean, College of Liberal Arts and Sciences at the university. . . . **Thomas A. Bruce**, professor of medicine, University of Oklahoma, to dean, School of Medicine, University of Arkansas. . . . **John A. Weese**, dean of engineering, University of Denver, to dean, School of Engineering, Old Dominion University. . . . **Gilbert D. Moore**, former chairman of counselor education, State University of New York, Buffalo, to dean, School of Education, State University of New York, Albany. . . . **Howard J. Arnott**, chairman, biology department, University of South Florida, to dean, College of Science, University of Texas, Arlington.

RECENT DEATHS

Jacob Bleiberg, 64; associate professor of clinical dermatology, New Jersey College of Medicine; 17 March.

Clyde L. Cowan, 54; professor of physics, Catholic University; 24 May.

Morton H. Cross, 32; assistant professor of biophysics, University of Newfoundland; 3 May.

Margaret B. Downs, 66; former assistant professor of geography, Southern Connecticut State College; 31 December 1973.

John L. Emmett, 70; associate clinical professor of urology, University of Oregon; 18 April.

W. Maurice Ewing, 68; chief, earth and planetary sciences, Marine Biomedical Institute, University of Texas Medical Branch; 4 May.

George Gold, 61; attending professor of psychiatry, College of Physicians and Surgeons, Columbia University; 29 September 1973.

Karl F. Meyer, 89; retired director, Hooper Foundation, University of California, San Francisco; 27 April.

Richard C. Miller, 82; professor emeritus of agricultural engineering, Ohio State University; 20 April.

Raymond C. Moore, 82; professor emeritus of geology, University of Kansas; 16 April.

Leonard Palumbo, Jr., 53; professor of obstetrics-gynecology, University of North Carolina; 21 April.

Thomas E. Poag, 65; former dean, School of Arts and Sciences, Tennessee State University; 3 April.

Leon Rosenfeld, 69; former professor of physics, Nordic Institute for Theoretical Atomic Physics, Copenhagen; 23 March.

Wilmer Souder, 90; retired chief, metrology division, National Bureau of Standards; 8 April.

Theodore F. Treuting, 56; professor of medicine, Tulane University; 25 April.

Floyd R. Watson, 101; retired professor of physics, University of Illinois; 18 January.

Carl F. Wedell, 73; professor emeritus of horticulture, Agricultural and Technical College, State University of New York, Farmingdale; 1 April.

Benjamin B. Weinstein, 61; former associate professor of gynecology, Tulane University; 10 May.

Julius R. Weissenberg, 92; professor emeritus of anatomy, University of Berlin; 27 March.