

W668

WILD, N.

Scientific

Jury selection.

NICOLA WILD

**SCIENTIFIC JURY SELECTION:
A CONVINCING ALTERNATIVE TO
JURY SELECTION BY STEREOTYPE?**

**LLB(HONS) RESEARCH PAPER
FORENSIC ISSUES IN CRIMINAL LAW (LAWS 534)**

**LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON**

1997

e
AS741
VUW
A66
W668
1997

VICTORIA
UNIVERSITY OF
WELLINGTON

*Te Whare Wananga
o te Upoko o te Ika a Maui*



LIBRARY

CONTENTS

I	INTRODUCTION.....	1
II	JURY SELECTION IN NEW ZEALAND.....	2
A	<i>Legislative Authority</i>	2
B	<i>Judicial Approach</i>	3
	1 <i>The Status Quo</i>	3
	2 <i>Challenging the Status Quo</i>	6
C	<i>Process in Action</i>	11
III	SCIENTIFIC JURY SELECTION: A CONVINCING ALTERNATIVE?.....	17
A	<i>The Originating Instance - The Berrigan Trial</i>	17
	1 <i>SJS effected</i>	17
	2 <i>SJS affects</i>	20
B	<i>Components of SJS</i>	23
	1 <i>Surveys</i>	23
	2 <i>Data analysis</i>	26
	3 <i>Characteristic and attitude assessment</i>	29
	4 <i>Focus groups</i>	35
	5 <i>Juror investigations</i>	36
	6 <i>In-court assessment of juror non-verbal communication</i>	36
	7 <i>Group dynamics analysis</i>	37
	8 <i>Mock trial</i>	38
C	<i>The Extreme Instance - The OJ Simpson Trial</i>	38
	1 <i>SJS effected</i>	39
	2 <i>Affects explained</i>	41
IV	SUMMARY.....	43
A	<i>Critics</i>	43
B	<i>Proponents</i>	47
V	CONCLUSION.....	50

ABSTRACT

VI APPENDICES.....52

VII BIBLIOGRAPHY.....54

This paper examines traditional jury selection procedures and suggests there is a strong case for New Zealand to follow Canadian courts, and to a minor extent English courts, and adopting a new, more comprehensive, approach to jury selection. The United States has a history of focusing far more seriously on the selection of the jury and has evolved a system of Scientific Jury Selection. This system is still developing and is the subject of controversy. This paper explores the origins of Scientific Jury Selection, its components as they are developing and the evidence it can provide as to its efficacy. It is suggested that, from an efficacy standpoint, Scientific Jury Selection is a valid, if imperfect, alternative to New Zealand's present selection process.

ACKNOWLEDGMENTS

The text of this paper including various appendices, bibliography and abstracted comprises approximately 10,000 words.

ABSTRACT

This paper examines traditional jury selection procedures and suggests there is a failure to deal with bias in juries. Judicial support for the current system remains strong in New Zealand however Canadian courts, and to a minor extent English courts, are adopting a new, more comprehensive, approach to jury selection. The United States has a history of focusing far more seriously on the selection of the jury and has evolved a system of Scientific Jury Selection. This system is still developing and is the subject of controversy. This paper explores the origins of Scientific Jury Selection, its components as they are developing and the evidence it can provide as to its efficacy. It is suggested that, from an efficacy standpoint, Scientific Jury Selection is a valid, if imperfect, alternative to New Zealand's present selection process.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 15,400 words.

I INTRODUCTION

Lord Devlin has provided one of the most eloquent and powerful statements in jury-related literature, highlighting the importance of the jury in society.¹

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

New Zealand's recent Parliamentary changes focused on the election of Parliament. This paper focuses on the selection of juries. Does the lamp that shows that freedom lives burn brightly in New Zealand? This question is addressed in legislative, judicial and practical terms. Could the lamp burn more brightly? The answer is considered in terms of an alternative to current methods of Jury Selection. The major alternative is a process known as Scientific Jury Selection ("SJS"). SJS will be explained and explored in depth throughout the paper but in brief it is a conglomeration of techniques, mainly taken from the social science field (particularly psychology and sociology) which attempt to ensure that the jury is made of preferred members. Two questions immediately arise: does SJS work and should SJS be allowed to work? For SJS to fan the flame of the lamp that shows that freedom lives both questions must be answered in the affirmative. This paper addresses the first of these questions.² Evidence as to efficacy of SJS is presented here in terms of actual trials and of academic studies. An attempt is made throughout to provide a balanced approach. Indeed, as SJS develops so too does the evidence in relation to its efficacy. To date the answer is somewhat equivocal and room is available for valid argument on both sides. Although the jury is still out on

¹ Sir P Devlin *Trial by Jury* (Stevens & Sons, London, 1966) 164.

² The issues surrounding the ethics of SJS are equally fascinating. They are comprehensively addressed in the following texts: J Abramson *We, the Jury* (BasicBooks, A Division of HarperCollinsPublishers, Inc., New York) 1994; JW Barber "The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom" (1994) 31 ACLR 1225; JA Tanford and S Tanford "Better Trials Through Science: A Defence of Psychologist-Lawyer Collaboration" (1988) 66 NCL Rev 741; D Sahler "Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule" (1996) 6 Alb. LJ Sci. & Tech. 383; DP Stolle, J K Robbenolt, R L Wiener "The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation" (1996) 20 Law & Psychol Rev 139.

this question, it is clear that SJS is a potentially powerful tool that should not be ignored.

II JURY SELECTION IN NEW ZEALAND

A *Legislative Authority*

In New Zealand that lamp is fuelled by the New Zealand Bill of Rights Act 1992 which states that:

24. Everyone who is charged with an offence ...
- (e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than three months;

and that:

25. Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
- (a) The right to a fair and public hearing by an independent and impartial court...

New Zealand legislation provides two opportunities for an accused to ensure the jury which hears his or her case is independent and impartial.

The first is set out in section 24(1) of the Juries Act 1981:

Subject to the succeeding provisions of this section³, in every case to be tried before a jury each of the parties shall be entitled to challenge without cause 6 jurors only.⁴

The second is provided in section 25(1):⁵

... each party to the proceedings shall be entitled to any number of challenges for cause on the ground that a juror is not indifferent between the parties.

Section 22 of the Juries Act allows the judge to discharge any juror who he or she feels is not disinterested in the facts or who might be closely connected with one of the parties or with one of the witnesses.

³ Subsection 2 provides for the prosecution to challenge without cause 12 jurors where the cases of multiple defendants are heard together.

⁴ In addition the Crown formerly had the right, now a consensual procedure, or dependent on a Judge's own motion, to require jurors to stand aside s27 of the Juries Act.

⁵ Juries Act 1981.

The second of these opportunities, challenges for cause, have been "rare in New Zealand and [t]he course of supporting a challenge for cause by examination by counsel of a juror before he or she is seated in the jury box is still rarer."⁶ In fact examination to support a challenge for cause has, as far as Williamson J or the Appeal Court judges in *R v Sanders*⁷ were aware, never occurred in New Zealand.

A *Judicial Approach*

1 *The Status Quo*

In the recent decision of *R v Sanders*⁸ Cooke P, delivering the judgment on behalf of Richardson, Casey, Hardie Boys and McKay JJ, sets out the New Zealand Court of Appeal's stance on jury selection.

Cooke P approves the English requirement whereby a party must establish a foundation in fact in support of a challenge for cause before a juror can be cross-examined as to potential bias.⁹ He notes that cross-examination of jurors did occur in the English case of *R v Kray*¹⁰ but that that was a case described by the judge and textbooks as "wholly exceptional".¹¹

Cooke then applies this "wholly exceptional" test to New Zealand cases:¹²

One can only remain unconvinced that any novelty should be introduced into ordinary New Zealand criminal practice, while recognising that in wholly exceptional cases a trial Judge may properly exercise the judicial discretion of allowing jurors, whose names have been called, to be cross-examined before taking their seats.

Therefore any person who is called as a juror in New Zealand is presumed to be able to deliver fair and impartial judgment unless the circumstances are "wholly exceptional".

The circumstances of *Sanders* were that the accused "is or was" a prominent member of the Road Knights motor cycle gang or club"¹³ and that:¹⁴

⁶ [1995] 3 NZLR 545, 549.

⁷ Above n 6.

⁸ [1995] 3 NZLR 545.

⁹ *R v Chandler (No 2)* [1964] 2 QB 322, 338.

¹⁰ (1969) 53 Cr App R 412.

¹¹ Above n 8.

¹² Above n 8, 550.

In 1991 and 1992 there had been much adverse publicity in Timaru, reflected in public meetings, about the violent criminal conduct of the motor cycle gangs. The discovery in 1992 of cannabis-growing on or adjacent to the accused's farm also figured in local media publicity, and in the context of anti-gang concern. Thereafter, on the material placed before the Court, the publicity and the concern gradually diminished, to the extent that on 27 October 1993 the Police Minister was reported as saying that there was no longer a gang problem in Timaru.

In May 1993 the appellant was tried before a Timaru District Court Judge and jury on five drug charges. The appellant was denied his application for a change of venue on the ground of adverse newspaper and radio publicity. The jury did not agree on a verdict. The case was re-tried before a High Court Judge and jury in Timaru in May 1994. Counsel for the appellant decided, in light of the previous unsuccessful application for a change of venue, to apply to the presiding High Court judge for an order permitting counsel to examine each prospective juror for cause.

Williamson J heard the application and dismissed it on the basis that he was:¹⁵

[N]ot satisfied that the publicity relating to the accused and to the Road Knights motor cycle club had been shown to have the potential effect of destroying prospective jurors' indifference, or that it would have so clogged a potential juror's mind with prejudice that he or she would be unable to try the case impartially.

Cooke J apparently approved of this statement. Williamson J's bias requirement, however, seems somewhat more extreme, at least in its descriptive language, than the plain "not indifferent" enacted in section 22 of the Juries Act.¹⁶ Indeed the meaning of "indifference" must be interpreted in light of the presumption of innocence which:¹⁷

[D]emands that [jurors] be biased in favour of the accused. It is the state's obligation to overcome this institutionally created bias in favour of the defendant by proof beyond a reasonable doubt.

¹³ Above n 8, 548.

¹⁴ Above n 6.

¹⁵ Above n 13.

¹⁶ Section 22 is also more consistent with the requirement as described by Doherty JA, reflecting American jurisprudence, in *R v Parks* 84 CCC (3d) 353, 364 (1993): "A juror's biases will only render him or her partial if they will impact on the decision reached by that juror in a manner which is immiscible with the duty to render a verdict based only on the evidence and an application of the law as provided by the trial judge."

¹⁷ JJ Gobert "In Search of the Impartial Jury" (1988) 79 *JCrimL & Criminology* 269, 276. This presumption was recognised in *R v Parks*, above n 16.

The jury in Sanders' re-trial found him guilty on five drug-related counts after he pleaded guilty to the first of six counts in the indictment. The appellant then appealed against conviction and sentence, essentially to challenge the pre-trial ruling denying the application to allow examination of prospective jurors.

As stated above,¹⁸ the Appeal Court found that the circumstances in *Sanders* were not "wholly exceptional". Cooke P gave reasons why the opportunity to examine for cause should be limited to wholly exceptional cases.

One of the reasons noted was that, as Australian courts have commented, detection of bias is difficult.¹⁹

It seems unlikely that a prejudiced juror would recognise his own personal prejudice - or, knowing it, would admit it. However, since there are no empirical data to contradict his declaration of detachment, his word is ordinarily the determining factor. What is more, the more prejudiced or bigoted the jurors, the less can they be expected to confess forthrightly and candidly their state of mind in open court.

Brennan J, in *Murphy*, also suggests that questioning and disqualifying jurors who admit to bias may produce the negative effect of leading "jurors to think that the community's confidence in their impartiality and sense of responsibility is heavily qualified."²⁰

Cooke P adopts the Australian view that better methods exist for mollifying or abating bias. One of these is to delay the trial until publicity has diminished or, alternatively appropriate directions warning against bias may be given by the judge. A change of venue may also be appropriate.²¹ Although, of course, a change of venue was refused for Sanders' first trial.

In essence, Cooke P sums up examination of jurors as to cause as being "intrusive and quite possibly fruitless".²² He does not elucidate on what

¹⁸ Above n 12.

¹⁹ Mason CJ and Toohey J in a joint judgment, *Murphy v R* (1989) 167 CLR 94, 103-104.

²⁰ Above n 12.

²¹ Above n 8, 551.

²² Above n 8.

circumstances might define a “wholly exceptional” case and so merit such a dubious course. If there were one, it is difficult to imagine what questions might be allowed because Cooke unceremoniously dismisses the questions that counsel suggested in *Sanders*.²³

It is hardly necessary to do more than to reproduce that list [of potential jury questions] to bring out the intrusive, inconclusive, and time-consuming inquiries which an inquisition of that kind would introduce into jury balloting. New Zealand law should not go down that road.

So, although challenge for cause is legislatively available in New Zealand it has not hitherto been available in practice, particularly if required to be supported by examination of jurors. Therefore the only method available to counsel to attempt to secure an accused’s right to an independent and impartial jury is by means of peremptory challenges.

2 *Challenging the Status Quo*

Cooke P noted in *Sanders* that while Canadian courts did not apparently “share fully the reluctance of English, Australian and New Zealand Courts to allow “intrusive and quite possibly fruitless cross-examination of potential jurors”, there was no in-depth discussion of the subject by the Supreme Court of Canada. The significant case not available to him, and which speaks to many of his objections, was *Regina v Parks*.²⁴

In *R v Parks*, the Ontario Court of Appeal upheld the appeal of a black drug-dealer accused for the manslaughter of a white cocaine user. The conviction was quashed and a new trial was ordered on the basis that:²⁵

[T]he appellant was denied his statutory right to challenge for cause. That right is essential to the appearance of fairness and the integrity of the trial.

In this case the trial judge had refused to allow defence counsel to ask jurors two questions:²⁶

- (1) In spite of the judge’s direction [to judge without bias, prejudice or partiality] would your ability to judge witnesses without bias,

²³ Above n 21, 551. The questions are presented in Appendix A. The issues to which they refer are highlighted currently by moves toward providing witness protection through anonymity in gang-related cases.

²⁴ Above n 16.

²⁵ Above n 16, 380.

²⁶ Above n 16, 359

prejudice or partiality be affected by the fact that there are people involved in cocaine and other drugs?

- (2) Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man?

The Court of Appeal upheld the trial judge's refusal of the first question because the witness' involvement in the drug trade and his or her personal use of illicit drugs could be properly considered by the jury in its assessment of the credibility and reliability of witnesses.

The reference to "Jamaican immigrant" was also agreed to be inappropriate for counsel to refer to as there was no indication that the accused's nationality or immigration status would be relevant or made known to the jury. The question without this reference, however, was held to be a valid question to be put to the jury.²⁷

The trial judge had denied counsel the opportunity to put the original questions on a very similar basis to that used in *Sanders*; that is, the presumption that duly chosen and sworn jurors could be relied on to do their duty and to decide the case without regard to personal biases and prejudice. Doherty JA, delivering the judgment in the Ontario Court of Appeal, also recognises this presumption. He considers that the case surpassed the limits of this presumption, which limits he draws from *R v Sherratt*.²⁸

The threshold question is not whether the ground of alleged partiality will create such partiality in [a] juror; but rather whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a *realistic potential* for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed.

Doherty JA was presented with, and cited, a number of sources recognising that racism exists in Toronto and Canada generally. He found, however, that even though the trial judge had not had the benefit of any of these sources he should have allowed the jury to be questioned as to possible

²⁷ In *R v Willis* (1994), 90 CCC (3d) 353 at 379-380 (Ont. C.A.) a similar question, but with emphasis on Jamaican immigrants rather than simply black persons was approved by the Court of Appeal.

²⁸ (1991), 63 CCC (3d) 193, 212.

bias resulting from race. In determining whether grounds for the application had been "sufficiently articulated" he adopted the test set out in *Sherratt* that:²⁹

[W]hile there must be an "air of reality" to the application, it need not be an "extreme" case ...

Trial counsel in *Parks*, like counsel in *Sanders* offered little evidence to support their request to allow examination of jurors. DM Tanovich suggests appropriate supporting evidence in Canadian settings are supplied by:³⁰

- (a) calling viva voce expert opinion evidence;
- (b) presenting the results of mock jury studies, opinions and studies of experts, newspaper articles;
- (c) relying on previous judicial decisions; or
- (d) relying on the number of successful challenges in similar cases.

Cooke P in *Sanders* was presented with American and Canadian studies which he said the Court did "not overlook but, in relation to laying a foundation for challenge, the Court once again adopts the "exceptional" test:³¹

There may be cases where a reading by the trial judge of offending material, where it has been published in circumstances that justify an inference that members of the jury are likely to have read it and to have been influenced against the accused, will be enough to justify acceding to an application to question potential jurors. But they are exceptional cases.

Parks and *Sanders* also disagree on a number of other points. Where Cooke P objects to questioning on the basis that the sometimes hidden nature of bias makes it difficult to detect, Doherty JA suggests that the more unconscious a bias is the more resistant it will prove to "judicial cleansing" by post-jury selection safeguards such as a trial judge's warning and the taking of the oath.³²

²⁹ Above n 28, 211.

³⁰ DM Tanovich, "Rethinking Jury Selection: Challenges for Cause and Peremptory Challenges" (1994) 30 Cr (4th) 310, 321.

³¹ Above n 6.

³² Above n 16, 371.

Where Cooke J notes the negative effect of questioning jurors Doherty JA simply states that answering the question requested in *Parks* was no "cost" to the prospective juror:³³

He or she should not be embarrassed by the question; nor can the question realistically be seen as an intrusion into a juror's privacy.

Indeed, Doherty JA's view was that the jurors would benefit from the question in the same way as with a direction from the judge, in that they would be sensitised from the outset of the proceedings to the need to confront potential racial bias and censure it to stop it impacting on their verdict. The merit of this view is, however, undermined by his earlier suggestion as to the inadequacy of directions from the judge.

The issue in *Sanders* was one of pre-trial publicity and also, possibly, the prejudice associated with being a member of a motor cycle gang or club. Although "pre-trial publicity" and "race" are quite distinct issues and Doherty JA deals specifically with "race" he relies for his test upon a "pre-trial publicity" case and does not draw a distinction between the two issues but rather sits them alongside one another without comment.³⁴

Just as the mere existence of prejudicial pre-trial publicity does not give an automatic right to challenge for cause, the existence of racial prejudice within the community from which jurors are drawn does not entitle an accused to challenge for cause.

Prejudice relating to the accused's membership of the motor cycle club/gang is a different issue. Whether or not the Court would consider it an appropriate factor for the jury to consider in assessing the witnesses, as was the dealing in drugs in *Parks* or whether it would be inappropriate, akin to race in *Parks*, has not been raised in New Zealand. Indeed, the reliance on peremptory challenges ensures that the New Zealand jurisprudence relating to juror bias is limited.³⁵

³³ Above n 16, 379

³⁴ Above n 16, 365. FA Cacchione J *Challenge for Cause* discusses the bias arising in different situations and of challenge for cause generally in Canada in an unpublished paper presented for the National Criminal Law Program, Memorial University of Newfoundland, July 1995.

³⁵ Extensive questioning in challenging for cause was recently allowed in a recent Canadian case involving rape by a motor cycle club member. *Regina v Hill* (Unreported). Noted in *Challenge for Cause* above n 34. The questions allowed in that case are listed in Appendix B.

Perhaps even more threatening to the status quo is a recent English decision by Phillips LJ. He outlines his course, and cause, of action in a recent article addressing the issue of challenge for cause.³⁶ After briefly outlining the English situation, where peremptory challenges were abolished in 1988 to avoid bias to the defendant, he describes a new phenomenon of successful applications for a stay of criminal proceedings on the ground that the trial would constitute an abuse of process because adverse publicity has been so intense that the members of any jury selected are likely to be infected by prejudice against the defendant.

In the face of an application for a stay on the ground of adverse publicity Phillips LJ describes how he recently:³⁷

[A]dopted a course that was without precedent. I settled, with the help of counsel, a questionnaire designed to identify those potential jurors who might be prejudiced as the result of the media coverage. Each member of the panel from which the jury would be selected was required to complete this questionnaire. The potential jurors were kept out of court when the selection ballot took place. As each juror was selected I considered his or her questionnaire with counsel and then questioned the juror to explore any possibility of prejudice suggested by the questionnaire.

Phillips LJ does not describe his case as being "wholly exceptional". Indeed, he notes that he took the course he did because there had been four recent cases where stays had been granted on the basis that "adverse publicity has been so intense that members of any jury selected were likely to be infected by prejudice".³⁸ He notes that the questions he allowed were similar to those that were described by Cooke P as "intrusive, inconclusive and time-consuming" in *Sanders*. Of particular interest is the fact that answers to the questions led him to excuse from serving "close on 50% of those selected". While expressly stating he does not view the practice of "American style jury selection" as being desirable, he sees the process he adopted, which he recognises has since been followed at least once, as preferable to a stay of proceedings on the ground that there can be no fair trial.

The acknowledgment Phillips LJ made, which the New Zealand Court of Appeal is most reluctant to make, is that pre-trial publicity produced a valid impediment to an accused's right to a fair trial. Phillips LJ had the

³⁶ Phillips LJ "Challenge for Cause" (1996) 26 VUWLR 481. Phillips LJ does not cite the trial in question, nor is it noted in major legal data bases.

³⁷ Above n 36, 483.

³⁸ Above n 36.

advantage, unlike Cooke P, however, of extensive Gallup poll evidence of the affect of publicity surrounding the case on the attitude to the defendants of those questioned.

B Process in Action

The only comprehensive research done on juries in New Zealand is a Justice Department study called *Trial by Peers? The Composition of New Zealand Juries*.³⁹ The results provide a less than reassuring picture for a defendant, a victim or the community at large who presumes or hopes that trial by jury will be before an independent and impartial court or, as the study particularly addressed, the popular conception of a jury of peers.

The diagram below indicates the points in the jury selection process where people living in New Zealand are excluded from serving on a jury.⁴⁰

³⁹ Department of Justice New Zealand, S Dunstan, J Pualin, K Atkinson (Department of Justice, Wellington, 1995). This study covered all people summonsed for jury service at all District and High Courts throughout New Zealand for trials starting during the period of 13 September to 8 October 1993 inclusive. It involved 99 District Court and 35 High Court trials. In addition, 12 judges, 24 counsel and 13 court staff, all selected for extensive trial experience, were interviewed for approximately 45 minutes as to their perceptions about jury selection practices in New Zealand.

⁴⁰ Above n 39, 167.

While counsel may be made about such exclusion points,⁴⁰ this paper addresses the questions that arise from challenges. The chart above does not distinguish between peremptory challenges and challenges for cause because, as noted above, challenges in New Zealand almost exclusively take the form of peremptory challenges. Peremptory challenges are used quite infrequently by the defence who are twice as likely to challenge as the prosecution. During the course of the study just over one third of all jurors selected were challenged.⁴¹

Almost all defence counsel contended that the challenge was used to eliminate any prejudice that may arise against their client. Prosecution counsel expressed a strictly wider view of challenging non-responsive, untruthful or inappropriate people. One prosecution counsel described the aim as⁴²

... people standing out of the experts, and sort of getting back to some natural, reasonable, ordinary sense. Average weight and member of the community - to weed out that fringe.

A variety of means are used by counsel to determine who are the "strange" to be weeded out from the jury panel. A list of potential jurors is generally made available to counsel on the Wednesday or Thursday of the week prior to the trial. Clearly this leaves little time to conduct personal interviews and on some occasions counsel do not bother to do so until the day of the trial.

If at all possible, the major city law firms routinely use the Whangarei telephone to contact the prosecution with information on potential jurors' previous convictions. The effect is change of the case identification forms through the prosecution's law firm to show a litigant to be or state does not work for the jury. The procedure is also used to determine who is "strange". One prosecution counsel for homicide commented⁴³

... I know who it was because I know, and has a previous conviction is not going to accept that a person who has got ten pounds of charges that's not the person, so that's an advantage to me I think. You can have a person who has been and know something about it.

⁴⁰ Fisher (supra) n 26.
⁴¹ Above n 26, 58.
⁴² Above n 26, 104.
⁴³ Above n 26, 111.

While comment may be made about each exclusion point,⁴¹ this paper addresses the exclusions that stem from challenges. The chart above does not distinguish between peremptory challenges and challenges for cause because, as noted above, challenges in New Zealand almost exclusively take the form of peremptory challenges. Peremptory challenges are used quite enthusiastically by the defence who are twice as likely to challenge as the prosecution. During the course of the study just over one third of all jurors balloted were challenged.⁴²

Almost all defence counsel commented that the challenge was used to minimise any prejudice that may arise against their client. Prosecution counsel expressed a slightly wider view of challenging non-representative, unsuitable or inappropriate people. One prosecution counsel described the aim as:⁴³

... you're avoiding sort of the extreme, and sort of getting back to some rational, reasonable, common sense, average straight out member of the community. To weed out [the] strange.

A variety of means are used by counsel to determine who are the "strange" to be weeded out from the jury panel. A list of potential jurors is generally made available to counsel on the Wednesday or Thursday in the week prior to the trial. Clearly this leaves little time to assess potential jurors and on some occasions counsel do not bother to uplift the list until the day of the trial.

In all areas except one major city the police routinely use the Wanganui computer to provide the prosecution with information on potential jurors' previous convictions. The officer in charge of the case sometimes looks through the prosecution's jury list to see if there is anybody he or she does not want on the jury. The conviction list may also be used to determine who is "desirable". One prosecution counsel, for instance, commented:⁴⁴

Well, a person who is using cannabis himself, and has a previous conviction, is not going to accept that a person who has got ten pounds of cannabis that it's all for his own use. So that's an advantage to me I think. ... It's nice to have someone on your jury who knows something about it.

⁴¹ Refer above n 39.

⁴² Above n 39, 66.

⁴³ Above n 39, 101.

⁴⁴ Above n 39, 111.

The defence, on the other hand, did little jury vetting owing largely to a lack of resources. Indeed concern was raised that the difference in ability to vet the jury lists gave an unfair advantage to the prosecution.⁴⁵ Counsel would go through the jury list with their client to see if any person should be excluded. At times information from the jury list was also discussed, particularly gender, occupation and address.

One of the judges described the results in terms which express essentially this writer's main objection to the current system:⁴⁶

I think it's a lottery. I think that it's resonant with misconceptions by both prosecution and defence. Neither of them know really very much about the jurors at all. I think it's embarrassing to a lot of people who have been challenged even though they tell you not to worry about it. Most of the challenges are on the basis of prejudicially held views.

These views are based on stereotypes relating to readily observable features such as address, ethnicity, occupation and gender. Challenging is sometimes also based on background information obtained through various sources that happen to be available. This option is particularly available to counsel in small towns. One judge noted that as defence counsel he had used well positioned female hairdressers as a particularly good source of information.

The issue this writer has about the method of challenging in New Zealand is not as to the reasons for challenging per se⁴⁷ but to how the undesirable or "strange" jurors are identified.

The results of these ill-informed challenges are described in the above diagram in the two boxes labelled "Prosecution Challenges" and "Defence Challenges". Of particular note are the figures relating to Maori. Counsel for the prosecution challenged Maori men more than any other group. They

⁴⁵ K Ryan *Justice Without Fear* (Hodder, Moe, Beckett Publishers Limited, Auckland, 1997) raises this issue in relation to the trial which initially convicted Arthur Allan Thomas.

⁴⁶ Above n 39, 142.

⁴⁷ The desirability for a jury to be impartial and/or composed of peers is another topic. The Justice Department study, as evidenced from its title, almost presumes a goal of "peers" while much, particularly American, writing argues for impartiality. For discussion on this see J Abramson *We, the Jury* (BasicBooks, A Division of Harper Collins Publishers, Inc., New York, 1994), a text strongly against selection for "peers". The compatibility of the two concepts is discussed in JW Barber "The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom" 31 *ACLR* 1225 (1994).

were twice as likely to challenge balloted Maori compared with non-Maori in the High Court, and nearly three times as likely to challenge Maori in the District Court. In the District Court, close to every second balloted Maori male was challenged. This challenging pattern rests on a number of factors including: a higher proportion with previous criminal convictions and sympathy for a Maori defendant, particularly if there was also a peer relationship of some kind. One counsel explained that a Maori juror might have "disproportionate empathy for [the defendant] and not enough objectivity". The study does not note if that counsel considered whether a potential juror from a different ethnic, age and socio-economic group might have disproportionate antipathy for the defendant and not enough objectivity. The defence apparently think this is so because they will challenge all other groups more frequently than Maori men.⁴⁸

Interestingly, in light of the results, two of the judges in the study commented that they had never seen any sign of calculated challenge of Maori by either prosecution or defence counsel.⁴⁹ However, as a result of the findings of this study the Solicitor General directed all crown solicitors to "take whatever steps are necessary to ensure that male Maori jurors are not disproportionately challenged by the Crown".⁵⁰ The president of the Wellington District Law Society (who is also a member of the crown solicitors' panel) echoed the judges' comments above in saying that he could see no reason for the edict. He said that challenges by the Crown were usually because of concern that the person might not be impartial and that, "In my experience it has nothing to do with race whatsoever."

This lack of recognition of what the research clearly indicates in itself highlights the pervasive nature of bias in New Zealand courts.

⁴⁸ For an extensive review of the issues surrounding empathy and race see DO Linder "Juror Empathy and Race" (1996) 63 *Tenn L Rev* 887. For a more general discussion of race and jury selection see BJ Serr and M Maney "Racism, Peremptory Challenges, and the Democratic Jury: the Jurisprudence of a Delicate Balance" (1988) 79 *JCrimLaw & Criminology* 1.

⁴⁹ Above n 39, 137.

⁵⁰ "Crown counsel receives juries edict - Maori males 'disproportionately challenged'" *New Zealand Herald*, New Zealand, 6 November 1995, 2.

The strengths of the present system of jury selection were considered by the study participants to be encompassed by the following four points:⁵¹

- (a) the peremptory challenge gave the accused an ability to exercise an opinion about who should judge his or her case;
- (b) because each side had equal challenges, biases were balanced out and a fair representation of people on the jury was likely;
- (c) the peremptory challenge offered scope for removing extreme points of view from either end of the spectrum;
- (d) not having to give account of the reason why a potential juror was challenged was a strength.

Inherent in the first three of these perceived strengths is the ability of counsel to be able to identify a biased juror. However respondents noted that two of the weaknesses of the present system were:⁵²

- (a) the defence often had to resort to assumptions, as they had very little information on which to base a challenge; and
- (b) challenges by the prosecution and defence could be based on stereotypes.

The weaknesses, therefore, undermine the three strengths while the fourth perceived strength simply enhances counsels' opportunity to rely on stereotypes.

The *Sanders*' approach seems to be to deny that biased jurors exist, or at least jurors who are biased to the extent of denying the accused's right to an impartial jury. If there happens to be such a biased juror, the Court determines that they would only be present in a "wholly exceptional" case.

⁵¹ Above n 39, 141.

⁵² Above n 39, 142.

Just as Cooke P notes that the necessity for and preferability of New Zealand's minimalist method of jury selection is self-evident,⁵³ in the United States the opposite is believed to be just as self-evident:⁵⁴

[S]ubconscious, as well as express, racial fears and hatred operate to deny fairness to the person despised; that is why we seek to ensure that the right to an impartial jury is a meaningful right by providing the defense with the opportunity to ask prospective jurors questions designed to expose even hidden prejudices ... [M]ight not the ... juror be influenced by those same prejudices in deciding whether, for example, to credit or discredit white witnesses as opposed to black witnesses ...

Traditionally jury selection in the United States has involved similar techniques as apply in New Zealand. Unlike New Zealand, the United States has incorporated these with voir dire in the form of cross-examination before challenges are made. However, in the last thirty years a method for jury selection has been developing which attempts to avoid reliance on traditional stereotypes. Originally called "Systematic Jury Selection, now called "Scientific Jury Selection this is a new, still formulating and rather nebulous collection of tools for selecting a jury. The balance of this paper considers the evidence of its efficacy to date.

III SCIENTIFIC JURY SELECTION: A CONVINCING ALTERNATIVE?

A *The Originating Instance - The Berrigan Trial*

1 *SJS effected*

SJS began against the turbulent backdrop of America's participation in the Vietnam War. In late November 1970, J. Edgar Hoover appealed to Congress for additional funds to control antiwar protesters and militants. He said the "East Coast Conspiracy to Save Lives" was plotting, amongst other things, to kidnap a "highly placed Government official" (Henry Kissinger). The "accused" were a group of Catholic priests, nuns and students who protested against the Vietnam War. Hoover named Philip and Daniel Berrigan, Catholic priests, as principal leaders of the plot. These two, along with other members of the group, had conducted more than 25 raids to destroy draft board records and generally protested about the Vietnam war. Both Berrigans were already serving prison sentences for these activities. In prison they continued to protest by sending out antiwar messages,

⁵³ Above n 21.

⁵⁴ *Turner v Murray*, 476 U.S. 28, 40 (1986).

recruiting convicts to their cause and staying in contact with other protestors.

The Justice Department chose Harrisburg, Pennsylvania, an area known to be politically conservative, for the trial; the presiding judge was a recent Nixon appointee and the prosecution case hinged on the testimony and credibility of an FBI informer who had smuggled letters between two of the accused.

Jay Schulman, an antiwar social scientist, along with a coalition of social scientists, activists and others with strong antiwar feelings, felt that the above circumstances made it unlikely that the defendants would be presumed innocent and so receive a fair trial.⁵⁵

Although the Berrigan trial is generally regarded as the originating Scientific Jury Selection trial the methods used and findings from are remarkably similar to today. The information garnered from this case is particularly valuable as it involves real jurors who heard real evidence, in distinction from most studies about juror behaviour. The down side, however, is that there is no control group for comparisons.

Schulman et al began their research with a phone survey collecting demographic characteristics. From this the team discovered that the members of the random sample were, on the average, younger than people in the available panel (and therefore the panel was more likely to favour the prosecution). Partly on the basis of this evidence the Judge agreed to the selection of a new, more representative panel from which to select a jury.

252 people from the phone survey were then chosen for their likely similarity to the eventual panel and were re-contacted for further indepth interviews. The focus of these interviews was on issues it was felt would be relevant to a juror's attitudes and the ability to be impartial.

⁵⁵ The description of events outlined here is taken from J Schulman, P Shaver, R Colman, B Emrich, and R Christie "Recipe for a Jury" (May 1973) *Psychology Today* 37.

The next step, the voir dire, is the interviewing of the potential jurors before they are accepted as jurors. This is the step which was, and remains, crucial to an application of SJS. Indeed one group of SJS researchers describe SJS as a new method of voir dire.⁵⁶

On the first day of the trial the judge questioned the panel of jurors as a group, focusing primarily on their biases, exposure to pre-trial publicity, and their varied reasons for not wanting to serve on the jury. Many people excused themselves immediately. This was often on the grounds that they had read about the trial and already had some thoughts about it. The defence expected from the survey, and confirmed in phone calls to 20 of the jurors who had excused themselves, that these jurors would favour the prosecution; 14 admitted they were biased against the defendants, 1 biased for, and 5 refused to answer the question.⁵⁷

If a person passed the judge's questioning, the prosecutor then asked a few questions. The defence asked their questions based on the responses from the survey. The survey had indicated that 4 out of 5 people in the area would be opposed to the defendants so the SJS team advised counsel that it was important to question the jury panel for as long as possible in order to challenge as many for cause as possible so that the pool of jurors remaining would present a much more favourable mix. The judge excused 22 people for probable bias against the defence. Only two were excused at the request of the prosecution.

After each court session the defence discussed and rated prospective jurors on a one-to-five scale with 'one' being very good for the defence, 'five' very bad. These ratings were taken on the basis of the surveys, the answers at voir dire, behavioural cues, and, through one of the lawyer's

⁵⁶ G Moran, BL Cutler and A De Lisa "Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror bias: Verdict Inclination in Criminal and Civil Trials" (1994) 18 *Law and Psychol Rev* 309, 312. The pre-eminence of voir dire in SJS is particularly problematic in New Zealand because voir dire seems to be only legislatively available here.

⁵⁷ As with the use of voir dire, this is at wide variance with the practice in New Zealand. Here potential jurors are asked simply to inform the judge or registrar if they recognise any of the parties or witnesses involved in the case. A list is usually read of the prosecution witnesses but only occasionally of the defence witnesses. No inquiry is made as to any other bias. A potential juror, therefore, has little opportunity to excuse themselves even although they might understand themselves to be unable to judge the case fairly.

extensive community and legal contacts, "third party" information on the backgrounds and attitudes of prospective jurors.

Common sense, and no doubt the traditional stereotype method, predicted those jurors who would be most favourable to the defence. This is apparent because prosecution, operating without any social science advice, used their six peremptory challenges to remove six of the defence's 'ones'.

Difficulty came for the defence when they had to decide who to leave on from the 15 jurors they had rated as 'three'. Considerations taken into account in this phase were: choosing between variances in an individual jurors' demographics and voir dire response; group dynamics; likely foreman; and gender mix.

During the trial the Government presented 64 witnesses, only one of whom was crucial to the kidnap-bombing charge. At the end of the Government's case the lead defence lawyer argued for a directed verdict of acquittal, on the grounds that the Government had presented "such flimsy evidence". This motion was denied. The defence called no evidence. The jurors deliberated for seven days. The principal charges of conspiracy were hung: 10 for acquittal, two for guilty. The charge of smuggling letters was found proved. The Government did not retry the case.

2 *SJS affects*

The frustrating yet inevitable part of SJS is that in real situations there is not control group so it is impossible to scientifically "prove" that the use of SJS has led to a conviction or acquittal or even to what extent it has impacted on the verdict. Taking this into account, a number of factors for and against the "success" of scientific jury selection can be argued in this case.

Those who deny the efficacy of SJS would argue the general points that are usually raised in any instance; that the jurors did not find the charge very clear or easy to understand, the evidence was weak,⁵⁸ and that the defence team were dedicated and very well prepared. More specifically, critics can

⁵⁸ J Abramson, above n 47, describes the evidence as "extremely weak, bordering on the ridiculous", 158.

point to the errors made by the team in choosing the two jurors who insisted that the accused were guilty. Schulman himself acknowledges that.⁵⁹

We were faced with a tragic irony. While we had argued and debated for hours about *third*-choice jurors, it was two of our *second* choices who hung the jury.

Given these possible weaknesses, however, the SJS team can still present a convincing argument that they contributed to the success of the defence.

The original phone survey provided evidence which in turn produced a more representative, and also more defence-favourable, pool of jurors

The survey indicated a factor that was counter-intuitive. Education and contact with metropolitan news media usually were linked to liberal attitudes and therefore a tendency to favour the defence. However, it was discovered liberal college-educated people and younger college graduates tended to leave Harrisburg and the college-educated who elected to live there were more likely to be Republicans, businessmen, members of local civic organisations, and read conservative magazines as well as metropolitan newspapers.

The original survey indicated that people living in the area had an unusually high level of trust in government. The national level of trust was 45 to 50% compared to 80% in Harrisburg. This naturally augured badly for defendants who were participants in anti-Government activities.

The generally negative bias towards the accused was further established by the defence team in further research while the jury was deliberating. Re-interviews of 83 people from the in-depth interview who roughly matched the actual jurors indicated that nearly all believed the defendants were guilty of conspiracy to raid draft boards; and guilty of one or both of the other charges. Only one respondent said the defendants were guilty of none of the charges. The argument that SJS had avoided an overwhelmingly pro-conviction population, however, cannot be taken too far: these respondents did not hear all the evidence and cross-examination and, unlike the actual

⁵⁹ Above n 55, 79.

jurors, were exposed to publicity and general public discussion during the course of the trial.

The impact of publicity during the trial was not measured but, as the foreman commented after the trial, most of his friends and clients had told his wife that the defendants had to be guilty, "They were very forceful in what they thought, I figure that 90 percent of them thought that they were guilty".⁶⁰ The influence publicity may have had in this trial is a salutary warning for the vast majority of cases where jurors are not sequestered. To simply assume that a person called for jury service can or will abide by a judge's direction to ignore publicity previous to or during the trial, as the New Zealand Court of Appeal appear to, requires something of a leap of faith which a number of studies indicate is insupportable.⁶¹

In the Berrigan trial, however, even pre-trial publicity probably had little to do with Evans, the juror who most strongly hung out for conviction. He turned out to be something of a "wild card" who believed from the beginning of the trial that he was doing God's work in voting for conviction and who was thereafter unable to be engaged rationally.⁶² How did this juror get rated as a "two" by the defence team? It appears Cooke P's fears are well founded in this instance. Evans apparently lied during the voir dire. He stated that, "More could be done and should be done to end the war ..." and then, asked about priests and nuns who opposed the war, he replied, "The church people should do more of that."⁶³ In SJS's defence, the survey information had indicated that as an older, male, store owner, Evans was unlikely to be supportive of the defence case. The selection team chose to ignore the demographics in this case and rely on his statements during voir dire.

With, Schwartz, the second juror who voted for conviction, it was the other way around. Here the defence lawyers relied on promising demographics

⁶⁰ Above n 55, 83.

⁶¹ This issue is extensively addressed in the Symposium issue on the Selection and Function of the Modern Jury, (Winter 1991) 40 Am UL Rev, see particularly NN Minow and FH Cate "Who is an Impartial Juror in an Age of Mass Media" 631 and NL Kerr, GP Kramer, JS Carroll and JJ Alfani "On Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pre-trial Publicity: An Empirical Study" 665.

⁶² Above n 55, 80.

⁶³ Above n 55, 43.

and did not engage in further questioning. Overall, however, it seems unlikely that this juror would have stood alone for conviction. Evans was obviously determined to convict and sought support from Schwartz on the basis of religious beliefs. Another of the jurors reports that he would verbally attack them and then say to Schwartz, "We'll stick together. We have to do God's work."⁶⁴ In post-trial interviews seven of the jurors said they believed that had Evans changed his vote Schwartz would have followed suit.⁶⁵

The evidence alone was not "underwhelming" or "ridiculous" enough for the judge to allow the defence motion for dismissal at the end of the prosecution case. The "evidence" was also enough to cause a third juror on top of the two already mentioned to vote for conviction on the conspiracy charges in the first vote. Interestingly, this juror too was ranked as a 2 for the defence. Like the other 'rational' convict-prone juror she had favourable demographics and was not asked many questions during voir dire.

This trial brought to legal and public attention the possibility of using social science methods to assist in the selection of jurors. Perhaps the three major components of SJS are the survey, the assessment of predictive characteristics and data analysis, the means by which the first two are analysed. The next section of this paper addresses these three components in more detail and then briefly introduces other components.

B Components of SJS

1 Surveys

Surveys in the community were used in the original SJS trial⁶⁶ and are still probably the key feature of SJS. A random sample survey is taken to provide the basic data for the development of juror profiles. This is usually carried out over the telephone in order to interview a large number of people at minimal cost. In community surveys members of the public who would be eligible to serve as jurors are asked three sets of questions.

⁶⁴ Above n 62, 80.

⁶⁵ Above n 55, 81.

⁶⁶ Above n 55.

The first set asks for the respondent's background characteristics, or demographics, (e.g., age, sex, occupation, prior jury service, prior experience in matters relating to the case, etc.). This information will be obtained from prospective jurors during the voir dire. The second set of questions measures beliefs and attitudes that are likely to be associated with a favourable or unfavourable trial verdict. The third set directly attempts to assess which side the respondent would favour in the trial. A brief description of the case is read and the respondent is asked to vote as if on a jury.

Surveying has a number of inherent problems which can lead to skewed results. These difficulties are applicable to SJS surveys.⁶⁷

Of particular importance in SJS surveys is the need for the sample to be representative of the population from which the jury venire is to be drawn.⁶⁸ The authors of *Inside the Jury*⁶⁹ note that it may be desirable to oversample certain types of potential jurors, "for example, if the defendant is black, it may be desirable to oversample from the black population".⁷⁰ The reason for this is difficult to understand unless it is expected that the jurors will also be black. "Oversampling" may be appropriate if it is anticipated that the eventual jury will have a different demographic than the population from which the jury venire is drawn. The difference in demographics between population and jury arises through the means of exclusion noted in the diagram above.⁷¹

Surveys can provide a number of benefits in jury selection. Properly constructed, they will take account of regional and case variability in attitudes. A community survey that provides specific and clear information

⁶⁷ See, for example, DG Myers *Social Psychology* (4th ed, McGraw Hill, New York, 1993) 18-19, suggesting difficulties arise in the timing of the survey, using an unrepresentative sample, response options which induce a particular answer, influential order of questioning and the wording of the questions themselves. These factors may lead to misleading answers in any survey.

⁶⁸ J Berman & BDA Sales "A critical evaluation of the systematic approach to jury selection" (1977) 4 *Crim Justice & Behaviour* 219-240. The jury consultant's commitment to the population from which the jury was to be drawn was, in fact, an important requirement in the choice of consultant by the OJ Simpson defence team; see text at n 129.

⁶⁹ R Hastie, SD Penrod & N Pennington *Inside the Jury* (Harvard University Press, Cambridge, 1983).

⁷⁰ Above n 69, 124.

⁷¹ Section II.

as to what certain groupings of jurors are likely to think about issues in the case will enable some assessment of critical attitudes and opinions without direct questioning in voir dire. This is particularly relevant to New Zealand where jury selection currently has to be achieved without voir dire.

In cases where voir dire is available, a previously established correlation of background demographics and attitudes should alert counsel to possible deception if the correlation is not evident in a juror's answers during voir dire. This was the key SJS provided Schulman et al in the Berrigan trial which, had they turned it, may have allowed them to "release" the two pro-conviction jurors.

Survey information of a general nature can, by itself or with more specific information that may be known about jurors prior to the trial, establish the probabilities of the presence of favourable or unfavourable jurors in the jury pool. Knowledge of this will allow counsel to more effectively use peremptory challenges; ie., when a high number of unfavourable potential jurors is indicated peremptory challenges will need to be used particularly cautiously so as not to be exhausted before the final juror is selected.

These benefits, however, are achieved within the framework of definite limits. The predictive power of surveys is limited to a probability estimate. They can never be 100 per cent accurate as to a potential juror's favourability.⁷² Clearly, therefore, surveys alone are inadequate for effective SJS.

Surveys are further limited by the expense is involved in conducting a survey which is extensive enough to provide useful results. Schulman et al noted in the Berrigan trial that there was a dilemma when asking people to respond to the survey with whether or not to tell them what it would be used for. In many cases, if the person is told the information will be used to assist one side of a case they may wish not to participate. This would provide a skewed sample of people who were either neutral or biased towards the side completing the survey. Schulman dealt with this difficulty by, in his words, 'uneasily' determining not to disclose the true purpose of

⁷² Above n 71, 7.

the survey. This difficulty may be reduced if the results are discoverable by the other side to use as they see fit. If both sides could use the survey then the cost could also be shared in some way. This 'sharing' may be hindered by the desire of each side to frame questions differently. However, as noted above, skewed question-framing will lead to skewed answers. The best, most useful information will be obtained through objective questioning. Each side may have to compromise somewhat but it is submitted that the benefits to cost of sharing will outweigh most, if not all, disadvantages. Although there is no record of the results from a pre-trial survey being shared, the questionnaire administered to jurors in the OJ Simpson trial was a conglomeration of questions put forward by both sides and approved by the judge. Both sides then obtained the results.

2 *Data analysis*⁷³

Data obtained from potential jurors is analysed using statistical procedures. It is this process that Schulman recognised was missing in the Berrigan trial. Since that initial trial various methods have been employed to statistically analyse a potential juror's tendency to favour or oppose one side in a case.

The most common of these is multiple regression analysis. This is a mathematical technique used to combine all the different characteristics of a potential juror into a single, predictive scale.⁷⁴ Additional factors, such as the potential dynamics of the jury⁷⁵ can also be added into the calculation. The more factors that are included in the calculation the more accurate will be the prediction of the juror's verdict preference.

For any single factor x affecting another factor y , where the correlation between variables y and x , is linear, is given by the equation $y = rx + z$. In graphical form this is a line whose gradient is given by r . r is the amount of correlation between y and x . $r = 1$ would mean that a x would correlate perfectly with y , this means that if x is known then y can be accurately predicted from the equation above. $r = 0$ would mean there is no correlation, the results are completely random and therefore no prediction is

⁷³ For the sake of clarity the mathematical section is dealt with at this point.

⁷⁴ JJ Rachlinski "Scientific Jury Selection And The Equal Protection Rights of Venire Persons" (1993) 24 PLJ 1500, 1507.

⁷⁵ See text at n 122.

possible. $r = -1$ indicates that there is an inverse correlation. A correlation is generally regarded as statistically significant at $r = .1$.

The above explanation is for single variable regression. However the preference for conviction depends on multiple factors and can be represented as a mathematical variable, P_{conv} . A multiple regression equation is used to find P_{conv} . Two questions which need to be addressed are:⁷⁶

- (a) *which* characteristics are important; and
- (b) how should these be *combined*.

The various factors (f_1, f_2, f_3, \dots) thought to determine P_{conv} are studied individually and every effort is made to account for all pertinent factors.⁷⁷ Mathematically, f_1, f_2, f_3 are independent variables and P_{conv} is the dependent variable. Coefficients⁷⁸ $a, b, c \dots$ measure the factors' probable contribution to P_{conv} .

This gives the general equation:

$$P_{conv} = a.f_1 + b.f_2 + c.f_3 + \dots$$

The values of $a, b, c \dots$ cannot be precise. The strength of the actual relationship to P_{conv} is measured with a t-test.⁷⁹ A factor that is dichotomous (eg gender) is a *dummy variable*, having the value 0 or 1. The inability to account for all the factors that go to make up a juror's conviction preference is, of course, a limit of SJS. Multiple regression formulas do not ignore unexplained factors, they incorporate them in what is called a random disturbance term. That is, the equation will look like the one above but with an additional factor of "u" to stand for the unknown quantity.

$$P_{conv} = a.f_1 + b.f_2 + c.f_3 + \dots + u$$

⁷⁶ Above n 66.

⁷⁷ GA Moore, MK Braswell "The Probative Value of Multiple Regression Analysis in Title VII Litigation" (1989) 27 AmBusLJ 254.

⁷⁸ In the equation $a = bc$, b determines the nature of the relationship between a and c . 'b' is called the *coefficient* of c .

⁷⁹ Each constant has its own t value, the larger the better, assessing its significance (ie the probability that its effect is *not* due to chance).

The goal, of course, is to reduce the value of u to as small an amount as possible.

For example a particular case a survey might indicate that age, income, education, and political liberalism are factors which impact to an estimated degree on a juror's verdict preference.

The equation might look like:

$$P_{\text{conv.}} = .008 \times (\text{age}) + .001 \times (\text{income in thousands}) - .015 \times (\text{years of education}) - .03 \times (\text{liberalism score}).^{80}$$

According to this equation, a forty year old person earning \$20,000 per year with sixteen years of education and a liberalism score of 3 would have a preference score of .12. Slotting the statistics of a similar but older person into the equation would produce a higher score (ie, the older person would be more likely to convict); while a person of the same age but better educated would have a lower score. The defence will look for the lowest $P_{\text{conv.}}$ scores available amongst the potential jurors.

$P_{\text{conv.}}$ for a juror indicates a juror's preference in certain theoretical conditions. A perfect regression equation would predict $P_{\text{conv.}}$ and the extent of any variation in its value. This would mean the equation contained all the information in order to predict the conviction preference for each juror without exception. In reality, jury regression models have typically accounted for only about a quarter of the variance⁸¹ Partly, this results from an inability to disentangle all the competing identities that constitute a person. The task is made even more complex by the necessity of accounting for additional "unknowable" factors such as the particular group dynamics which will operate.

R^2 (the coefficient of variation) is a measure of the *calculated* variation of $P_{\text{conv.}}$ compared to *actual* variation of $P_{\text{conv.}}$. If $R^2 = 0$ then the model

⁸⁰ Above n 69, 126.

⁸¹ RA Berk, M Hennessy & J Swan "The vagaries and vulgarities of scientific jury selection: A methodological evaluation" (1977) 1 *Evaluation Quarterly* 143-158. However some report higher figures, e.g., see text at n 111.

explains none of the variation. If $R^2 = 1$ then the model explains precisely all of the variation.

Possible misspecifications in a multiple regression equation are:⁸²

- (a) omission of relevant variables;
- (b) inclusion of inappropriate variables;
- (c) inappropriate functional form; and
- (d) failure to apply standards to the goodness of fit (inaccuracies in evaluating a,b,c...).

Alongside these limits of multiple regression are the problems generated when attempting to move from very specific sample results to a generalisation for actual jurors. These, of course, are drawbacks but one can see how it may have assisted Schulman et al to ensure divergent factors for each juror were taken into account during the ranking process.⁸³

3 *Characteristic and attitude assessment*

In order to apply the community survey to the trial at hand survey responses are analysed to determine which juror characteristics correlate with favourable attitudes and beliefs and then which attitudes and beliefs will go on to correlate with verdict preferences.⁸⁴

An attitude, in psychological terms, represents an internal mental state that indicates a propensity or predisposition to respond in one manner or another.⁸⁵ Hence, by definition, an attitude can indicate a verdict preference. For example, if a person has an attitude of approval towards the police this will cause them (predispose them) to respond favourably to

⁸² Above n 77, 264-273.

⁸³ Multiple Regression is judicially accepted in United States courts, for instance to show that bias has existed in employment practice. See above n 77.

⁸⁴ S Siedman Diamond *Scientific Jury Selection: What Social Scientists Know and Do Not Know* (1990) 73 *Judicature* 178, 179.

⁸⁵ PC Ellsworth "Some steps between attitudes and verdicts" in R Hastie (ed) *Inside the Juror* (Cambridge University Press, Cambridge, 1993) 49.

evidence presented by the police and so they will be more likely to convict than a person who was suspicious of the police.

The SJS consultant may be able to utilise an attitude which has been proven to be predictive. However the few predictive attitudes that have been proven to date tend to be valid only in some cases.

If the consultant cannot utilise any established predictive attitude they may organise an attitude scale. This is generally a series of questions which relate to a central, core attitude and makes use of the fact that attitudes are often "shortforms" for a group of related beliefs. For instance the extent to which a person agrees with the positive responses to the group of related questions reflects the extent to which a respondent endorses the core attitude tested for.⁸⁶

A large number of people will then be presented with an abbreviated version of the case and their reactions to various issues in the case will be correlated to the new attitude scale so the consultant can determine that certain attitudes will indicate a particular verdict preference. The most direct transference of this scale to the potential jury is by a system recently introduced in some state courts which allows litigants to prepare a written series of questions which potential jurors can respond to in writing. The SJS consultant then determines which measurable attitudes will best predict verdicts and includes the attitude scale in the questionnaire.⁸⁷ In the OJ Simpson trial,⁸⁸ the questionnaire appears to have contributed to accurate attitude assessments and resulting predictions were effective.

It is in the prediction of verdict preference from characteristics and attitudes that SJS meets its most formidable hurdle and ferocious critics.

The critics have argued that in an overwhelming number of occasions an individual's verdict is accounted for by the weight of the evidence and not by any individual characteristic or attitude. The critics are not the only ones

⁸⁶ Above n 67, 112-116.

⁸⁷ Above n 69.

⁸⁸ See text at n 121.

who believe this: a juror will form a pre-deliberation opinion he or she believes to be rigorously and rationally based on the evidence but.⁸⁹

[O]ne of the most surprising experiences for jurors in many cases is to discover, at the start of deliberation, that other jurors could disagree with them on a verdict that seems patently obvious.

This is a common occurrence; in approximately 70 per cent of criminal trials the jury has a split verdict prior to deliberation.⁹⁰ More seriously, in some cases the jury cannot agree at the end of deliberation after the jurors have had an extensive opportunity to highlight to each other the evidence they find convincing.⁹¹ Different jurors evidently draw different conclusions about the right verdict on the basis of the same evidence. The difference must stem from individual differences.⁹²

Possible influential differences include beliefs and knowledge about how the world works⁹³ or should work; enduring personality traits, preferences, and attitudes; mental capacities; past experience; and a variety of biological, social, and economic factors that are previously described as demographic background.⁹⁴

Hastie, Penrod and Pennington describe the failure to convincingly link verdict preference to any juror attribute.⁹⁵

The relationships between juror behaviour and juror attitudes, personality, and demographic characteristics are not well understood. More than 160 jury studies provide little systematic evidence that personality variables, such as authoritarianism, locus of control, and legal attitudes, provide the predictive power needed to detect and challenge biased jurors, even assuming that requisite information on prospective jurors is available in voir dire.

⁸⁹ PC Ellsworth "Are twelve heads better than one?" (1989) 52 *Law and Contemporary Problems* 205-224.

⁹⁰ Richard O Lempert "Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases" (1975) 73 *Mich L Rev* 643, 649.

⁹¹ In New Zealand it is of concern that this now occurs in 10 per cent of trials. See J Goulter *No Verdict New Zealand's Hung Jury Crisis* (Random House Publishers, Auckland, 1997).

⁹² SM Kassin, LS Wrightsman *The American Jury on Trial Psychological Perspectives* (Hemisphere Publishing Corporation, New York, 1988) 45.

⁹³ "The Just World Scale" is a well established assessment scale which measures a sense of imminent justice. People scoring high on this will anticipate that one invariably gets what one deserves, eg, "When parents punish their children it is almost always for good reasons." See above n 56, 234.

⁹⁴ Above n 69, 43.

⁹⁵ Above n 69, 127.

However they then go on to acknowledge that some characteristics *are* a fruitful source of information on juror bias in some cases. They note particularly attitude to the death penalty. Indeed, the fact that those jurors who oppose the death penalty are less likely to convict than jurors who do not is the most clearly established predictive tool that uses attitudes.⁹⁶

From this, essentially cynical, standpoint Hastie et al used a mock jury to carry out an extensive study of the efficacy of SJS methods using a mock jury. 828 jurors provided a wide range of demographic information on their personal backgrounds in a post-deliberation questionnaire.⁹⁷

This information was entered into a multiple regression formula. The pre-deliberation verdict preference was used as the dependent variable.⁹⁸ Four independent variables were found to be significant in predicting juror preference. Employment status showed the highest correlation of $r = .110$, gender was $r = -.073$, number of previous criminal cases as jurors was $r = 0.59$ and number of previous cases (criminal or civil) as jurors ($r = .054$).⁹⁹ At the inclusion of the fourth factor R^2 was only 0.032.

A more extensive questionnaire was administered to 269 jurors. From this questionnaire five factors were found to contribute significantly to predictions of verdict preference: residence in a wealthy suburb ($r = -.20$), attitude toward punishing someone who causes another's death ($r = -.16$), marital status ($r = -.13$) and newspaper read ($r = -.08$). R^2 of these factors came to .1089 or 11 per cent of the variance in verdict preference.¹⁰⁰

The researchers found that when all four possible verdicts were taken into account 45.6 percent of the jurors were correctly classified by verdict preference. When the division was only into two groups (guilty v not guilty)

⁹⁶ Above n 69, 48, noting that in the past 30 years every study into this correlation has found that jurors who did not oppose the death penalty were more likely to convict than jurors who opposed the death penalty. "In our [Ellsworth et al's] view, the answer to the basic "prediction question" is firmly established; attitude toward the death penalty, a fairly stable individual difference, does predict jurors' verdicts in a wide range of criminal cases."

⁹⁷ Information included income, race, number of previous cases heard as a juror and number of previous criminal cases heard as a juror.

⁹⁸ The verdict preference was categorised into four possible verdicts from first degree murder to self-defence.

⁹⁹ Above n 69, 128.

¹⁰⁰ Above n 69, 129.

61 percent of the jurors were correctly classified. They note that this is better than chance (by 11 per cent) "but is not an impressively powerful lever for use in courtroom selection procedures".¹⁰¹

It is interesting that in this case Hastie, et al, appear not to have used the characteristic they state is the most valid predictor; that of attitude toward capital punishment. It may be noted, however, that one of the difficulties with SJS is that even where a characteristic has been shown to have predictive value, the presiding judge may not allow the relevant question to be asked in order to determine whether a juror has that characteristic. Attitude to capital punishment, for example, may only be raised in a capital case.¹⁰² In New Zealand, with no recent experience of capital punishment and it currently not being a sentencing option this attitude to it may be entirely irrelevant. This difference is probably just the most obvious example of the difficulties in applying any American research into a New Zealand context.

In the study Hastie et al did determine that the jurors' world knowledge concerning events and individuals involved in the facts of the case does affect their verdict decisions. They attribute this to various readings of the evidence by jurors; such as a varied knowledge from past experience of what would be typical behaviour in a pub fight. Demographic characteristics may in this way inform on likely attitudes.¹⁰³

Ten years after Hastie, Penrod and Pennington's study a group of studies was carried out which does affirm the predictive value of attitudes.¹⁰⁴

Moran, Cutler and De Lisa note that jury selection research has not sufficiently addressed the controversy over the effectiveness of SJS.¹⁰⁵

If active research and public communication of empirical results are hallmarks of science, then investigation of the new method of jury selection is at an impasse. While consultants expect to be right 19 out of 20 times, academic reviewers assert that "a large body of empirical research"¹⁰⁶ calls into question the premise that jurors' votes during deliberation can be

¹⁰¹ Above n 84.

¹⁰² Above n 56.

¹⁰³ The phenomenon of varied "readings" of the evidence is discussed in the text at n 136.

¹⁰⁴ Above n 56. (This article deals with the efficacy of SJS part of their studies).

¹⁰⁵ Above n 56, 312, quoting R MacCoun "Experimental Research on Jury Decision-Making" (1989) 244 Sci 1046.

¹⁰⁶ Including, notably the study by Hastie et al, above n 69.

reliably predicted from juror characteristics that are observable before the trial. In general, jurors demographic attributes, personality traits, and general attitudes are associated weakly and unreliably with jurors verdicts".

In this group of studies Moran et al sought to establish, among other things, whether attitudes toward tort reform¹⁰⁷ was significantly associated with respondents' perceptions of criminal defendant culpability.

Each of the studies used a combination of jury selection survey methodology, multiple regression analysis and attitude assessment.

Respondents were all eligible for jury service, were given part of a brief actual case scenario which occurred in the state in which they lived, then gave a judgment on the likelihood of the defendant's culpability. After this they answered questions designed to assess their attitudes toward tort reform. Each of the three criminal studies increased in sophistication and indicated that respondents who favoured tort reform perceived the defendant as more culpable than did respondents who were less in favour of tort reform. In their conclusion the authors of this study state that the average correlation between attitudes toward tort reform and verdict inclination was $r = .20$ and that this would therefore increase predictive accuracy from 50% (ie. chance) to 60%.¹⁰⁸

Moran, Cutler and De Lisa conclude¹⁰⁹ that the academic critics of SJS¹¹⁰ have failed to address either studies with real jurors or relevant measures which do have predictive power. In particular Moran et al suggest that jury simulations which have not found SJS useful have failed to measure attitudes toward specific issues relevant to the case at hand. In contrast, the authors note that their juror surveys during the previous five years, with measures of specific case-relevant attitudes, had invariably correlated with juror verdict inclination. In a drug-related study Moran et al measured these

¹⁰⁷ This was related particularly to Florida's proposed Amendment 10 (1993) which was designed to put a cap on lawyers' fees and limit awards for pain and suffering; ie disapproving of lawyers' excesses, including those they obtain for their clients.

¹⁰⁸ Above n 56, 327.

¹⁰⁹ Above n 56, 326.

¹¹⁰ Notably SS Diamond, R Hastie and R MacCoun.

predictors explaining as much as 30% of the variance in verdict when the evidence was not overwhelming.¹¹¹

4 *Focus groups*

A group of mock-jurors is drawn from the area where the trial will be held and is presented by attorneys with one or two issues in the trial or perhaps an opening statement. The group is then broken into sub groups where they discuss their responses and then present them back to the attorneys and consultants. Then individual members are questioned in detail about what they disliked and liked, believed or didn't, understood or not. Their responses are assimilated and identified with corresponding demographic types and attitudes. Robert Hanley, former Chairman of the Section of Litigation of the American Bar Association, describes how focus groups help him in his central objective of getting to know the potential jurors.¹¹²

With the information mock jurors provide, we find out what types of personalities and personal biases are most dangerous to our case. ... These groups help us to isolate those prospective jurors whose personalities and biases will probably cause them to respond negatively to me, my client, my client's witnesses, and our side of the case at trial.

Focus groups are a more expensive method than telephone surveys so a smaller, less representative, group has to be studied. The advantage, however, is that it gives the respondents a more realistic understanding of the nature of the case and so can provide more accurate responses.¹¹³ In the OJ Simpson trial both the prosecution and the defence used focus groups to obtain information that proved to be reliable.¹¹⁴

¹¹¹ Above n 108. Other studies which Moran et al refer to as showing attitudes to be significant predictors of verdict are: G Moran et al "Jury Selection in Major Controlled Substance Trials: The Need for Extended Voir Dire" (1990) 3 Forensic Rep 331, showing attitudes toward lawyers and drugs are predictive in a criminal case against a lawyer charged with drug crimes and attitudes towards drugs are predictive when the charge is large-scale drug trafficking; J Goodman et al "Matters of Money: Voir Dire in Civil Cases" (1990) 3 Forensic Rep 303, showing attitudes toward battered women are predictive in murder trials where the defendant alleges they are a battered women.

¹¹² RF Hanley "Getting to Know You" (1991) 40 AULR 865, 871.

¹¹³ Above n 84.

¹¹⁴ See text at n 131.

5 *Juror investigations*

The two most common types of juror investigations are community network models and home surveillance of potential jurors.¹¹⁵ The former is another form of the community survey and involves combining general neighbourhood demographic information and aggregate interview responses. The latter is a rather more insidious approach of researching potential jurors by interviewing their neighbours, watching their homes, and generally investigating them. As noted above¹¹⁶, the home (or hairdresser!) investigation is the main method New Zealand counsel use apart from traditional stereotyping.

6 *In-court assessment of juror non-verbal communication*

Communication experts generally agree that over 50% of the meaning of a communicated message is transferred through the nonverbal behaviour accompanying the oral message.¹¹⁷ While a person may control the actual words and phrases that come out of their mouths, it is very difficult to control the entire communication. The speaker is less aware of his or her kinesic¹¹⁸ or paralinguistic¹¹⁹ communication and therefore these are the areas where 'leakage' of any intended deception is likely to occur.¹²⁰

If juror non-verbal communication can be read accurately it will be particularly useful in detecting a potential juror who is attempting to hide his or her prejudices in order to make them felt in the jury room. This method goes some way to answering Cooke P's doubts in *Sanders* as to detection. However this method does require the opportunity to talk with the juror, preferably at some length. The current "analysis" undertaken in New Zealand during the walk to the jury box is clearly inadequate. As one prosecution counsel in the Justice Department study recognised:¹²¹

¹¹⁵ Above n 2, Barber 1237.

¹¹⁶ See text at n 47.

¹¹⁷ EJ Imwinkelried "Demeanour Impeachment: Law and Tactics" (1985) 9 Am. J. Trial Advoc. 183, 187 cited in J Goodwin Symposium: Securities Litigation: The Fundamental Issues: Note: Articulating the Inarticulable" (1996) 38 Ariz L Rev 739 at n 3.

¹¹⁸ Body language, such as facial expressions, body movements, body orientation, eye contact, and hand movements. See Goodwin, above n 117, at n 137.

¹¹⁹ Breathing, pauses, pitch and tone of voice, and speech disturbances unrelated to the content of the message. Above n 118.

¹²⁰ Gerald R. Miller & James B. Stiff, *Deceptive Communication* 20 (1993) cited in above n 117, 752.

¹²¹ Above n 39, 128.

... you've got that few seconds to make that assessment, that's quite arbitrary really, the assessment you get from that..

7 *Group dynamics analysis*

Group dynamic analysis assesses the way in which the jury will work together as a group. The identification of jurors who are likely to be influential is particularly important as their views will play more than a 1/12 role in the jury decision making. Hastie et al¹²² found that jurors who speak more also tend to be more persuasive. These jurors include those who have a high status occupation or some expertise related to the case, highly educated, retentive memories, male (men have spoken 50% more than women since studies began), neither young nor old and particularly the jury foreperson. Typically four jurors will consume more than half the talking time. The foreperson will speak twice the amount of anyone else and a foreperson committed to a particular view can often make the difference in the outcome of a jury's deliberations.¹²³ These findings confirm considerations that the SJS team cautiously took into account in selecting the Berrigan jury. And, comfortingly for Schulman et al in their experience with their "wild-card" juror, Hastie et al conclude that although a number of factors point to influential jurors, it is difficult to predict who will be a hold out juror.¹²⁴

Another factor to be considered in the group dynamics analysis is the possibility of subgroups forming who will strengthen one side of a case. In the original the SJS trial¹²⁵ the consultant opted to include a group of young women whom he posited would function as a subgroup supporting the defence.¹²⁶

¹²² Above n 69, 129.

¹²³ Above n 67, 59.

¹²⁴ Above n 69, 166.

¹²⁵ Above n 55.

¹²⁶ Above n 2, Barber, 1237.

8 *Mock trial*

After counsel present evidence and submissions the 'jurors' deliberate and the counsel analyse their discussion. This technique provides information for selection and also, perhaps more significantly, assists counsel formulate their trial strategy during the course of the trial. Although exceedingly expensive the use of mock juries has been found to work.¹²⁷

C *The Extreme Example? - The OJ Simpson Trial*

1 *SJS effected*

SJS originated with the unusual, high publicity, Berrigan trial and has recently been brought to public attention in another unusual, high publicity trial. It is difficult to deny the advantages obtained from SJS in *The People of the State of California v Orenthal James Simpson*¹²⁸. It is submitted that although the uniqueness of this trial in terms of its participants, publicity, length and expenditure must be taken into account when drawing any conclusions, these are factors to be considered, not factors which outweigh, the benefits of SJS over traditional methods of jury selection.

The defence were highly positive in their approach to SJS. Only two months after the murders of Nicole Brown and Ron Goldman the defence team unanimously agreed on hiring Jo-Ellan Dimitrius of Forensic Technologies Inc.. Dimitrius, like Schulman, began with surveys in the area where the trial would be held. She used four surveys of Los Angeles County residents to gauge community attitudes toward Simpson and the prosecution, as well as potential defence arguments. Like Schulman, too, Dimitrius then selected and addressed two focus groups of mock jurors - selected to resemble the likely Simpson jury. Dimitrius also prepared the defence's proposed jury questionnaire and tabulated the responses to the questionnaire administered by Judge Ito.

The prosecution, headed by Marcia Clark, were far more ambivalent in their attitude toward, and use of, SJS. Clark reluctantly agreed to consider a pro-bono offer by a prominent jury consultant to assist in jury selection. Donald Vinson, of DecisionQuest recruited a diverse group of thirty "jurors" in the

¹²⁷ Above n 126.

¹²⁸ Official Transcript, *People v Simpson*, No BA 097211 1995 WL 686428 (Cal Super Ct LA County 1995).

area He conducted a second research exercise in Phoenix Arizona, where he said he could find demographically comparable jurors. As a result of concern about publicity and the prosecution case being leaked by study jurors Clark would only agree to jurors being asked what they thought of the case so far, rather than be given mock presentations.

However, even this limited research provided the prosecution with the majority of the information they needed to avoid a defence-biased jury. A telephone survey in the Los Angeles district revealed that black men were three times as likely as black women to believe that Simpson was guilty; black women felt overwhelmingly that, even if Simpson had engaged in a pattern of violence against Nicole Brown Simpson, doing so didn't make him more likely to have killed her; and an alarmingly large number of black women felt that the use of physical force was not inappropriate in a marriage.¹²⁹

When the study jurors were asked to rate on a scale of one to ten how much sympathy they felt for each participant the results confirmed the telephone survey. Black women gave O.J. Simpson all nines and tens. The murder victim, Nicole Brown Simpson, scored sevens, fives and threes. Black jurors' reactions to Clark were scathing, particularly those of black women who described her as, "Shifty", "Strident", and, most commonly, "Bitch". The racial divisions proved almost absolute, with black women backing the defendant most intensely.¹³⁰

These findings appeared to contradict the experience Marcia Clark had gained in a successful career. This experience had "taught" her that a particular style and a particular juror would produce the result she sought.¹³¹

Many of Clark's trial's took place "downtown" - in the Criminal Courts Building in Los Angeles, that is - and she felt a great affinity for the jurors ... who were selected there. ... She even had a fan club of sorts consisting of a group of former jurors, all black women, who wrote letters to her and otherwise kept in touch with her after their trials ended.

¹²⁹ J Toobin "Annals of Law The Marcia Clark Verdict" *The New Yorker* 9 September 1996 58, 64.

¹³⁰ Above n 129.

¹³¹ Above n 129, 58.

Young black women were traditionally favourable to Clark: young black women were favourable to O.J. A careful path would have to be trod to accommodate both these facts. Clark did not find that path. She chose to rely on the lesson she had learned from her experience rather than the SJS advice and tolerated Vinson's input only until the second day of jury selection¹³² when she informed him he was no longer required.

The defence, however, continued their close association with Dimitrius. She briefed the lawyers before their voir dire questioning and closely observed the body language and reactions of prospective jurors as they were questioned. At key points throughout the trial, she was in court to assess juror reactions to the evidence and the witnesses. Aside from the revealed black female bias Dimitrius chose just eight questions from the Court-administered 85-page questionnaire that she believed strongly predicted a juror's vote. These included questions about Simpson's guilt or innocence and what constituted a reasonable doubt.

Some of Dimitrius' advice clearly played a part in the eventual verdict. For instance several jurors pointed to their understanding of reasonable doubt in causing them to vote for acquittal. These jurors commented that they were uncertain about the verdict going into deliberation and some have stated that they believed Simpson was involved in the murders in some unspecified manner, but that they harboured enough reasonable doubts to acquit.¹³³ Juror's post-trial remarks apparently provide little information about how they conceived of reasonable doubt but Hastie notes that there were hints that for some jurors reasonable doubt took the form of the incompleteness and vagueness of major components of the prosecution story, that is, the existence of some doubts, rather than a definite alternate explanation of the credible evidence. For example, as one juror noted:¹³⁴

It is important to remember that a not guilty verdict requires just one thing that can create a reasonable doubt. We had much more than that. There were many questions that were not answered.

¹³² Jury selection lasted six weeks, a length of time which has occasioned criticism. See, for instance, Hastie and N Pennington "Perceptions and Decision Making: The Jury's View: The OJ Simpson Stories: Behavioural Scientists' Reflections on *The People of the State of California v Orenthal James Simpson*" 67 (1996) U Colo L Rev 957, 972.

¹³³ Above n 132.

¹³⁴ Above n 132.

2 *Affects explained*

The opportunity for the defence to create that doubt in the minds of jurors in this case is explained by social science. It was also discoverable by social science before the trial. Hastie et al explain it in terms of the story model which psychologists use to describe the process through which a juror arrives at a verdict.¹³⁵ The story is constructed both from information presented at trial and from the juror's background knowledge. Each juror determines guilt or innocence by constructing one or more narrative sequences; the most convincing of which will point them to their verdict. Evidence from research by cognitive and social psychologists has established that as a general principle ambiguous or incomplete information will tend to be interpreted in a fashion that is consistent with a person's initial attitudes and that confirms their expectations. This principle is particularly relevant in jury situations where:¹³⁶

[J]urors are faced with a complex task with a host of new, often conflicting information, both legal and factual and in unfamiliar language, to be grasped and resolved. This situation provides fertile ground for an unperceived operation of and reliance on pre-existing attitudes.

Hastie et al believe that a juror's race (via associated pre-existing attitudes) made a difference in the construction and acceptance of the story that seems to have been most important in undermining the prosecution story that OJ Simpson murdered Nicole Brown Simpson and Ronald Goldman and thereby creating a "reasonable doubt" in the minds of jurors. That story is one where Fuhrman, a police officer (possibly aided by other police officers) planted incriminating evidence. The plausibility of this story needs to be supported by jurors' inferences as to the likelihood of its occurrence. Hastie et al note that African Americans, compared with white Americans, hold more beliefs and have more experiences that support the plausibility of stories of police misconduct and police bigotry. This was confirmed by post-trial interviews where jurors told stories of police errors and misconduct, for example the false arrest of members of their own families. In fact jurors' reports on the deliberation process indicate that, at most, only one of the two initial guilty votes was cast by one of the eight black jurors.

¹³⁵ Above n 132, 960.

¹³⁶ Above n 85, 51.

Jurors' comments after the trial clearly reflect the comments the prosecution obtained from pre-trial jury research. The following explanation of how one juror perceived the marital violence-related evidence reflects the comments of a number of other jurors:¹³⁷

Now, if you put all of those together, they were always drunk. Both of them, all of them. ... drinking, tempers are flaring ... So, when they went from "89 to "92 or "93 when he came through the door - you know, the 911 tape - there was no abuse there. He hadn't hit her or anything, but he did scare her. But there was no abuse there. What they presented to me, well, I related it all to they had been drinking.... But I didn't think it was necessarily a motive for murder.

Uelman, a law professor assisting the defence team, notes that predicting human behaviour will never be an exact science and so ultimately, both sides were still guessing, right up to the return of the verdict. However the lesson he suggests to be taken from the jury selection process in *People v O J Simpson* is that diversity on juries does make a difference, and many of the decisions and strategies employed by the lawyers can drastically affect that diversity.¹³⁸

Of course others draw very different lessons from the *People v OJ Simpson* case. Hastie et al suggest that jury selection procedures, especially the voir dire examinations preceding the exercise of the peremptory challenges, played an unreasonably exaggerated role in the Simpson trial. They also state that:¹³⁹

The voir dire process seems to have been wholly ineffective at producing a balanced and impartial panel. The panel still included some reasonably biased jurors - prejudiced jurors who had not been identified in the over-long voir dire. By the reports of members of the final jury panel, at least one extremely racist juror remained among the two final alternates.

However, they also admit that, "the Simpson trial may be an example of a case in which jury selection did help cause the verdict"¹⁴⁰ and object to SJS for allowing the side with the most resources to obtain an advantage.

¹³⁷ Above n 132, 972.

¹³⁸ GF Uelman *Lessons from the Trial* (Andrews and McMeel, Kansas City, 1996) 91.

¹³⁹ Above n 132, 974.

¹⁴⁰ Above n 139.

There is a further apparent contradiction in their statement of scepticism of the efficacy of SJS methods in more typical trials alongside their statement that.¹⁴¹

Assuming our speculation about the race difference in prior beliefs is true, there simply exists a race difference that would be related to jurors' verdicts in any case with the Simpson trial elements: that is, an African American suspect, mostly white police officers, and a defence argument that racist officers framed the suspect.

It is possible that the story model explanation offers scope for input by SJS in numerous, if not all, trials. Any trial to which the jurors must apply their "common sense" or life experiences to fill gaps in the prosecution story will admit more than one "reading". These different "readings" by jurors are viewed as a positive ingredient in trials and is one of the reasons why we have a number of jurors, so that the various readings can be debated until common verdict can be arrived at. The goal of SJS is to determine the likely "readings" of the potential jurors.

IV SUMMARY

A Critics

Currently the best advertising for the efficacy of SJS is the cases where it has been used successfully. The Berrigan brothers trial and the OJ Simpson trial are examples. But, as the critics are quick to point out, it is not possible to say that it was SJS that actually made the difference. Diamond describes what would be required to provide such evidence that in any trial SJS could determine a verdict.¹⁴²

In the ideal test of SJS, a series of cases would be tried before multiple juries, some 'scientifically' selected and others traditionally chosen. A comparison of the verdicts rendered by the two types of juries would test the value of the method. This direct test has not yet been done.

Even if the resources and will were found to conduct this test it would still be inherently flawed in that it could only ever be carried out in a hypothetical court situation. Missing would be the real defendant with the real consequences that stem for him or her from the jury's decision making process. Missing too, is the ability to distinguish how much affect is produced by the particular group dynamics of any given set of jurors, real or

¹⁴¹ Above n 139.

¹⁴² Above n 84.

simulated. It is impossible to conduct the series of cases before multiple juries before in a true-life court situation and it is equally impossible to test exactly what difference that variable would produce.

Some SJS critics complain that even if a variable is found to be a useful predictor, it cannot generally be applied across a variety of cases.¹⁴³ This is certainly a practical problem in terms of the need to conduct surveys and attitude assessments over a number of cases rather than just pulling some research out of a drawer and applying it to the case in hand. However, the fact that predictive variables differ for appreciably different scenarios is reassuring in that the process is responding to, and results reflecting, the obvious complexity of a trial situation. Scientific knowledge is appropriately uncertain because the world that it reflects is uncertain.

As well as a huge number of possible variables, the "certainty" provided by SJS is further reduced by the limits the court imposes as to questioning. Diamond suggests, perhaps overstating the case somewhat:¹⁴⁴

Assuming that more powerful attitudinal measures are available or can be developed, the measures will be valuable for jury selection only if they can be administered in court.

This in turn raises difficulties for SJS. Courts tend to only permit voir dire questions that appear logically relevant to the case, eg juror support for the death penalty is consistently associated with a greater willingness to convict, and is likely to be the strongest predictor currently available can only be asked in capital cases. Judges are also unlikely to permit the number of questions required to provide an accurate measure. In addition, jurors are exposed to the responses of other jurors to the same questions and their answers may be affected by those earlier responses.

Hastie et al state that the relationship between attitudes and behaviour has failed to produce consistent or striking relationships. They note that "if half of all jurors are expected to vote for conviction, simple guessing or coin-

¹⁴³ Above n 84.

¹⁴⁴ Above n 84.

flipping would yield a 50 percent accuracy rate. And if 80 percent of the jurors prefer conviction, either in a single case or across cases, an 80 percent accuracy rate can be achieved by always predicting conviction." These statements may make sense mathematically but counsel cannot simply predict conviction for an 80% success rate (one study indicates that the actual rate for jurors who prefer conviction is more in the region of 65%). Counsel must also predict the juror who will prefer acquittal. Each member of the jury is necessary to achieve a unanimous verdict. And then the "chance" wrong juror or jurors may be far more influential in the jury room than their 1/12 vote would suggest.

Probably one of the most convincing arguments against the efficacy of SJS is that the predictions it produces are probabilistic not absolute. The analogy has been drawn to batting averages in baseball. Selecting a right-handed batter to face a left-handed pitcher increases the chances of a hit, but by no means guarantees that outcome. Likewise, using survey data and observations might increase the probability of identifying a sympathetic juror, but does not guarantee that outcome.¹⁴⁵

The extent to which empirical research on juror decision making is applicable to actual trials is a topic of great interest and controversy among social scientists.¹⁴⁶ The bulk of the experimental work uses "jury simulation" techniques in which participants are asked to play the role of jurors and make individual decisions about a hypothetical defendant on trial. This research has been criticised on several grounds as not adequately reflecting actual trials.

Firstly, much of the research uses college student subjects who are not attitudinally or demographically representative of the juror population. Studies have shown that younger adults may have more weak and changeable attitudes than older adults, and therefore might be more susceptible to attorney persuasion tactics.

¹⁴⁵ JM Weyant *Applied Social Psychology* (Oxford University Press, New York, 1986).

¹⁴⁶ The following discussion is drawn from a comprehensive discussion of SJS techniques in JA Tanford and S Tanford "Better Trials Through Science: A Defence of Psychologist-Lawyer Collaboration" (April, 1988) 66 NCL Rev 741, 754.

Secondly, the stimulus materials often do not approximate an actual trial. Psychologists have used everything from short written case summaries to videotaped trial re-enactments, but these experimental types all share a common characteristic: they are shorter and simpler than actual trials. The effect of a nonevidentiary manipulation is likely to be larger in magnitude when subjects have less evidence to consider.

Thirdly, decisions of experimental jurors usually have no real consequences for a defendant on trial. Manipulations of defendant and victim status characteristics had different effects when subjects thought there were consequences than when they thought there were none.

Fourthly, only a handful of the many experiments have included group deliberations in their procedures; most studies ask for individual, written decisions. Some research suggests that the effects of extra-legal or nonevidentiary biases may be eliminated during deliberation, although the effects of certain evidentiary biases may be exacerbated. In either case, the effect of a manipulation on actual jurors cannot be predicted without considering the deliberation process.

Fifthly, many of the studies assess impact not in terms of what verdict a person would reach, but along other lines such as how subjects perceive a witness's credibility.

In response to these criticisms, researchers recently have attempted to increase the realism of their experiments through the use of non-student subjects, more realistic materials and procedures, and field experimental techniques.¹⁴⁷ However, most of the research summarised in the trial advocacy materials available to lawyers was conducted in the old way -- in laboratory settings quite different from the courtroom. Findings from such research would be considered low in generalisability. The work on attitudes and persuasion, nonverbal communication, and impression formation that forms the basis of many suggestions concerning attorney tactics is

¹⁴⁷ Above n 14, 755.

particularly lacking in this respect. Most of the research did not even involve a simulated jury decision task.¹⁴⁸

Most experiments examining the influence of extra-legal factors hold evidentiary strength constant while manipulating variables of interest. In addition, an attempt often is made to keep the evidence weak or ambiguous in experiments to assure maximum sensitivity to the manipulation's effect. Studies that have manipulated evidentiary strength demonstrate that extra-legal factors exert their greatest impact when the remaining trial evidence is weak or ambiguous, and may have little or no effect when evidence is strong.¹⁴⁹ In addition, the relative impact of extra-legal factors may be small compared to the impact of evidentiary factors.¹⁵⁰

B Proponents

It is accepted that SJS is probabilistic but SJS proponents would argue that:¹⁵¹

[W]hile certain errors and harm may be inherent even in the proper use of probabilistic tools, even more harm may be inherent in not using them.

One advantage of "scientific" jury selection is a level of objectivity it provides between selector and juror. Although it is important for counsel to have a rapport with the jury members in order for them to hear what is said, it is also important to differentiate between jurors for whom counsel has positive feeling and jurors who, because of their attitudes or experiences, would be advantageous for the case.¹⁵²

An interesting feature of the literature on the efficacy of SJS, is that it is not so much the results that differ, but rather the interpretation of those results. All of the studies seem to find at least a 5% variability for at least some characteristics.

¹⁴⁸ Above n 147.

¹⁴⁹ Above n 147.

¹⁵⁰ Above n 146, 756.

¹⁵¹ Saks & Kidd "Human Information Processing and Adjudication: Trial by Heuristics" (1980-81) 15 *Law & Soc'y Rev* 123, 125.

¹⁵² JT Frederick *The Psychology of the American Jury* (<http://www.usc.edu/dept/law-lib/Michie>, retrieved 2 August 1997) § 3-203.at n 3.

Professors Fulero & Penrod,¹⁵³ determined that where scientific jury selection could account for 5% of the variance in verdict by attitudinal and personality measures, successful use of the information could potentially increase an attorney's performance from mere chance at 50% to 61% correct classifications of juror preference. They similarly suggest that 15% of a variance accounted for could lead to 69% correctly classified juror preference. Further, they suggest that the variance achieved by Saks¹⁵⁴, which falls into the 5%-15% range, is small but that the potential improvement in selection performance is "not insignificant".¹⁵⁵ Diamond, however, concluded that the same figures were "modest at best"¹⁵⁶ and that "there is good reason to be sceptical about the potential of [scientific jury selection] to improve selection decisions substantially."¹⁵⁷

Both Fulero & Penrod¹⁵⁸ and Diamond note that early empirical, survey methods of SJS combined with newer jury preparation techniques (such as focus groups) may considerably increase the amount of variability in juror verdicts accounted for by the trial consultant's intervention. However, as Stolle et al point out, no empirical evaluations of the combined use of such techniques currently exists in the academic literature.¹⁵⁹ These last authors suggest that critics of the effectiveness of SJS have "thrown the baby out with the bathwater" based on early reviews of a small and methodologically unsophisticated body of literature."¹⁶⁰

SJS is assessed here in terms purely of jury selection. There are also a number of side benefits which accrue. Surveys can assess the community's reactions to various aspects of the case. Such information, if gathered early enough, can be helpful in evidence preparation and in the formation of arguments for use at trial. In addition, themes for the case can

¹⁵³ SM Fulero & SD Penrod "Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?" (1990) 3 Forensic Rep 233.

¹⁵⁴ See Saks *Jury Verdicts: The Role of Group Size and Social Decision Rule* (Lexington, MA: Lexington, 1977).

¹⁵⁵ Cited in DP Stolle, J K Robbennolt, R L Wiener "The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation" (1996) 20 Law & Psychol Rev 139, 145.

¹⁵⁶ Above n 84, 183.

¹⁵⁷ Above n 84, 180.

¹⁵⁸ Above n 155.

¹⁵⁹ Above n 155.

¹⁶⁰ Above n 155 at n 39.

be developed by noting the community's values and opinions and incorporating them into the case strategy.¹⁶¹

Although strength of evidence is often cited as being the determinant in producing a verdict, the SJS critics agree that SJS will have an impact in cases where the evidence is ambiguous.¹⁶²

The identification of biased jurors is particularly important in cases where the evidence is ambiguous or in the other types of cases which SJS critics concede SJS seems to have succeeded in and may be applicable for, highly controversial trials. Some researchers suggest that in these trials extra legal bias (bias which influences the juror's decision and is not part of the evidence presented in open court) may influence the result in as many as half the cases.¹⁶³

Surveys have consistently revealed a number of surprising biases which would be likely to affect a juror's decision making in a particular case and which have not been apparent to counsel or the researchers before the survey was undertaken. In other words the survey information gave material contradictory to the traditional method of "common sense" stereotyping. Both the Berrigan trial and the OJ Simpson involved at least one example where "common sense" could not be trusted and SJS revealed the true state of affairs; ie, college-educated people living in Harrisburg were conservative and black women would identify with OJ Simpson and detest Marcia Clark.¹⁶⁴

Clark's failure in relying solely on her experience is somewhat similar to Schulman's failure in being swayed by the "rogue" juror's attitudes and not his unfavourable demographics. Both were unable to deal with conflicting information; both took a guess and both were wrong. SJS could have addressed both situations. In Schulman's case statistical analysis methods have improved so as to be able to address conflicting results. In Clark's case, studies of SJS have shown the inability of case-wide applications; ie.

¹⁶¹ Above n 152.

¹⁶² See, for eg., above n 145.

¹⁶³ Hans & Vidmar and Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court* (1978) 30 *Stan L Rev* 491, 525-30.

¹⁶⁴ See text at above n 55 and n 131.

a predictive characteristic in one case will not necessarily be predictive in another. SJS critics use this as one of its drawbacks however it is, as Clark discovered, a simple reality and most cases need to be considered in their own terms. As seen in OJ's case, this truth is far more problematic for traditional stereotypical jury selection than it is for SJS.

The Berrigan trial began SJS: the OJ Simpson case took it to an extreme. The ethics of SJS were generally accepted in the Berrigan trial; the efficacy was not: the efficacy of SJS in the OJ trial is grudgingly conceded (at least to some extent); the ethics are decried. Defence counsel in the OJ trial suggests that keeping what progress we have made from being used in the courtroom is imprudent. He recommends that:¹⁶⁵

A lot more can be done for defendants who cannot afford a jury consultant. Jury questionnaires should be standardised, and the information they gather should be readily available to both sides in every jury trial. Those we train as trial lawyers should be familiar with the tools of modern psychology, rather than with the racial stereotypes of old wives' tales. If we impose a regimen of ignorance upon the jury selection process, as many advocate by restricting lawyer participation in voir dire, we end up with greater deference to prejudices and stereotypes.

V CONCLUSION

This paper has reviewed an imperfect but preferable alternative to New Zealand's current stereotype-based method of jury selection. Scientific Jury Selection is informed by social science's understanding and research into human behaviour and is a more rational and fair approach to ensuring an accused receives his or her legislative right to an impartial jury.

Social psychological research has identified ways in which prejudices, either inherent or induced through such influences as publicity, have a negative impact upon jury decisions. The research also works towards understanding how these prejudices can be reduced to a minimum in jury trial settings. It is this writer's opinion that the evidence and examples presented here demonstrate that although SJS has limits, it fans the flame that shows that freedom lives more convincingly than does traditional jury selection. The critics noted above suggest that any improvement achieved by SJS is only minimal: even if those critics are right, that improvement can

¹⁶⁵ Above n 138, 90.

a predictive characteristic in one case will not necessarily be predictive in another. SJS critics use this as one of its drawbacks however it is, as Clark discovered, a simple reality and most cases need to be considered in their own terms. As seen in OJ's case, this truth is far more problematic for traditional stereotypical jury selection than it is for SJS.

The Berrigan trial began SJS: the OJ Simpson case took it to an extreme. The ethics of SJS were generally accepted in the Berrigan trial; the efficacy was not: the efficacy of SJS in the OJ trial is grudgingly conceded (at least to some extent); the ethics are decried. Defence counsel in the OJ trial suggests that keeping what progress we have made from being used in the courtroom is imprudent. He recommends that:¹⁶⁵

A lot more can be done for defendants who cannot afford a jury consultant. Jury questionnaires should be standardised, and the information they gather should be readily available to both sides in every jury trial. Those we train as trial lawyers should be familiar with the tools of modern psychology, rather than with the racial stereotypes of old wives' tales. If we impose a regimen of ignorance upon the jury selection process, as many advocate by restricting lawyer participation in voir dire, we end up with greater deference to prejudices and stereotypes.

V CONCLUSION

This paper has reviewed a valid, if imperfect, alternative to New Zealand's current stereotype-based method of jury selection. Scientific Jury Selection is informed by social science's understanding and research into human behaviour and is a more rational and fair approach to ensuring an accused receives his or her legislative right to an impartial jury.

Social psychological research has identified ways in which prejudices, either inherent or induced through such influences as publicity, have a negative impact upon jury decisions. The research also works towards understanding how these prejudices can be reduced to a minimum in jury trial settings. It is this writer's opinion that the evidence and examples presented here demonstrate that although SJS has limits, it fans the flame that shows that freedom lives more convincingly than does traditional jury selection. SJS critics accept that it may be more effective than traditional methods of jury selection but only in some cases and to a minimal extent.

¹⁶⁵ Above n 138, 90.

be viewed in terms of a patient with the chance of obtaining "minimally" more effective treatment.¹⁶⁶

The best modern medical drugs improve effective treatment from 50% to approximately 56%. Should they be used? Would a patient decline them? Would a criminal defendant prefer that his lawyer was 50% rather than 60% accurate in judging venireperson bias?

For counsel who wish to provide their client with the most effective "treatment" available the lesson from social science is that jurors *are* potentially, and significantly, biased. And that this bias is *not* readily identifiable from external characteristics. The lesson to be adopted then, can be drawn from *Cooke P* and *Phillips LJ*. That is, convincing evidence of bias, such as a Gallup poll, will need to be presented before the court will consider invoking all of the methods, which Parliament have enacted, to protect the lamp that shows that freedom lives.

¹⁶⁶ Above n 56, 77.

VI APPENDICES

*Appendix A Questions proposed by counsel to be put to the jury in
R v Sanders [1995] 3 NZLR 545.*

1. Have you read newspaper articles or heard radio or television items or reports about local gangs or motorcycle groups such as the Road Knights or The Devils Henchmen? How has this affected you?
2. Would knowledge that the accused man is a member of the Road Knights Motorcycle Club affect your ability to give him a fair and impartial hearing; and to give a true verdict on the evidence you will hear at this trial?
3. Have you or any member of your immediate family ever had an unpleasant experience with a member of any motorcycle club which you feel might make it difficult for you to be fair and impartial at this trial?
4. What view do you have, if any, of the role played by the police in dealing with gang issues?
5. Have you, or your spouse, ever attended a meeting relating to the "Timaru gang problem" or taken any public step such as writing to a public official or the newspapers about gangs?
6. Have you ever heard of Charles Score Sanders? If so, what have you heard about him?
7. Do you believe that your safety or financial or physical security or the safety or financial or physical security of any member of your family has been threatened or could be threatened by gangs such as the Road Knights?

Appendix B Questions allowed to be put to the jury in R v Hill (Canada, Unreported, Lief J presiding)

1. Marital status
2. Children and their ages
3. Female children
4. Juror's place of employment
5. Duration of employment
6. Members of family in police department or relatives or close friends in police department or work for law enforcement agency
7. Have you formed any opinion on motorcycle clubs?
8. Have you read any accounts or seen anything on television or heard anything on the radio regarding the case?
9. Have you discussed the case with anyone?
10. Have you read anything in newspapers about the case and do you believe what you have read?
11. Have you formed any opinion as a result of newspaper reports or other reports?
12. Any conclusions as to guilt or innocence of accused?
13. Having read the newspaper reports, could you give a fair trial?
14. Are you related to any of the accused - do you have any knowledge of him?
15. Does your wife work?
16. Do you know the complainant?
17. Do you know what the charge is about?
18. Do you know the Crown attorney?
19. Do you know the defence counsel?
20. Would the manner in which the accused lives, if it differs from yours, affect your ability to decide?
21. Have you ever sat on a jury before?
22. Would you be influenced by anything you might have heard outside?
23. Are you only paid when working and not when away? Is it a hardship for you to be away?
24. Would your opinion interfere with your giving a fair trial?
25. Would the fact that you have an 18-year-old daughter affect your ability on a charge of rape?
26. Would you have to overcome something within yourself to abide by your oath?
27. Do you have any opinions on rape charges? Does the charge cause bias or prejudice?
28. Would you evaluate the testimony of a member of a motorcycle club the same way as you would a police officer?
29. Do you have any feelings about people who associate with motorcyclists?
30. Having known certain witnesses, would you have difficulty rejecting their evidence?

VII BIBLIOGRAPHY

J Abramson *We, the Jury* (BasicBooks, A Division of HarperCollinsPublishers, Inc., New York, 1994).

AW Alschuler "The jury trial needs reform; changing the rules." February 1997 *Current*, 8.

J W Barber "The Jury Is Still Out: The Role of Jury Science in the Modern American Courtroom" (1994) 31 *ACLR* 1225.

RA Berk, M Hennessy & J Swan "The vagaries and vulgarities of scientific jury selection: A methodological evaluation" (1977) 1 *Evaluation Quarterly* 264.

J Berman & BDA Sales "A critical evaluation of the systematic approach to jury selection" (1977) *Criminal Justice and Behaviour* 4.

FA Cacchione *J Challenge for Cause* (National Criminal Law Program, Memorial University of Newfoundland, July 1995).

Department of Justice New Zealand, S Dunstan, J Pualin, K Atkinson (Department of Justice, Wellington, 1995).

Sir P Devlin *Trial by Jury* (Stevens & Sons, London, 1966).

SS Diamond *Scientific Jury Selection: What Social Scientists Know and Do Not Know* (1990) 73 *Judicature* 178.

PC Ellsworth "Are twelve heads better than one?" (1989) 52 *Law and Contemporary Problems* 205.

P C Ellsworth "Some steps between attitudes and verdicts" in R Hastie (ed) *Inside the Juror* (Cambridge University Press, Cambridge, 1993).

J T Frederick *The Psychology of the American Jury* (<http://www.usc.edu/dept/law-lib/Michie>, retrieved 2 August 1997).

SM Fulero & SD Penrod "Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?" (1990) 3 *Forensic Rep* 233.

JJ Gobert "In Search of the Impartial Jury" (1988) 79 *The Journal of Criminal Law & Criminology* 269.

G Goodwin "Symposium: Securities Litigation: The Fundamental Issues: Note: Articulating the Inarticulable: Relying on Nonverbal Cues to Deception to Strike Jurors During Voir Dire" (1996) 38 *Ariz L Rev* 739.

J Goulter *No Verdict New Zealand's Hung Jury Crisis* (Random House Publishers, Auckland, 1997).

R F Hanley "Getting to Know You" (1991) 40 *AULR* 865.

Hans & Vidmar and Zeisel & Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court (1978) 30 Stan. L. Rev. 491.

R Hastie and N Pennington "Perceptions and Decision Making: The Jury's View: The OJ Simpson Stories: Behavioural Scientists' Reflections on the People of the State of California v Orenthal James Simpson" (1996) 67 U. Colo. L. Rev. 957.

R Hastie, SD Penrod & N Pennington *Inside the Jury* (Cambridge University Press, Cambridge, 1983).

SM Kassin, LS Wrightsman *The American Jury on Trial Psychological Perspectives* (Hemisphere Publishing Corporation, New York, 1988) 45.

NL Kerr, GP Kramer, JS Carroll and JJ Alfini "On Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pre-trial Publicity: An Empirical Study" (1991) 40 Am UL Rev 665.

RO Lempert "Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases" (1975) 73 Mich L Rev 643.

DO Linder "Juror Empathy and Race" (1996) 63 Tenn L Rev 887.

N S Marder, "Beyond Gender: Peremptory Challenges and the Roles of the Jury" 73 Tex. L. Rev. 1041 (1995).

NN Minow and FH Cate "Who is an Impartial Juror in an Age of Mass Media" (1991) 40 Am UL Rev 631.

GA Moore, M K Braswell "The Probative Value of Multiple Regression Analysis in Title VII Litigation" (1989) 27 AmBusLJ 254.

Moran and Comfort, Scientific Juror Selection: Sex as a Moderator of Demographic and Personality Predictors of Empanelled Felony Juror Behaviour 43 Journal Pers Soc Psy 1052 (1982).

G Moran, B L Cutler and A De Lisa "Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict Inclination in Criminal and Civil Trials" (1994) 18 Law and Psychol. Rev. 309.

G Moran, B L Cutler and A De Lisa "Jury Selection in Major Controlled Substance Trials: The Need for Extended Voir Dire" (1990) 3 Forensics Rep 331.

DG Myers *Social Psychology* (4th ed, McGraw Hill, New York, 1993).

New Zealand Herald, New Zealand, 6 November 1995, 5.

CJ Parker, Jr *Legal Psychology: eyewitness testimony: jury behaviour* (Springfield, Thomas, 1980).

Penrod, "Study of Attorney and 'Scientific' Jury Selection Models." Unpublished Doctoral Dissertation, Harvard University (1980).

JJ Rachlinski "Scientific Jury Selection And The Equal Protection Rights of Venire Persons" 24 Pacific Law Journal (1993).

D Sahler "Comment: Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule" (1996) 6 Alb LJ Sci & Tech 383.

Saks *Jury Verdicts: The Role of Group Size and Social Decision Rule* (Lexington, MA: Lexington, 1977).

J Schulman, P Shaver, R Colman, B Emrich, and R Christie "Recipe for a Jury" *Psychology Today* 37 (May 1973).

BJ Serr and M Maney "Racism, Peremptory Challenges, and the Democratic Jury: the Jurisprudence of a Delicate Balance" (1988) 79 *The Journal of Criminal Law & Criminology* 1 (1988).

DP Stolle, J K Robbennolt, R L Wiener "The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation" (1996) 20 *Law & Psychol Rev* 139.

JA Tanford and S Tanford "Better Trials Through Science: A Defence of Psychologist-Lawyer Collaboration" (April 1988) 66 *NCL Rev* 741.

J Toobin "Annals of Law The Marcia Clark Verdict" *The New Yorker* 9 September 1996, 64.

DM Tanovich, "Rethinking Jury Selection: Challenges for Cause and Peremptory Challenges" (1994) 30 *Cr (4th)* 310.

GF Uelman *Lessons from the Trial* (Andrews and McMeel, Kansas City, 1996).

JM Weyant *Applied Social Psychology* (Oxford University Press, New York, 1986).

VICTORIA
UNIVERSITY
OF
WELLINGTON

A Fine According to Library
Regulations is charged on
Overdue Books.

LIBRARY

LAW LIBRARY

13 MAR 2000

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00523508 8

e

AS741

Wild, Nicola

VUW

Scientific jury

A66

selection

W668

1997

