A View From the Other Side of the Bench

Shirley S. Abrahamson
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SHIRLEY S. ABRAHAMSON**

After serving on a jury, G.K. Chesterton wrote: Many legalists have declared that the untrained jury should be altogether supplanted by the trained judge .... The Fabian argument of the expert, that the man who is trained should be the man who is trusted would be absolutely unanswerable if it were really true that a man who studied a thing and practised it every day went on seeing more and more of its significance. But he does not. He goes on seeing less and less of its significance ....

.... [T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it .... They do not see the awful court of judgment; they only see their own workshop.1

My opportunity to see whether I had "got used to it" came on July 2, 1984. In answer to a summons for jury duty,2 I

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   For jurors’ writings about their experiences, see Hinchcliff, Portrait of a Juror: A Selected Bibliography, 69 MARQ. L. REV. 495 (1986).

2. The summons procedure is set forth in Wis. STAT. § 756.08 (1983-84).
   The same jury procedures are used in criminal and civil cases. Wis. STAT. § 972.01 (1983-84) provides:
was reporting to the second floor of the Dane County courthouse as Juror Number G-428. It was a Monday morning, the first day of my "summer vacation;" the 1983-84 session of the Wisconsin Supreme Court, of which I am Justice Number Three (in seniority), had ended the previous Friday.

I had been in these second floor corridors, courtrooms, and anterooms many times before. I had been there first in July, 1962, when I delivered some papers to Judge Bardwell—the law firm that had recently hired me felt I could be trusted with that job. Cynthia Fokakis, then Judge Bardwell's secretary, was warm-hearted and friendly, showing me around the courthouse and introducing me to the staff. Twenty-two years later she was in charge as Clerk of Court, instructing staff and jurors.

Since my trip to Judge Bardwell's chambers I had returned to the second floor on numerous occasions—first from my law office on my clients' matters and later from my chambers in the Capitol, generally on ceremonial matters. On July 2, 1984, though, the courtroom, counsel table, bench, and jury box looked different to me. I had never seen this place through the eyes of a juror.

Even so, I felt I was a maven on juries. In 1981 when I was writing a supreme court opinion on the Milwaukee County jury selection process,3 I had studied the history of jury selection in Wisconsin. I knew that from 1849, shortly after statehood, until 1978, the Wisconsin statutes exempted many people from jury duty. Judges and lawyers were automatically exempt, as were physicians, dentists, Christian Science readers, ministers of the gospel, students who were attending or who had attended law school or medical school, and others.4 Furthermore, many people could be exempted upon their own request or on the judge's own motion, namely: all administrators, professors, instructors, and teachers of public and private schools from primary grade to institutions

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3. State v. Coble, 100 Wis. 2d 179, 301 N.W.2d 221 (1981).
of higher education; officers and employees of state and county institutions; and persons over sixty-five years of age.\(^5\) In addition to these exempt groups, a judge could excuse or exclude from jury service any person or class of persons if jury service would entail undue hardship or serious obstruction of administration of justice.\(^6\)

Democratization of the jury occurred in 1978 when the Wisconsin legislature significantly revised the statutes.\(^7\) Following the recommendations of the American Bar Association\(^8\) and the Uniform Law Commission,\(^9\) the legislature eliminated the long list of excluded persons and broadened the pool of jurors.\(^10\) Hereafter, jurors would be United States citizens, electors of the state who are possessed of their natural faculties and are not infirm, who are able to read and understand the English language, and who have not been summoned for jury service within the preceding two years.\(^11\)

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11. Wis. Stat. § 756.01 (1983-84). Section 756.01(2) discusses infirmity as follows:

   (2) Subsection (1) shall not exempt, exclude or disqualify a person from jury service on the ground of infirmity because of a physical condition unless the judge finds that the person clearly cannot fulfill the responsibilities of a juror. The judge shall not consider the structural, physical or architectural limitations or barriers of a building, courtroom, jury box or other facility in making such a finding.

Sec. 756.02(2)(c) further provides:

   (c) No citizen may be excluded from service as grand or petit juror in any court of this state . . . because of a physical condition, except as provided in s. 756.01(2).

In the democratized system I had been selected for jury duty by a computer that, when instructed by the jury commissioners, selects about 4000 names at random from the list of registered voters in Dane County. To achieve a more representative and balanced cross section of the population, sometimes the driver's license list is used in lieu of the voter list.

Each person initially selected by the computer receives a one-page juror qualification questionnaire. Section A asks for personal information — name, occupation, employer, age, spouse's name, age of children, spouse's occupation and employer, address, telephone, sex, marital status, and the woman's birth name. Section B of the questionnaire asks for information about juror qualifications — citizenship, eligibility to vote, ability to read and understand English, prior jury service, and disabilities preventing jury service. The questionnaire ends with a threat: "upon willful misrepresentation of a material fact, a fine of $500 may be imposed."

The jury commissioners, three people chosen by the circuit judges of Dane County, read the responses to the questionnaire and strike those persons who do not meet the statutory qualifications. The commissioners do not disqualify anyone for reasons of employment or inconvenience. According to

12. The jury commissioners and electronic automated systems are discussed in Wis. Stat. §§ 756.03, 756.04, 756.27 (1983-84).

13. The National Center for Jury Studies reports that a perennial concern is the prevention of citizens' withdrawal from the voters' list to avoid jury duty. The Center suggests that education, improving jury service conditions (especially reducing the term of service), and using multiple source lists would prevent citizens' withdrawal. The motivation to protect "the voters' list was the impetus for the Nebraska Legislature to require the use of the voters' and drivers' list as the source of prospective jurors' names." 1985 Neb. Laws LB 113 (adopted Mar. 20, 1985). See Center for Jury Studies News, National Center for State Courts Report, Dec. 1985, at 3.

"Is America's Jury System Working?" was the topic on The Larry King Show, a nationally broadcast radio call-in program, on Jan. 17, 1986. One caller reported her experience of having been excused from jury duty because of a heart condition but being advised by a "jury coordinator" that "you must give up your right to vote. You know that don't you?" The program moderator expressed horror and the guest experts assured her that she had been misinformed.


15. Juror Qualification Questionnaire, June, 1984 (available through Circuit Court, Dane County Courthouse, Madison, WI 53709).
our court's interpretation of the statute in the Milwaukee case, only the judge can make the latter disqualifications.\textsuperscript{16}

From those persons determined to be qualified, the computer randomly selects names for jury duty.\textsuperscript{17} My name was one of those, and I was summoned to serve as a juror from February 27 to March 23.

I had a problem. The 1978 statute provides that judges and attorneys are the only people who can claim an exemption from jury duty.\textsuperscript{18} On the one hand, I did not want to claim an exemption. I had always wanted to serve on a jury. Besides, according to jury folklore, business and professional people who serve on juries set good examples for doing one's civic duty.\textsuperscript{19}

Furthermore, there were precedents for Wisconsin judges serving as jurors: Judge Ed Wilkie in Dane County, and Judges Patricia Curley, Robert Miech, and Arlene Connors in Milwaukee. Three justices of the Arizona Supreme Court had served.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{16} State v. Coble, 100 Wis. 2d 179, 206-08, 301 N.W.2d 221, 234-35 (1981).
\item \textsuperscript{17} This procedure is set forth in Wis. Stat. §§ 756.04(3), 756.27 (1983-84).
\item \textsuperscript{18} Wis. Stat. § 756.02(1) (1983-84). Wis. Stat. § 756.02(2)(b) also provides that "[a] state legislator or full-time elected official shall be excused from service as a juror if the official states to the court that jury service would interfere with the performance of his or her official duties."
\item A judge may exclude or excuse any person or group of persons for hardship under Wis. Stat. § 756.02(2)(a), which provides:
\begin{quote}
Any person or group of persons may be excluded from the jury panel or excused from service as jurors by order of the judge based on a finding that jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice. The exclusion or excuse shall continue for a period deemed necessary by the judge, at the conclusion of which the person or group of persons shall reappear for jury service in accordance with the order of the judge.
\end{quote}
\item \textsuperscript{19} In 1960, Judge John R. Brown, U.S. Circuit Judge for the Fifth Circuit, agreed to serve on the jury panel in the Texas state courts. He explained that his action was in protest against the broad jury exemption and exclusion laws. He said:
\begin{quote}
I felt that perhaps my willingness to serve and to waive exemption might set an example to others entitled to exemptions . . . . My purpose was primarily to dramatize the ridiculous nature of statutory exemptions to jury service and to demonstrate to busy, important people that they need not claim an exemption otherwise open to them.
\end{quote}
23 TEX. B.J. 54 (1960).
\item \textsuperscript{20} See Cameron, \textit{A Judge in the Jury Box, Letter to the Editor}, 64 JUDICATURE 386 (1981).
\end{itemize}
On the other hand, I did have obligations in my own court from September through June. The Wisconsin Constitution does not allow for replacement judges in the supreme court. If I served on a jury I would have to do so in the summer when our court was not in session.

There was also the possibility that the case in which I had been a juror might come up on appeal. I would, of course, have to disqualify myself from sitting on that appeal. The rules of judicial ethics require that I avoid engaging in activities which are likely to come before me in an official capacity. Still, the chances of the case coming to our court would not be great. Of all the cases around the state, approximately 2400 cases a year are appealed to the court of appeals. Of those 2400 cases, only 600 seek review in the supreme court, and of those we take about 100 cases per year. Besides, if a case were likely to be appealed, the attorneys ought to be smart enough to strike me from the jury. Indeed, the likelihood of any attorney permitting me to sit on any jury was small.

Members of the legal profession disagree about whether lawyers and judges should sit on juries. Some would allow lawyers and judges to serve in the interest of obtaining a more representative jury. The Uniform Laws Commission does not exempt lawyers and judges from jury duty in its proposals. The Commission proceeds on the principle that jury service should be shared as widely as feasible and that business and

21. The Code of Judicial Ethics provides:

   A judge shall not accept any duties or continue to administer or hold any fiduciary position or position of trust, or incur any obligations which are, or will be, inconsistent with the expeditious, impartial, and proper administration of the duties of his office or which will involve association with enterprises or persons which are likely to come before him in his official capacity.

In Re Promulgation of a Code of Judicial Ethics, 36 Wis. 2d 252, 260, 153 N.W.2d 873, 877 (1967).


23. Clerk of Wisconsin Supreme Court, Supreme Court Monthly Statistical Report (December 1985). Furthermore, approximately one hundred of the litigants seek to bypass the court of appeals or the court of appeals requests the supreme court to take the matter on certification. Id.

professional people should be excused only in cases of demonstrated need.\textsuperscript{25}

In contrast, those who seek to disqualify members of the legal profession argue that lawyers could or might appear to exercise overbearing influence in the deliberations of the jury because of their specialized training and experience. Although the American Bar Association Standards Relating to Trial Courts do not exempt lawyers and judges from the jury, the Commentary recommends that judges and lawyers be excluded from jury service "because they are professionals in the law."\textsuperscript{26} The Commentary goes on to explain their recommendation as follows:

Their [lawyers' and judges'] presence on the jury could be the cause of embarrassment by reason of their professional acquaintance with the judge and lawyers involved in trying the case; their status as persons trained in the law can easily give them disproportionate influence with fellow jurors; their training may result in their having a special professional outlook on law and justice that is incompatible with the idea of decision by a lay jury.\textsuperscript{27}

Of course, the "expertise" of numerous classes of people—engineers, doctors, teachers, farmers, depending on the subject matter of the case—could, arguably, result in their becoming overbearing in the jury deliberations. Our growing habit of excluding people of education and experience from juries has led many to conclude that juries were composed predominantly of the uneducated and the indolent.

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\item \textsuperscript{25} McKusick & Boxer, Uniform Jury Selection and Service Act, 8 Harv. J. on Legis. 280, 304 (1971).
\item \textsuperscript{26} A.B.A. Commission on Standards of Judicial Administration, Standards Relating to Trial Courts § 2.11 commentary at 28 (1976).
\end{itemize}
To avoid the problem of undue influence, several judges serving on juries maintained their anonymity. One of them, Judge Sherman of the Massachusetts trial court, wrote that he and the court staff had taken every precaution to avoid having any of the jurors learn he was a judge.\textsuperscript{28} I thought perhaps I could do that.

There was one final consideration. When I was appointed to the bench nine years ago, I vowed I would not "get used to it," as Chesterton said. Consequently, I have tried to see the courtroom and the justice system from the perspectives of others. When I travel in this country and abroad, I often observe other courts in session. Court proceedings look different from the visitors' gallery than from the bench or from counsel table. A view from the jury box would provide one more perspective.

I decided not to exempt myself. Our legislature had not chosen to disqualify lawyers and judges; it had left the matter to each lawyer and to each judge. I would leave the question of whether I should sit to the trial judge and counsel. I responded to the jury summons with a letter requesting a postponement until July when the supreme court was in recess. I was granted a postponement until Monday, July 2, 1984.

Each Monday, juries are selected for all the trials that will take place in Dane County that week. Anyone not selected for a jury on a given Monday is released until the following Monday. A juror is on call for four Mondays.

\textsuperscript{28} Sherman, \textit{Eliminating Juror Confusion: A Judge's View from the Jury Box}, 21 Court Review, Winter 1984, at 15, 16.
Having heard that jury duty often means long waits and delays, I gathered together many newspapers and a copy of Alice Walker's *The Color Purple* in preparation for jury duty. According to the Center for Jury Studies, jurors' most frequent complaint is the waiting and lack of activity.29

On Monday, July 2, I reported to the jury room. The jurors were chatting, reading newspapers, talking on the telephone, or contemplating life in silence. I recognized several people: a lawyer, a colleague of my husband's from the University, the spouse of a law student intern who worked in my chambers, a former client. I sat down. The man across from me smiled. A woman commented that she was confident that Justice Abrahamson, whom she had read about in the newspaper,30 was not being kept waiting in this warm, crowded room. The man across from me grinned. The fantasy of anonymity was over.

Within the hour, staff people directed the jurors to several courtrooms, forty or fifty of us to Judge Torphy's courtroom. Prospective jurors now would be called. During one jury call, my intern's spouse asked to be excused because his wife had gone to the hospital that morning to have a baby. The judge excused him. The prospective jurors applauded and wished him well.

When the clerk began calling names, mine was the third one called.31 Justice Number Three was now Juror Number Three. I entered the jury box; I looked up at the judge and down at the people at the counsel table. The males dressed in suits and ties would be the lawyers; the man in a sports shirt, the defendant. The woman next to me whispered that she was willing to bet that I would be knocked off the jury while she would waste her time sitting there instead of being at her new job. I had met the reluctant juror, a familiar figure in jury

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30. Wis. State J. (Madison, Wis.), June 22, 1984, § 3, at 2, col. 1; Milw. Sentinel, June 22, 1984, § 1, at 3, col. 3; Capital Times (Madison, Wis.), June 21, 1984, § 1, at 1, col. 3.
31. The drawing of the petit jury is discussed at Wis. STAT. § 756.096 (1983-84).
literature, and had heard the complaints of economic burden and inconvenience.\textsuperscript{32}

Twenty-three people were called,\textsuperscript{33} and the judge told us that this was going to be a criminal case involving stealing. The \textit{voir dire} began.

"\textit{Voir dire}" is French, meaning "to speak the truth." The phrase denotes the questioning of the prospective jurors by the lawyers and the judge.\textsuperscript{34} The lawyers would have to assess these twenty-three strangers on the basis of our answers and the information they had about us from Section A of the juror questionnaire. One judge who served as a juror wrote: "As a trial judge, I find most \textit{voir dire} examinations . . . consist of relatively standard questions . . . . As a prospective juror, I found I listened more intently . . . ."\textsuperscript{35} I, too, listened intently. From the juror's standpoint, the \textit{voir dire} is similar to a job interview.\textsuperscript{36} And I wanted the job. I had to be careful to be

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\item\textsuperscript{33} Directions as to the number of jurors to be drawn appear at Wis. STAT. § 805.08(2) (1983-84).

\item\textsuperscript{34} The examination of the jurors under oath is explained at Wis. STAT. § 805.08(1) (1983-84).

\item\textsuperscript{35} Hittner, \textit{A Judge's View of Jury Service: A Personal Perspective}, 47 TEX. B.J. 227, 228 (1984).

scrupulously honest in answering the questions and not to be concerned about keeping myself on the panel.

The lawyers’ questioning is designed first to identify any jurors who are not competent or who are biased. These jurors might be excused by the judge for cause. In this case defense counsel advised us that the defendant was Egyptian and held dual citizenship. He asked whether these facts would influence any of us and prevent us from giving the defendant a fair trial. No hands were raised.

In another criminal case for which a jury was selected that day, the defendant was a black Cuban man who spoke little English. We were told that the man sitting next to the defendant whispering into his ear was an interpreter. Just five months earlier our court had written an opinion requiring the state to furnish interpreters to indigent criminal defendants who do not understand English. I was surprised how distracting the interpreter’s whispering was and how defense counsel had to strain to hear the jurors’ responses. Nevertheless, despite the distraction, I thought our opinion was right. It was essential that the defendant understand what was happening in the courtroom.

Defense counsel asked a series of questions to discover whether any of the jurors harbored prejudice against a black or a Cuban. There were no blacks in the jury box, and of the

37. Wis. Stat. § 805.08(1) (1983-84) provides:

Qualifications, examination.
The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court’s examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.


39. In Ham v. South Carolina, 409 U.S. 524 (1973), the Court held that on the facts of the particular case, the trial judge was constitutionally compelled to inquire into the possibility of racial prejudice. In subsequent cases the Court clarified Ham, holding

other jurors in the room, only one was black and one was oriental. Minorities are typically underrepresented on juries. Would anyone confess to such prejudices? One juror raised his hand. He said that on the basis of his job experiences, he did not think he could give the defendant a fair trial. The lawyers looked at the judge. The judge thanked the juror for his honesty and excused him.

Jury researchers—and that group includes lawyers, sociologists, psychologists, social psychologists, anthropologists, linguists, and experts in communications and persuasion—are attempting to find out what kinds of questions would uncover racial and other biases. The possibility of hidden bias presents an important concern for courts committed to fair trials.

In the last few years our court has reviewed two troublesome cases raising the question of juror bias. In both cases, after the jury had rendered a verdict, a juror later asserted that bigotry had tainted the deliberations.

that there is no absolute right to question jurors about racial bias whenever there may be a confrontation in a criminal trial between persons of different races. Inquiry is constitutionally mandated only when special circumstances inextricably link the issue of race with the factual issues at trial. See, e.g., Ristaino v. Ross, 424 U.S. 589 (1976).

In Turner v. Murray, 106 S. Ct. 1683 (1986), the United States Supreme Court held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." Id. at 1688. The Court said that it was not retreating from Ristiano; the Turner case differs from Ristiano because in Turner the defendant was not only being accused of a crime against a white victim, but also the crime charged was a capital case.


For a discussion of the use of the peremptory challenge to strike jurors of a particular race, see Abrahamson, Justice and Juror, 20 GA. L. REV. 257, 287-92 (1986).

41. Vivian Gornick reports that the jury on which she served scrupulously avoided any reference to color—until the twelfth hour of its deliberations. Then, "[t]he word black was a match struck to a can of gasoline: conflagration blazed in less than thirty seconds." The judge had asked the jurors to reason from the evidence; no one, Ms. Gornick wrote, "counted on the implacable weight of racial hostility." Gornick, On the Jury, ATL. MONTHLY, June 1979, at 73.
In the first case, a juror in a civil case said that during deliberations another juror had referred to a corporation's officer as a "cheap Jew." The verdict was against the corporation.

In the second case, a criminal case involving prostitution, the jury had been deliberating for six hours when one juror said to the others: "Let’s be logical, he’s a black, and he sees a seventeen year old white girl—I know the type." Another member of the jury expressed agreement with the statement. Within twenty minutes the jury found the defendant guilty of soliciting prostitutes and keeping a place of prostitution.

The issue for our court was whether to permit these two jurors to testify about the deliberations. Resolution of this issue turned on other questions: To what extent and under what circumstances should the court allow losing parties to challenge verdicts? How important is the value of finality? Should courts zealously guard confidentiality of the jury's deliberations? Or, if there is a charge of ethnic or racial bias, should the court allow the jury to be examined for impartiality? In the civil case, our court ordered the trial court to hear the juror's testimony. In the criminal case, the court refused to permit the challenge to the verdict.

While one purpose of the *voir dire* is to uncover bias, a second purpose is to allow the parties to eliminate those jurors who they think might, for one reason or other, be unsympathetic to their position. Each side may strike a limited number of jurors; this is the peremptory challenge.

While lawyers talk about wanting an impartial jury, in reality, each side attempts to seat jurors with psychological predispositions favoring its side. According to jury folklore, some groups are more apt to favor the defense, and others, the

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42. After Hour Welding, Inc. v. Laneil Management Co., 108 Wis. 2d 734, 736, 324 N.W.2d 686, 688 (1982).

prosecution.\textsuperscript{44} In 1936 Clarence Darrow, for example, recommended Congregationalists and Unitarians for the "under-dog" rather than Baptists and Presbyterians.\textsuperscript{45}

All of us have predilections, whether or not we are aware of them or are willing to admit them. Russell Baker "admitted" his in reaction to his summons to jury duty. He wrote:

Most people are surely willing to spend some time at the courthouse without pay if they can have the chance to send people to jail and bring in large financial judgments against those utilities that are always raising your rates and then telling you to "have a nice day." . . . I don't want to suggest that I would be a bad juror . . . . I certainly wouldn't dream of bringing in a multimillion-dollar finding against some detestable public utility until its lawyers had finished their devious attempts to distort all the evidence and smear the good name of the poor crippled widow who had brought the suit. This notice in the mail warns me that unless I acknowledge it within 10 days I will be haled into court and subjected to the rigors of the law. They don't have to threaten me. Back it goes in this afternoon's mail. I can't wait to start loading the trains to Attica and making poor crippled widows very, very happy.\textsuperscript{46}


For studies about who wins, who loses, and whether juries treat everyone the same, see publications of the Institute for Civil Justice (The Rand Corporation): \textit{A. CHIN & M. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY
Social science research indicates that the lawyer's hunches or intuitions about jury selections are unreliable. Psychologists have been attempting to relate specific juror characteristics to a general propensity to convict or acquit. Members of the legal and social science communities question the success of the social scientists' approach.

Since the late 1960s, lawyers have hired social scientists as consultants to aid in jury selection. The validity of the con-
consultants' advice depends on two assumptions: first, that a survey can determine the general relationship between juror characteristics and a propensity to favor a particular party, and second, that the particular juror in the jury box will behave according to this relationship. The correctness of these assumptions and the value of scientific jury selection is being debated in the popular press and in the professional journals. 48

In addition to general questions of validity, the injection of the behavioral sciences into the selection of juries raises significant social and administrative questions. One is cost and the ability of the rich and the poor to obtain equal justice. A second and equally significant question is the effect of such jury selection on the ability to obtain a fair trial. When a jury represents a cross section of the community, we assume that the biases, training, experiences, and values of the individuals will balance each other. The objective of psychological screening

of whether performance at one trial should be a measure for another, totally different proceeding.

Davis Trial Raises Troubling Questions, Milw. Sentinel, Nov. 8, 1985, at 18, col. 1.


of jurors is to obtain a jury with a shared bias. Some critics suggest barring this type of tampering with jury selection by limiting the information available about jurors, limiting the scope of *voir dire*, and reducing the number of peremptory challenges.\textsuperscript{49}

At this stage, due to our limited knowledge about human behavior and in light of our failure to resolve the attendant social issues of scientific jury selection, psychologists and lawyers suggest that perhaps the most significant objective of the *voir dire* is to familiarize the jurors with the case. They suggest that *voir dire* be used to inoculate the jurors against unfavorable facts, to emphasize favorable law or facts, and to guide the jurors in sorting out the facts and law of the case. Furthermore, psychologists tell us that persons who make public commitments to behave in certain ways are likely to follow through on those commitments.\textsuperscript{50}

In our case the district attorney started the questioning. Do you know the defendant? Do you know any of the attorneys? Do you or any members of your family work for the Madison police department or sheriff’s office? When he asked whether any of us knew people in the district attorney’s or public defender’s office, I raised my hand. Could I nevertheless decide the case impartially? Yes. The prosecutor asked whether any of us would be unwilling to convict a person of stealing even if the amount stolen was small or if we disagreed with the law. We committed ourselves to apply the law, like it or not.\textsuperscript{51}


\textsuperscript{51} For discussions of the juror as policymaker and jury nullification (i.e., the jury’s deciding the case on the basis of its own conscience rather than on the basis of the law as instructed), see, e.g., M. KADISH & S. KADISH, Discretion to Disobey (1973); Barkan, Jury Nullification in Political Trials, 31 Soc. Pros. 28 (1983); Becker, Jury Nullification: Can a Jury Be Trusted?, J能看到 Which Law? 582 (1939); Irish, Does Conscience Matter More Than Law?, UPDATE, Winter 1981, at 18; Jacobsohn, Citizen Participation in Policy-Making: The Role of the Jury, 39 J. Pol. 73 (1977); Kunstler, Jury Nullification in Conscience Cases, 10 Va. J. Int’l L. 71 (1969); Levine, The Legislative Role of Juries, 1984 Am. B. Found. Re-
Defense counsel asked whether any of us would be influenced by the fact the defendant was divorced and had violated a court order not to see his former wife. I immediately surmised that the defendant was going to testify and that the lawyer was telling us of prior offenses instead of letting the state bring forth the defendant’s misdeeds. Our silence committed us not to hold those prior acts against the defendant in judging him on the alleged crime.52

Defense counsel asked, “Do you know who Juror Number Three is?” He pointed at me. No response. “In real life she’s Justice Abrahamson of the Wisconsin Supreme Court,” he said. “She’s here just like the rest of you—to listen and to decide the case on the evidence; Judge Torphy will explain the law to you and to her. Will any of you be more persuaded by her than by anyone else? Are you going to let her dominate jury deliberations?” They shook their heads no. Defense counsel was thus instructing us about my role. I was relieved that my identity was out in the open. If the defendant was to get a fair trial, either all the jurors should know my occupation or none of them should know.

Voir dire lasted about an hour. Now each lawyer would strike five of us.53 That would leave thirteen, one of whom

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53. The number of peremptory challenges permitted in criminal cases is set forth in Wis. Stat. § 972.03 (1983-84).
would be an alternate and would be eliminated by lot before we entered deliberations.\textsuperscript{54}

I silently made my own strikes. One choice was the woman next to me who had told the lawyers during \textit{voir dire} how unhappy she was to be serving when she had just started a new job. I was right—she was off. Another choice was a woman whose relative worked for the Dane County Sheriff's department. I was wrong—she stayed on. Since all my friends had told me that I would be struck, I concluded that I would be. Wrong again; although I was later struck from two drunk driving cases.

The trial began on Friday: The Case of the Missing City Directory.

The judge advised us that because the trial would be short, he thought it unnecessary to permit us to take notes. I leaned forward. The judge was carefully complying with the statute which requires the trial judge to determine whether the jurors may take notes of the proceedings and to state the reasons for the determination.\textsuperscript{55} Juror note taking is controversial in legal circles. Proponents say it helps the jury keep the facts straight. Opponents say that note taking is distracting, that the notes may be wrong, that the person who takes notes has too much influence, and that jurors need not take notes since

\textsuperscript{54} Wis. \textsc{stat.} §§ 972.04(1), 972.10(7) (1983-84) allow more than twelve jurors to be impaneled and provide for discharge of the extra jurors. See \textit{State v. Lehman}, 108 \textsc{wis.} 2d 291, 321 N.W.2d 212 (1982) (discussing substitution of alternate jurors).

\textsuperscript{55} Wis. \textsc{stat.} § 972.10(1) (a) (1983-84) provides as follows:

(a) After the selection of a jury, the court shall determine if the jurors may take notes of the proceedings:

1. If the court authorizes note-taking, the court shall instruct the jurors that they may make written notes of the proceedings, except the closing arguments, if they so desire and that the court will provide materials for that purpose if they so request. The court shall stress the confidentiality of the notes to the jurors. The jurors may refer to their notes during the proceedings and deliberation. The notes may not be the basis for or the object of any motion by any party. After the jury has rendered its verdict, the court shall ensure that the notes are promptly collected and destroyed.

2. If the court does not authorize note-taking, the court shall state the reasons for the determination on the record.

For a similar provision relating to civil trials, see \textsc{wis.} \textsc{stat.} § 805.13(2) (1983-84). These provisions were amended by \textit{Supreme Court Order filed April 30, 1986}, to exclude written notes of the opening statements.
they can ask to hear testimony repeated. Our case would be a short trial with relatively simple facts. But no one juror recollected every detail. Like others, our jury had what Professors Kalven and Zeisel call "collective recall." Each juror remembers and shares different parts of the trial from a different perspective.

The lawyers first presented opening statements and then their witnesses. An employee in the city assessor's office testified that she helped the defendant use the city directory belonging to the assessor's office. A police officer testified that two weeks later he found the city assessor's directory in the defendant's car when he arrested the defendant and impounded the car.

The defendant, a graduate student at the University of Wisconsin, testified he had gone to the assessor's office to consult the directory for clues to his wife's whereabouts. He had taken the book to the University to duplicate some pages because the duplicating machine outside the assessor's office was broken. The state stipulated that the machine was broken. The import of the defendant's testimony was that he intended to return the book.

There were a few objections to the questions, and the judge handled them easily. The jurors in this trial were not given the opportunity to ask the witnesses any questions. Although it is within the judge's discretion to allow such questions, few judges do; and one of the usual complaints of jurors is that they do not get the facts they think are important. It is strange that jurors cannot ask questions. "In very few other

56. Wisconsin Judicial Council Committee on Improving Jury Communications, Final Report, 29 (June 21, 1985) (unpublished manuscript) recommended, on the basis of a study of ninety-six jury trials, that the Wisconsin Supreme Court adopt a rule amending secs. 805.13(2)(a) and 972.10(1)(a) requiring the court to permit jurors to take notes during all or part of the trial proceedings. See note 55 supra.


instances in life do you have people trying to make relevant decisions without asking questions."  

After lunch the lawyers presented their closing arguments and Judge Torphy instructed us on the applicable law. Having often read these instructions in my own chambers, both in the form books and in the trial records of cases before our court on review, I was familiar with them. I wondered whether the instructions were clear to jurors who were not familiar with them. Hearing them, I thought they seemed different from what I had read silently to myself.

I knew that the judge would give the jury a written copy of the instructions for its deliberations. Our court had recently upheld the validity of a statute requiring judges to do so. The


59. Wis. STAT. § 805.13(4) (1983-84), applicable to civil trials, provides:

INSTRUCTION. The court shall instruct the jury before or after closing arguments of counsel. Failure to object to a material variance or omission between the instructions given and the instructions proposed does not constitute a waiver of error. The court shall provide the jury with one complete set of written instructions providing the substantive law to be applied to the case to be decided.

Wis. STAT. § 972.10(5) (1983-84), applicable to criminal trials, provides:

When the evidence is concluded and the testimony closed, if either party desires special instructions to be given to the jury, the instructions shall be reduced to writing, signed by the party or his or her attorney and filed with the clerk, unless the court otherwise directs. Counsel for the parties, or the defendant if he or she is without counsel, shall be allowed reasonable opportunity to examine the instructions requested and to present and argue to the court objections to the adoption or rejection of any instructions requested by counsel. The court shall advise the parties of the instructions to be given. Counsel, or the defendant if he or she is not represented by counsel, shall specify and state the particular ground on which the instruction is objected to, and it shall not be sufficient to object generally that the instruction does not state the law, or is against the law, but the objection shall specify with particularity how the instruction is insufficient or does not state the law or to what particular language there is an objection. All objections shall be on the record. The court shall provide the jury with one complete set of written instructions providing the substantive law to be applied to the case to be decided.
statute had been challenged as a usurpation of the judicial function.\(^6\)

In legal circles the issue of furnishing the jury written instructions is controversial. Some say that the juror's ability to read the instructions helps the jury. Others say that on its own the jury may pay undue attention to particular words or phrases in the instructions.\(^6\)

The Wisconsin jury instructions are drafted by a committee of lawyers and judges. No persons trained in communications or the behavioral sciences take part in the drafting. As you might guess, comprehensibility of jury instructions is a major problem in law today.\(^6\)

60. E.B. v. State, 111 Wis. 2d 175, 330 N.W.2d 584 (1983). The E.B. court concluded that instructions relating to the burden of proof did not fall within the statute requiring the jury to be furnished with written instructions on substantive law and that a court's failure to submit written instructions to the jury does not mandate automatic reversal. Wisconsin Judicial Council, Committee on Improving Jury Communications, Final Report, at 29 (June 21, 1985) (unpublished manuscript), recommended that secs. 805.13(4) and 972.10(5) be amended to require that one set of written instructions setting forth the burden of proof be provided to the jury for use during deliberations. These provisions were amended by Supreme Court Order filed April 30, 1986, to require that written instructions concerning the burden of proof be furnished to the jury.


A key instruction in this case was the one about the defendant's intent. The parties apparently were disputing only
one element of the crime as defined in the instructions: whether the defendant intended to deprive the city permanently of its book. The instructions explained—and consider this carefully, please—that "the intent to deprive the owner permanently of possession means that the defendant has the purpose permanently to deprive the owner of such possession." The instruction goes on to say, such intent must be found as a fact before the jury can find the defendant guilty. We could not look into the defendant's mind to find his intent. We would have to determine such intent directly or indirectly from all the facts presented in evidence, from statements or conduct of the defendant which indicated his state of mind. We were the sole judges of the facts and must not find the defendant guilty unless we were satisfied beyond a reasonable doubt that the defendant intended to deprive the city permanently of possession.

I thought I now understood why the lawyers had not struck me from the jury. A lawyer or judge would have no better insight into intent than would the machine repair person, the homemaker, the government employee, or the retiree who were also on the jury.

It was two-thirty when the bailiff escorted us to the jury room. We were twelve strangers locked in an austere, windowless room with a large gray metal table, fifteen or sixteen chairs, two adjoining washrooms, water, coffee, paper, pencils, the jury instructions, and the key exhibit—the City Directory. Another juror paged through the directory; the inside cover revealed its price—about $130.

In Dane County the jurors are given an orientation program and view a film about jury duty. Jurors have commented that they would benefit from juror education programs. See, e.g., Crosgrave, A Juror's Experiences, 21 ILL. L. REV. 530, 531 (1927); A.I.G., Confessions of a Juror, Wis. B. BULL., Aug. 1956, at 21, 65; Goren, Ladies and Gentlemen of the Jury, 28 J. EDUC. SOC. 325 (1955); Inglewood, Thoughts of a Jurywoman, WOMAN'S JOURNAL, Dec. 1929, at 24, 25, 44; Kennebeck, From the Jury Box, in THE JURY SYSTEM IN AMERICA 235, 249 (R.J. Simon ed. 1975); McKelway, Layman's View of Jury Service, 5 F.R.D. 207 (1945); Seymour, "They Don't Care About Us", 51 N.Y. ST. B.J. 380, 416 (1979).

63. Wis. JI-Criminal 1441 (1980).
By about six o'clock it appeared that the jurors would be dining together. The bailiff said he would order sandwiches and offered to call our families. I had a further request for the bailiff: would he mind reading a recipe to my husband over the phone? I had agreed to take hors d'oeuvres to a dinner party that night, a party for people attending a conference on judicial disability. I quickly wrote out the recipe. Seymour would have to make the dish and deliver it, along with my regrets.

After dinner we resumed our deliberations. We continued to discuss the evidence from a myriad of angles. The Dane County Juror's Handbook encouraged us to speak fully and frankly and to listen carefully to the comments of our fellow jurors. We did. The jury handbook and jury instructions admonished us not to rely on any private sources of information but to use our own experiences, knowledge, and common sense in reaching our conclusions. The line between private sources of knowledge and experiences on the one hand and knowledge and common sense on the other is not bright and clear. Nevertheless, we tried to keep on the correct side of the line. One judge tells juries to picture the words "experience" and "common sense" "in capitals reaching from the floor to the ceiling of the courtroom."

The juror's handbook said that "jury deliberation is not the place for emotions, prejudice or sympathy, but rather for the calm review of the facts and applicable law." Sometimes we were calm and sometimes we were not. We voted—by hand, by voice around the table, by secret ballot. We also spoke out of turn—sometimes several speaking at the same time. There were hoarse comments, angry shouts, and laughter, apparently audible at times in the corridor. A newspaper reported that "at one point, a man's voice said, 'This is ridiculous.' "

65. Dane County Juror's Handbook at 12 (available through Circuit Court, Dane County Courthouse, Madison, WI 53709).
66. Id. at 12-13.
67. Notes and Comment, The Talk of the Town, New Yorker, Nov. 21, 1984, at 47.
The juror's handbook states that only after the trial may the juror discuss the case with other people, and that the juror has no obligation to reveal her or his vote or justify the decision.\(^7\) I choose not to discuss the deliberations of this jury for several reasons. The jury hung— it did not reach a unanimous verdict as required in criminal trials. For several months the case was scheduled to be retried in Dane County. Ultimately the prosecutor dismissed the case.

Furthermore, I believe there are values that may be served in keeping closed jury deliberations confidential, except under compelling circumstances.\(^7\) We spoke freely for nine or so hours. We tested out theories, ideas, arguments. We expected our conversations to be confined to the room, not to be overheard or repeated.

In lieu of discussing our deliberations, I shall comment on several aspects of the deliberations from my own experiences as a judge and as a juror, from the perspective of other persons who have written about their jury experiences, and from the reported research of lawyers and social scientists on the jury.

First, the subject of our deliberations was typical. It is not at all unusual for a jury trial to involve what some might call a minor offense. This case was a misdemeanor theft charge, not a felony. The judge did not state the punishment, but the statutes provide a maximum penalty of nine months in jail or a $10,000 fine or both.

The county probably spent more than $1,000 to assemble the jury and conduct a one-day trial for the alleged theft of a book worth about $100. None of the jurors complained that the case was too small for us to handle. I have, however, read that jurors complain about the cost of the jury and object to spending valuable time on petty theft cases.\(^7\) In contrast,

\(^{70}\) Dane County Juror's Handbook, at 3.


\(^{72}\) Pileggi, *Alice in Juryland*, NEW YORK, Mar. 26, 1984, at 47, 58. A textile company executive was reported as saying that she thought a misdemeanor theft case should have been handled by a local magistrate.
Chief Justice Burger\textsuperscript{73} and others suggest that perhaps the jury should not be used for complex civil litigation. Yet other commentators suggest that high technology cases are so complex that neither a judge nor jury can master them.\textsuperscript{74}

Just as the subject of the case was typical, so was the procedure we followed. The jurors’ first task was to select a foreperson to chair the meeting. Jury studies report that the foreperson is chosen in a number of ways. Often the jurors select a person willing to serve or the person sitting at the head of the table—the foreperson’s normal seat. According to the available literature, jurors who know a lawyer or a judge is among them often turn to that person to serve. Some judges and lawyers accept the position of foreperson; others decline, preferring not to take such an active role. I was not the foreperson.

At one point during our deliberations, the jury wanted clarification of the instructions relating to intent. Researchers report that instructions about intent generally cause difficulty among jurors.\textsuperscript{75} Our foreperson wrote out the question and

\textsuperscript{73} Burger Suggests Waiving Juries in Complex Civil Trials, Nat’l L.J., Aug. 13, 1979, at 21, col. 1.


gave it to the bailiff, who was seated outside the locked door. The bailiff returned about a half hour later with a written message from the judge: the jury should reread the instructions he had already given us.\textsuperscript{76}

In the hundreds of trial court records I have read as an appellate court judge, this same scenario is reported often. Perhaps the judge does not provide additional instructions because he or she is concerned that an appellate court might rule that the additional instructions had unduly affected the outcome of the case. I sympathized with Judge Torphy. He had a short time to make up his mind. Our court can study a transcript for several days or weeks and discuss the instructions at length to decide whether the instructions were correct.

Although the votes fluctuated we were not able to reach a unanimous decision. The juror’s handbook explained: “You should not hesitate to change your opinion, if your reasoning and judgment have changed, but no juror is required to vote against personal conscience. The jury should work together to reach a verdict.”\textsuperscript{77} In their 1966 book entitled \textit{The American Jury}, Professors Kalven and Zeisel reported that the vote of the majority on the first ballot usually becomes the result of the case.\textsuperscript{78} The jury is hung in less than ten percent of the cases.\textsuperscript{79}

At about ten-thirty the foreperson reported to the bailiff that we had not reached a decision. The bailiff escorted us to the courtroom where the foreperson announced to those present—judge, counsel, and defendant—that we were deadlocked. The judge asked the foreperson whether she thought it would do any good to continue trying to reach a decision. She asked for more time.

We returned to the jury room and deliberated for more than an hour. Sometime after midnight the foreperson sent a note to the judge saying the jury was divided ten to two, without identifying the persons on each side and without explain-

\textsuperscript{76} Wis. Stat. § 805.13(5) (1983-84) allows the court to reinstruct the jury or give supplementary instructions.

\textsuperscript{77} Dane County Juror’s Handbook, at 13.


\textsuperscript{79} Id. at 56-57, 453, 508-09.
ing whether the ten were for conviction or acquittal. It had been a long day and we had done our best. We shook hands and embraced. We returned to the courtroom. The judge graciously thanked us. We left in twos and threes. It was nearly one o'clock in the morning.

We were twelve conscientious, earnest people, twelve strangers chosen at random from a county of more than 300,000. We had been entrusted with decision making power. An awesome power—sitting in judgment of another human being to decide whether the community labels him a thief; to determine whether he should be deprived of his liberty. Our deliberations were secret. We needed to report only our final answer, and we needed to give no reasons for our answer.

When I sit in the supreme court, we do not decide the guilt of the defendant. We affirm the jury verdict or reverse and ordinarily order a new trial. As appellate judges our vote is not secret; it is reported. Furthermore, we must furnish written justification for our votes.

Yet, in many ways, the jury's deliberations are like the conferences in which appellate judges make their decisions. Both the jury and the appellate court are deliberative bodies; both are small groups making decisions. Judges, like jurors, have personal predilections and values. Judges, like jurors, consider the facts, the legal principles, and the equities. Both try to use rational arguments to reach and justify their result. Both groups are subject to psychological mechanisms—processes by which individual perceptions change when exposed to group discussion. Justice cannot be programmed into a computer.80


For a film of a jury deliberation by University of Wisconsin Law School Professor Stephen Herzberg, see “Inside the Jury,” one of the “Front Line” series produced by WGBH, Boston Public Television. See Milw. J., Dec. 12, 1985 (Accent Section), at 25, col. 1.

Through its long history, the jury has been condemned and celebrated.\(^1\) The controversy has engaged great names in law and philosophy—including Hamilton, de Tocqueville, Blackstone, Montesquieu, Bentham, Wigmore, Pound, Lord Justice Devlin, Griswold, and Chief Justice Burger.

 Critics of the jury stress its lack of predictability, its inefficiency, and its costs. The advocates assert that our political system is based on the assumed competence of the common person to participate in the political process. They see the jury as a remarkable political institution allowing citizens to participate actively in the judicial system and to infuse the law with the community's sense of justice. To the advocates, justice cannot be measured in dollars; courts should be gauged by how they dispense justice, not how they dispatch business.

The battle rages in the 1980s.\(^2\) At this moment, I am on the side of the jury. The system works. I've seen it. How-

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Decision making is not easy. For a discussion of juror trauma, see Kaplan, *Death, So Say We All*, PSYCHOLOGY TODAY, July 1985, at 48.


For more recent discussions of jury trial, see, e.g., P. DiPerna, *Juries on Trial* (1984); R. J. Simon, *The Jury: Its Role In American Society* (1980); Annual
ever, like all legal institutions, the jury will continue to change.

I conclude as I began—with Chesterton’s view of the jury:

[T]he instinct of Christian civilization has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and coarse faces of the policemen and the professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a play hitherto unvisited.

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.\(^{83}\)
