VOIR DIRE: STRATEGY AND TACTICS IN THE DEFENSE OF SOCIAL AND POLITICAL ACTIVISTS

The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former.

MR. JUSTICE STORY
Commentaries on the Constitution of the United States. 1883[1]

I. INTRODUCTION

LITERALLY INTERPRETED, Voir Dire means to speak the truth[2]—and therein lies the problem.[3] It is defense counsel who must be prepared to probe deeply in an effort to uproot the true convictions of the potential jurors.[4] This is not to suggest that those jurors being administered the voir dire are engaged in a conscious effort to deceive the court (although obviously, some are), but rather that unconscious deception often is practiced to mask prejudices which if consciously admitted, would threaten a person's psychological well-being.[5] It is most difficult, indeed, for one to assert such deeply held feelings as racist, political or religious prejudices, but they do exist, and must be coped with.[6] This dilemma is one of considerable import in all trials, though when the setting is one in the "political" or "social" arena, the ramifications take on new dimensions of acuteness. The defendant's appearance, philosophies, attitudes or life style can invoke the jurors' fears and prejudices, which

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[1] Justice Story cites from 3 BLACKSTONE'S COMMENTARIES 349, 350 and 4 BLACKSTONE'S COMMENTARIES 379-381.

[2] State v. McRae, 200 N.C. 149, 155, 156 S.E. 800, 803 (1931); BLACK'S LAW DICTIONARY 1746 (rev. 4th ed. 1968).

[3] The prejudices which all people harbor to one degree or another were well recognized by Charles Garry in his defense of Huey P. Newton. State v. Newton, No. 41266, Super. Ct. Alameda County, Sept. 27, 1968. *See* A. GINGER, MINIMIZING RACISM IN JURY TRIALS—THE VOIR DIRE CONDUCTED BY CHARLES GARRY IN STATE V. NEWTON (1968) [hereinafter cited as GINGER]. *See also* KALVEN & ZEISEL, THE AMERICAN JURY (1966); Broeder, *The Negro in Court,* 1965 DUKE L.J. 19 (1965) [hereinafter cited as Broeder].

[4] Additionally, it should be noted that in many jurisdictions the trial judge is an active participant in the voir dire. This is also true in the federal sphere which is governed by FED. R. CIV. P. 42(a) and FED. R. CRIM. P. 24(a).

[5] Kuhn, *Jury Discrimination: The Next Phase,* 41 S. CAL. L. REV. 241-43 (1968) [hereinafter cited as Kuhn]. *See also* GINGER, *supra* note 2, at xix, xx.

[6] C. JOINER, CIVIL JUSTICE AND THE JURY 66-79 (1962).

create an impregnable wall off which evidence will merely bounce or be twisted. This situation fosters something less than the fair and equitable administration of justice; and as a result, commentary correctly signaling the demise of another element in the American judicial system.

It is the considered judgment of many distinguished commentators that the judicial structure is in grave trouble, and that only an enormous amount of reordering will save it from total collapse.[7] If one considers the fact that the foundation of any system of social order must by definition rest upon the support of those who subject themselves to its scheme, then those who echo doom may in fact be resounding the already begun erosion. With the courts increasingly being the forum for legal disputes between those who demand change in the superstructure and those who represent (or are) the structure, a rather unfortunate by-product has evolved: a feeling that the courts can no longer adequately dispense justice.[8] This manifests itself in beliefs that if one is prosecuted for activities that were designed to advance social change, either in violation of the law or not, that the individual will not be afforded a fair trial;[9] a reflection that the social or political activist will not be judged by an impartial jury.

It is obvious that these feelings are not pure truth or pure fallacy, but rather, part of a social milieu of frustration, misinformation, emotionalism, and fear. For the purposes of this comment, it is enough to assume that this proposition has considerable validity. As such, the writer's goal in this comment is to supply information to assist in selecting impartial jurors, and as residual value, to restore a small amount of the mortar which has been chipped away from the foundation of the philosophy of justice.

II. VOIR DIRE PREPARATION: PRE-SELECTION INVESTIGATION

The right to trial by jury is nothing more than an empty promise if the jury is less than impartial.[10] To minimize the chances of this occurrence, it is imperative that the first step in the preparation stage be a complete assembly of all available information relating to the case. Once

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[7] *See* E. CAHN, THE SENSE OF INJUSTICE (1949); R. CLARK, CRIME IN AMERICA (1970); DOWIE, JUSTICE DENIED—THE CASE FOR REFORM OF THE COURTS (1971); R. GOLDFARB, RANSOM—A CRITIQUE OF THE AMERICAN BAIL SYSTEM (1965); S. ROSENBLATT, JUSTICE DENIED (1971); Hufstedler, *New Blacks for Old Pyramids—Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971). *See also* Dolan, *Law and the Class Struggle*, JURIS DOCTOR (April 1971).

[8] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, THE KERNER REPORT (1968) [hereinafter cited as KERNER REPORT]; Lefcourt, *Law Against the People*, in LAW AGAINST THE PEOPLE 21-22 (1971).

[9] THE REPORT OF THE TASK FORCE ON VIOLENT ASPECTS OF PROTEST AND CONFRONTATION OF THE NATIONAL COMMISSION OF THE CAUSES AND PREVENTION OF VIOLENCE, THE POLITICS OF PROTEST 323-24 (J. Skolnick ed. 1969).

[10] *See* Glasser v. United States, 315 U.S. 60 (1942). *See also* Lee v. Baltimore Hotel, 345 Mo. 458, 464, 136 S.W.2d 695, 698 (1939).

compiled, this information then becomes a tool which is not only of great value during the voir dire, but also throughout the entire litigation, in that it serves as an excellent reference for cross-examination, direct examination and evidentiary matters.

Because the voir dire is controlled by statute in most jurisdictions,[11] the statutory mandate becomes the first area of investigation. In almost every instance, the statute will define the general nature of acceptable questions,[12] the grounds for challenge for cause,[13] the number of peremptory challenges,[14] and the relationship between the trial judge and the attorneys in the examination of the potential jurors.[15] With a comprehensive knowledge of the statutes and case law of the jurisdiction, the second and most tedious task begins.

It is desirable that the defense compile an up-to-date statistical profile on the residents of the county and the community from which the juror array (statistical universe) is determined. There are three reasons for this procedure:

1. The information may later be used for statistical evidence in a challenge to the array.
2. The information will assist in the question design for the actual voir dire.
3. The information may assist attorneys from other jurisdictions in understanding the composition of the community.

The primary source of data is the local public library which generally keeps complete up-to-date census tracts[16] which provide average income, race, religious preference, political affiliations, age breakdowns and employment profiles. A secondary source in some jurisdictions will be the county courthouse which may provide specialized voter information, and in some cases, demographic data on past juries. Both sources can provide valuable data on the general composition of the array and its subsequent juries.

The second major area in this stage is the collection and cross-referencing of each and every reference to the case made in the news media or general public. This includes the reporting of the incident at its first instance, the news coverage to date, and a complete list of every

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11 OHIO REV. CODE §§ 2313, 2945.17-2945.36 (1953).

12 OHIO REV. CODE § 2945.27 (1957).

13 OHIO REV. CODE § 2945.25 (1953).

14 OHIO REV. CODE §§ 2945.21-2945.22 (1953).

15 OHIO REV. CODE § 2945.27 (1957).

16 U.S. BUREAU OF THE CENSUS, CENSUS TRACT REPORTS, Series PHC (1) (1971); U.S. BUREAU OF THE CENSUS, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, Series PC (1)-C (1971); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (92d ed. 1971).

person who commented upon the case publicly. The reasons for this information are obvious in that:

1. It may be used to argue a change of venue.
2. It may be used in an appeal based on pre-trial publicity.
3. In the voir dire this type of data is necessary to:
   a) Check the level of general news media pre-trial bias, and
   b) To correlate comments made by specific potential jurors—a situation which is usually grounds for challenge for cause.[17]

What has been suggested in the pre-selection area may appear to some to be over-detailing and too time-consuming. Neither is true. The socio-cultural background of jurors creates tremendous conflicts between what they perceive as acceptable avenues of change and what the social or political defendant believes is necessary.[18] Thus, it becomes essential that in the defense of activists, every positive factor be utilized in an attempt to get the least unfavorable predisposed panel of jurors.

III. CHALLENGING THE ARRAY

The Kerner Commission found that the United States is a racist nation, and through conscious or unconscious endeavor reflects it in almost every area of life.[19] The ghettos are geared economically to regeneration,[20] the availability of housing has traditionally been anti-minority,[21] employment opportunities are pro-white,[22] the welfare system (primarily non-white) is a tangled web of perpetual degradation,[23] education has classically been white,[24] and last but surely not least, is the

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[17] State v. Huffman, 86 Ohio St. 229, 99 N.E. 295 (1912); OHIO REV. CODE § 2945. 25(B) (1953).

[18] *See generally* GINGER, *supra* note 2; Lefcourt, *Law Against the People, supra* note 8.

[19] KERNER REPORT, *supra* note 8, at 1-2, 145, 203; M. HARRINGTON, THE OTHER AMERICA 63-82 (1962). *See also supra* notes 20-25.

[20] KERNER REPORT, *supra* note 8, at 413-24; J. K. GALBRAITH, THE AFFLUENT SOCIETY 250-58 (1962); HARRINGTON, *supra* note 19, at 73-80; Clobe, *The Economic Basis of the Law and the State,* in LAW AGAINST THE PEOPLE, *supra* note 8, at 65-80.

[21] KERNER REPORT, *supra* note 8, at 467-82. Though the area of housing is still in dire need of considerable revamping, some advancement has been seen in case law. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Reitman v. Mulkey, 387 U.S. 369 (1967); Shelley v. Kramer, 334 U.S. 1 (1948); Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

[22] KERNER REPORT, *supra* note 8, at 203; HARRINGTON, *supra* note 19, at 63-82.

[23] KERNER REPORT, *supra* note 8, at 203; W. DOUGLAS, POINTS OF REBELLION 70, 92 (1970).

[24] KERNER REPORT, *supra* note 8, at 424-56; HARRINGTON, *supra* note 19, at 63-82; Rockwell, *The Education of the Capitalist Lawyer: The Law School,* in LAW AGAINST THE PEOPLE 90-104, *supra* note 8.

judicial structure—which is white.[25] In face of this a black man or woman comes to trial, either innocent or guilty of the charge, but with a much more substantial chance of being convicted and of receiving a longer sentence because of white racism.[26] The why of this type of justice obviously flows from every element of racism practiced; thus the task is to isolate individual segments of prejudice so as to effectively combat its continuance and growth. One element where considerable work is needed to remedy racism is in the selection process of the trier of fact.

It should be noted that the following discussion would not be necessary if the state legislature would enact procedures to guarantee that racism in jury selection would be minimized. It is hardly startling that until juries represent the minority elements of society they will not be the genuine conscience of the community. The right to a jury trial is basic and deeply ingrained in this country's heritage,[27] a right which by its very nature embraces the right to a fair and impartial jury. As such, the constitutional right to a trial by jury[28] has been held to include an impartial jury drawn from a cross-section of the community.[29]

In almost every jurisdiction the method of designating the array from which the panel will be chosen is, either intentionally or not, one which fosters racism.[30] In an effort to rectify this, counsel may look to the challenge for cause and the peremptory challenge, but both may fail for a number of reasons. First, the challenge for cause will necessarily fall short because of the inevitable concreteness required,[31] and the peremptory is not only limited in number,[32] but and can be used by the prosecutor to further solidify racism because of its use against blacks.[33] The main reason for the challenge's ineffectiveness, however, is integral to the very nature of the challenge; that is, the challenge is in reality, one of selection based upon rejection. In reality, there exists no right to select, only the privilege

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25 KERNER REPORT, *supra* note 8, at 337-57; Broeder, *supra* note 3; Burns, *Racism and American Law*, in LAW AGAINST THE PEOPLE, *supra* note 8, at 38-54; Lefcourt, *Law Against the People*, in LAW AGAINST THE PEOPLE 21-35; Burns, *Can a Black Man Get a Fair Trial In This Country*, New York Times Magazine, July 5, 1970.

26 KALVEN & ZEISEL, *supra* note 3, at 58-61, 210-211; Broeder, *supra* note 3.

27 Commonwealth Dept. of Highways v. Garland, Kentucky, 394 S.W.2d 450 (Ky. 1965).

28 U.S. CONST. amend. VI.

29 Baylis v. Travellers' Ins. Co., 113 U.S. 316 (1885); Glasser v. United States, 315 U.S. 60 (1942); Lee v. Baltimore Hotel, 345 Mo. 458, 136 S.W.2d 695 (1939).

30 *See* GINGER, *supra* note 3, at 3-5, 206-241; KUHN, *supra* note 5, at 237; Broeder, *supra* note 3, at 25; Moore, *Brown v. Board of Education—The Court's Relationship to Black Liberation*, in LAW AGAINST THE PEOPLE, *supra* note 8, at 62.

31 GINGER, *supra* note 3, at xxi; KUHN, *supra* note 5, at 243; Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417 (1969) [hereinafter cited as *The Jury*].

32 OHIO REV. CODE §§ 2945.21-2945.22 (1953).

33 GINGER, *supra* note 3, at xxi; *The Jury*, *supra* note 31, at 1429-30.

to reject. Consequently, one is continually trying to replace racist jurors from an array which is similarly biased. This results in a dichotomy between reality and theory that may make it necessary to challenge the entire array.

The process of selection in the state courts is a matter of local concern, governed by state statutes,[34] which are generally broad enough to leave considerable discretion to the local bench.[35] Although the various systems differ from state to state, and county to county, the general practices are almost universal.[36] There is either a master list, population, array or universe; all amount to the same thing—the group of prospective jurors. From the array, those who are not qualified under state statute are stricken,[37] as are those who are found to be *exempt*[38] *or excused*.[39] From the remaining names, panels are chosen by lot or some other method of chance, such as jury wheels. At this stage the voir dire is supposed to further eliminate those not qualified due to partiality. The mythical result is an impartial and unprejudiced jury that reflects the conscience of the community. The difficulty is that right from the moment of inception the prejudice begins because of the "tainted population." There is a direct correlation between this result and the method by which the population is determined.

The two most common methods of selection are the "Key Man" and the "Public List."[40] The key man is the most repugnant if judged by democratic standards of equal and fair representation. Under this approach, the jury commissioner or his counterpart selects from the community "key men" who recommend others for jury service. This presents two immediate obstacles to obtaining a representative jury. The first is the mirror effect: that people generally associate with those who reflect their own socio-economic class, interests, and backgrounds. This presents a definite problem for the social or political defendant because it would be safe to assume that the defendant and his peers are not rcognized as "key man" material by the commissioner. The second area of difficulty arises from the fact that by the system's very design, it is open to jury stacking. It does not take a conspiratory mentality to grasp the possibility that in trials of political import the "key men" may be, either consciously or unconsciously, over zealous in protecting their vested interests. As a result of these two major flaws, a "sub-culture" is created

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34 OHIO REV. CODE §§ 2313, 2945.17-2945.36 (1953).

35 Cooper v. State, 16 Ohio St. 328 (1885); OHIO REV. CODE §§ 2945.25 (1953), 2945.27 (1957).

36 *See generally* GINGER, *supra* note 3.

37 OHIO REV. CODE § 2313.06 (1953).

38 OHIO REV. CODE § 2313.12 (1953).

39 OHIO REV. CODE § 2313.16 (1953).

40 Kuhn, *supra* note 3; *The Jury*, *supra* note 31, at 1421-22. *See also* KALVEN & ZEISEL, *supra* note 3.

that is no more representative of a community cross-section than is any sub-culture representative of the whole.

The "Public List" system, though not quite so noxious as the "key man" approach, is no rose either. The lists are usually drawn from the tax lists, voter registration files, or telephone directories.[41] All three discriminate either economically, socially, or both. Tax lists, especially those based on property taxes (either real or personal), and voter registration lists are both guilty of socio-economic discrimination.[42] The former obviously accreditable to the realities of poverty, and the latter to the frustration of the same. Telephone directories are somewhat less discriminatory with the increasing subscription to this service, though this also discriminates against the poor.

The standard selection processes are discriminatory, and at best, constitutionally questionable.[43] When the forum is one with social or political overtones, the defense must challene at every available instance that very system which created these conditions. What follows is a fine example of such a challenge. It was filed by Charles R. Gary in his defense of Black Panther, Huey P. Newton.[44]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

No. 41266

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

MOTION TO QUASH THE ENTIRE MASTER PANEL AND JURY VENTURE

VS.

HUEY P. NEWTON,

Defendant

Defendant hereby moves to quash the master panel of jurors; *e.g.*, the entire jury venire on the grounds that black persons, culturally different, and persons of lower economic status have been systematically excluded and are substantially under-represented in said panel, by virtue of the fact that the use of voter's registration lists without supplementation, does, as did the intelligence test rejected in Peop. v. Craig, No. 41750 in the above entitled court (April 18, 1968) result in the dispropor-

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41 Lindquist, *An Analyses of Juror Selection Procedure in the United States District Courts*, 41 TEMP. L.Q. 32, 34 (1967).

42 GINGER, *supra* note 3, at 3-5, 206-241. *See also The Jury, supra* note 31.

43 Kuhn, *supra* note 5, at 265-72; *The Jury, supra* note 31, at 1434-40.

44 GINGER, *supra* note 3, at 3-12. Huey P. Newton was indicted for the murder of an Oakland, California, policeman, John Frey. The alleged murder occurred at 6:00 A.M. on October 28, 1967.

tionate exclusion of identifiable groups, specifically racial minorities and lower income citizens, and produces a master panel which is not representative of the community at large, and particularly not of the black ghetto of Oakland, in violation of the due process and equal protection clauses of the Fourteenth Amendment. Said motion to quash the venire is also based upon the prevalence and existence of white racism amongst the predominantly white persons on said panel and the inability of many of said white persons to understand black culture, or perceive or objectively judge persons manifesting personality and cultural differences from the predominantly white culture.

The motion will be based on this notice, all the pleadings and files in this case, the memorandum of points and authorities filed herewith in support of the motion, the Brief Amicus Curiae of social scientists filed herein, and the Declarations of Bernard L. Diamond, M.D., Robert Blauner, Ph.D., Jan Dizard, Ph.D., Sheldon Messigner, Ph.D. and other Declarations to be filed in support of the motion, and on evidence and oral argument to be heard at the time and motion comes on for hearing.

GARY, DREYFUS, MCTERNAN & BROTSKY

By (CHARLES R. GARRY)

Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH THE JURY VENIRE

I. *Black persons, culturally different, and persons of lower economic status have been systematically excluded and are substantially under-represented by the present use of voters' lists.*

Since the ruling of Judge Avakian in Peo. v. Craig, No. 41750 in the Superior Court of the State of California in and for the County of Alameda (filed April 18, 1968) the jury panels for trial have been drawn from the voters' registration lists of said county. Judge Avakian considered the question of whether the limitation of the jury panel to registered voters is itself too narrow. (See p. *16* et seq.)

Because the statistics and the data and evidence were not before him at that time, the court stated that he felt the percentage of adults otherwise qualified for jury service who failed to register in Alameda County "is probably small . . . since intensive voter registration drives take place before each state and national election and no group is discouraged from registering or voting."

It is clear from the tenor of the court's opinion that upon a showing that a large percentage of black people, other minority racial groups, the culturally different, and lower economic status persons are not registered, that the court would also have struck down the use of voters' lists alone, without augmentation from other sources, as not providing

the constitutionally required "random selection of a fair cross section of the persons residing in the community."

The use of voters' lists without supplementation, as did the intelligence test rejected in the Craig test, results in the disproportionate exclusion of identifiable groups, specifically racial minorities and lower income citizens, and consequently produces a master panel which is not representative of the community at large, in violation of the due process and equal protection clauses of the Fourteenth Amendment. Therefore, the jury venire must be quashed in the instant case.

Although popular conception is otherwise, there has been a substantial increase in non-voting and in occasional voting in this country in the last three-quarters of a century. (See Walter Burnham, "The Changing Shape of the American Political Universe," *59 American Political Science Review,* No. 1 [March, 1965] page 22.) At pages 22-23 Burnham states:

"The late 19th century voting universe (in the United States) was marked by a more complete . . . voting participation among the American electorate than ever before or since."

Burnham sets forth the following percentages:

Core Voters		*Peripheral Voters*	*Non-Voters*
Late 19th Century	66%	10%	24%
Present day	44%	16%	40%

Core voters are those who vote regularly, while peripheral voters are those who vote occasionally. These statistics show, as Burnham states, a "political apathy on a scale quite unknown anywhere in the Western world."

All studies on the subject show that the non-voters are not randomly distributed in the adult population. Social scientists have found that a variety of differences exist between voters and non-voters, psychological, attitudinal and demographic. Seymour Martin Lipset, Professor of Sociology at Harvard University, formerly of the University of California, Berkeley, summarizing a variety of recent voting studies, shows that the following groups tend to vote at a higher rate: men (as opposed to women), those with a higher level of education, those aged 35-55 years, married persons, higher status persons, and members of organizations. Businessmen, white collar workers and government workers vote at a higher rate than do unskilled workers, servants and service workers, amongst which black persons and minority groups are heavily represented. (Lipset, *Political Man,* Anchor Books, Garden City, N.Y., 1963, pp. 187-189; see also V. O. Key, *Politics, Parties and Pressure Groups,* Thomas Y. Crowell Co., New York, 1958, pp. 633-634.

A recent basic study by Angus Campbell concludes that Catholic religious affiliation and higher income are significant

attributes of the voter. (Campbell, et al., *The Voter Decides,* Row, Peterson & Co., Evanston, Ill., 1954, pp. 70-73.)

Precise estimates of the variation in voter turnout rate along these various factors are available and show serious under-representation by the groups amongst which black persons are heavily over-represented. These findings are unequivocal by normal measurement standards of the social and statistical sciences.

The black community in the United States and in Alameda County is distributed along many of the dimensions listed above in quite different proportions than in the white community. (It is to be noted that Judge Avakian stated in his opinion that the residents of West Oakland are predominantly black and of low economic income.) See p. 14.

Blacks have a lower overall level of formal education, lower occupational level, lower income, and a lower proportion of Catholics than do whites. It also has been found that income makes more of a difference in voting turnout for Negroes than it does for whites. (See Edward Litchfield, "A Case Study of Negro Political Behavior in Detroit," *5 Public Opinion Quarterly,* No. 2 [June, 1941] page 269).

In the classic study referred to supra, *The Voter Decides,* Campbell presents the following turnout estimates by race for two recent presidential elections:

	Negro	*White*
1948	36% (61)	66% (585)
1952	33% (157)	79% (1453)

Although turnout rates vary election to election, the cross-racial differences remain strong: an average for these two elections of a 38% lower Negro turnout.

Although the above stated data included the southern region, where Negro voting is of course far lower than in the west and north, the data from other studies bear out Lipset's conclusion that voting turnout of northern Negroes is lower than that of northern whites. (*Lipset, Political Man, supra,* p. 209; see also Lipset, et al., "The Psychology of Voting: An Analysis of Political Behavior" in Gardner Lindzey [ed.] *Handbook of Social Psychology,* Addison-Wesley Publishing Co., Inc., Reading, Mass., 1954, Vol. 2, p. 1132; see also Litchfield's case study of Negro political behavior in Detroit 1930-40, *5 Pub. Opinion Quarterly, supra,* at page 268, and *Litchfield, Political Behavior in a Metropolitan Community* [1941]). For the five elections studied in the Litchfield Detroit study, the average Negro turnout of registered voters was 54.3% and the average native white turnout was 75.1%; it must be noted that failure to vote in a general election removes the voter from the registration lists.

These findings are confirmed by Oscar Glantz' study of the Negro voter in northern industrial cities. (See Glantz, "The Negro Voter in Northern Industrial Cities," 13 *Western Political Quarterly,* No. 4 [December, 1960], pp. 999-1000).

Glantz examined the 1948, 1952 and 1956 presidential ballots in Chicago, Cincinnati, Cleveland, Detroit, Kansas City, Pittsburgh and St. Louis. His results showed the average Negro voting rate for the seven cities over the three elections to lag far behind the overall voting rate. The average Negro rate of turnout of registered voters was 73.6% and for the total registered population 83.4%. These statistics must be further modified by the fact that Negroes and whites are not registered at the same rate. The effect of the varying suffrage laws in the north results in the following statistics, indicating an enormous cross-racial difference of 30%:

Frequency of past voting

	Negro	*White*
Voted in all or most elections . . .	43%	73%
Voted in some or no elections . . .	57%	27%
Number of cases	(111)	(2268)

The available data indicate that in the north Negro voting lags at least 20% behind white voting, and probably 30% behind it. About two-fifths of eligible northern Negroes vote at least most of the time, compared to about seven-tenths of their white counterparts. Negro non-voting is not strictly voluntary. Negroes forced to move while job hunting will often not meet residence requirements for voting. Burnham's study cites several of the well-known features of the American policy that effectively make many persons involuntary non-voters today. And for a description of the plight and lives of urban Negroes which contribute to their non-voting behavior, see Report of the National Advisory *Commission on Civil Disorders,* Bantam Books, N.Y., 1968, an exhibit now filed with this court.

The higher negative contact with the law, as defendants, which characterizes the plight of the blacks in the urban ghetto also disqualifies them from voters' lists and thus from jury service.

Some special factors which should be noted are that fewer people vote in off years, and thus the current Alameda County voters' lists, drawn as they are from the 1966 or 1967 elections, make the present juror universe even less representative than usual. The findings presented from eastern and midwestern cities herein hold true for Alameda County and the far west; see the analysis in "The Negro Voter in the Far West," published by Loren Miller in 26 *The Journal of Negro Education,* No. 3 (summer, 1957) page 263, wherein the author shows that both registration and voting of Negroes have lagged in California and in the rest of the Far West.

II. *The venire should be quashed because of the racism prevalent in the white jurors and because using the present master panel will result in a largely white jury* which does not, and under present circumstances cannot, objectively understand, perceive or judge persons of black culture and personality patterns.*

The racism prevalent in white Americans today is documented in the accompanying declarations and Brief Amicus Curiae of the social scientists. This severe problem or racism affects our society generally, and the black defendant's possibility of a fair trial and poses a serious challenge to the ability of the administration of justice to follow constitutional imperatives.

The problem of the culturally different and the bias implicit in the legal system poses another severe threat to the possibility of the defendant's obtaining a fair trial under the circumstances of this case. Attached hereto and made a part hereof is the study by the Anthropolgist, Daniel H. Swett, Department of Anthropology, San Francisco State College, entitled *Built-in Biases in the American Legal System.*

Further considerations are as follows:

Negro Americans across the nation and particularly in Oakland and Alameda County are discussing "black culture" and Negro distinctiveness. From Harlem to Watts there has been a proliferation of black theatre, art, and literary groups. In his book, *Urban Blues,* the anthropologist Charles Keil uses the blues singer and his audience as the raw materials to outline the distinctive traits and ethos of Negro-American culture, finding the core of this culture in the "soul" ideology. Keil notes that Negroes have a dearly bought experimental wisdom, a "perspective by incongruity" that provides black Americans a unique outlook on life that cannot be shared by whites.

Judge Avakian's opinion states that "One can well imagine how different the results (of intelligence test rejected therein) if half of the vocabulary questions were related to "soul" food, people and music and other terms commonly spoken in West Oakland but almost unheard and unread in Montclair."

The traditional process of all other ethnic immigrant groups to America, involving occupational mobility and the ethnic's increasing contract with dominant institutions, especially education, does not fit the cultural experience of most Afro-Americans. How a minority group enters the host society has fateful, if not permanent consequences. The very manner in which Africans became Americans constituted a rape of traditional culture and social organization. The black man did

* Counsel here notes that should the prosecution peremptorially excuse all black persons who are seated in the jury box, objection based on the unconstitutionality of this practice and of the result will be made.

not enter this country with a group identity as a Negro. This group category could only be formed by the slavemaking operation which vitiated the meaning and relevance of the traditional African identities. The cultural process could therefore not be one of movement from ethnic group to assimilation, since Negroes were not an ethnic group.

But sources of black culture today are Africa, slavery, the south, emancipation and northern migration, and *racism itself*. The racist oppression provides the basis for a more elaborate and more ethnic cultural response than does class exploitation and lower class status. Negro American culture is an ethnic as well as a class culture because the history of black people in the United States has produced a residue of shared collective memories and frames of reference. It is because black Americans have undergone unique experiences in America, experiences that no other national or racial minority or lower class group have shared, that a distinctive ethnic culture has evolved. Though this culture is overwhelmingly the product of American experience, the first contributing source is still African. And the single most dominant factor from today's urban black experience that sets him apart from his white counterpart is contact with the police, described in the Kerner report as the chief complaint of all black communities, and resonant with overtones of brutality. This chief component of black experience, the white American, whether racist or not, does not and cannot share. It is a vital issue in the present proceeding and points up the impossibility of a jury of substantially white persons being able to perceive and objectively render fair judgment in the present case with the meaning of due process of law and equal protection of the laws.

The aesthetic and linguistic principles that underlie Negro-American music and dialect, as well as some movement patterns and religious orientations, have their origins in those peoples, tribes and kingdoms that furnished the slave trade. The first great source of black culture in America is slavery. White Americans have undergone, experienced, or concerned themselves with these institutions from an entirely different point of view. A further source of Negro-American culture, the promises, betrayals and frustrations that followed upon emancipation, cannot be shared by white persons. The great mobility, the moving about and restlessness that characterizes the life of many blacks came directly from this phenomenon (and rendered many Negroes ineligible as voters and thus as potential jurors) and was related to the mobility and promise of the north, the attractions of industry, the push from a depleted southland following emancipation. Finally the racist society made no serious move to assimilate black Americans, and for this reason the Negro ghettos have served more as the setting for the flowering of a distinctive ethnicity, whereas the immigrant ghettos of other groups (Jews, Irish, etc.) were actually way stations in the

process of acculturation and assimilation. Thus analogies from these other ghettos will not serve in the present instance.

In the black community, in different ways than in the white, economic pressures strain the family and matriarchal trends are visible. Particular styles of music, language, style of dress and movement are consciously cultivated. A sense of fatalism, even apathy or quasi-paranoid outlooks pervades the streets. Against some of this, and yet incorporating some of the black heritage and style, the modern national liberation black groups struggle for manhood and a new identity as blacks. As a member of this sub-culture and this militant liberation group, the defendant herein is virtually a stranger to most of the white American voters who will make up the jury under prevailing practice. They are not his peers. They are part of the continuing racist structure that has served to consolidate rather than to erase the distinctive experience of the black past. No other lower class group in America's pluralistic society has met in the past or meets in the present the systematic barriers of categorical exclusion, blockage and discrimination based on race and color. Through this continuing struggle to surmount and change a racist social system, black Americans have created a political history which is the core of the emerging ethnic culture and the clue to contemporary revitalization movement which celebrates blackness. Can a white jury understand the pressures, attitudes, beliefs, on a leader of such a movement? Can such a defendant be constitutionally tried by a jury that perceives him with a racist bias?

It is unpleasant for white Americans to accept the unpleasant fact that America remains a racist society. This awareness of racism is also obscured by the fact that more sophisticated, subtle and indirect forms, that might be termed "neoracism" tend to replace the traditional, open forms that were most highly elaborated in the old south. But the two key characteristics of the racist social structure still obtain:

(1) the division based upon color being the single most important split within the society, the body politic and national psyche, and (2) the various processes and practices of exclusion, rejection and subjection based on color are built into the major public institutions such as labor, market, education, politics and law enforcement, with the effect of maintaining special privileges, power and values for the benefit of the white majority.

III. *Conclusion*

The constitutional requirement, and the policy of the State of California and of the United States that all litigants entitled to a trial by jury "shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes" (28 U.S.C. 1861) requires that sources other than the voter lists must be

used when necessary to foster the policy and protect the rights secured by said section. Under the circumstances herein described, it is necessary to use census tracts and not the voters' lists to obtain a random and fair cross-section of the community. The venire as presently composed must be quashed.

Respectfully submitted,
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Though the Motion was not entirely successful, it did lead Judge Avakian to declare that the so-called intelligence test for jurors could no longer be used in Alameda County, California, because it produced unrepresentative juries.[46] It is exactly these types of motions and appeals which, if utilized continuously, will chip away at the lack of representation inherent in most juries until the jury is truly a reflection of the community.

IV. VOIR DIRE QUESTION DESIGN

Social and political trials, by necessity, demand a multipurpose voir dire. The defense must not only be prepared to cope with the problems of prejudice and bias, but will also be faced with an equally urgent task of education. "Sub-cultures," be they Black, poverty, youth, radical or any other social segment striving for structural change, are individually unique and must be approached singularly. Consequently, the juror must be directed to a mental state whereby at least comprehension, if not empathy, is realized in regard to the defendant's cultural sphere. The juror must be led to the point of being able to grasp the environmental bankruptcy of the ghetto,[47] the frustration of political activists,[48] or the personal degradation which is fundamental to the welfare system.[49] This does not imply that the juror need an in-depth understanding of great compassion for the defendant's segment of society (though both would be ideal); rather, the juror must be cognizant of the fact that these micro-societies do exist and must be recognized as social forces. With this knowledge, the juror will not be quite so surprised to learn that ghetto residents arm themselves, that political radicals use rather strong language at times, or that the mother receiving Aid to Dependent Children has the "gall" to picket the welfare office.

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[45] Reprinted by permission from GINGER, *supra* note 3, at 3-12 [Appellate brief at 206-241].

[46] GINGER, *supra* note 3, at xix.

[47] Clark, *The Cry of the Ghetto,* in MAN AGAINST POVERTY: WORLD WAR III 109-118 (A. Blaustein & R. Wook ed. 1968).

[48] *See* DOUGLAS, POINTS OF REBELLION, *supra* note 23, at 53-54. *See also* RIGHTS IN CONFLICT (report to the National Advisory Commission on the Causes and Prevention of Violence) (1968).

[49] *See supra* note 23.

Before presenting samples of questions prepared for the *Kent 25*[50] trials and others from the *Newton Trial*,[51] a few comments concerning the conduct of the voir dire are in order.

The first is that if the Court does not require the voir dire to be recorded, then the defense should demand that it is. This, of course, is upon the realization that the case may be appealed. Secondly, it may be advisable to remind each candidate before questioning that he is under oath and the consequences of that. This may give the potential juror second thoughts about the content of his words. Third, the questions themselves should be planned with the utmost care. Certain questions are improper, not necessarily because of their content, but because of the way they are framed.[52] This type of question is one where counsel attempts to place the juror in a position whereby he commits himself to a fact before the juror has had a chance to hear the evidence, argument of counsel or the court's instructions to the jury.[53] These questions are generally of four types:

1. Those which ask the juror what he would do *if the evidence* were evenly balanced.[54]
2. Those which ask the juror to *speculate* as to his reaction in the jury room under given sets of *circumstances*.[55]
3. Those which ask the juror to *speculate upon evidence* which has not yet been introduced.[56]

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[50] The *Kent 25* trials arose out of the killing of four students on the Kent State University Campus by the Ohio National Guard on May 4, 1970. A grand jury indicted the twenty-five persons for a variety of charges ranging from interference with a fireman to first degree riot. (No National Guardsmen or state officials were indicted.) Though the trials were ordered to continue, the Federal District Court ordered the Grand Jury report burned because the Jury had no authority to issue such a report. *See* Hammand v. Brown, 450 F.2d 480 (6th Cir. Ohio 1971). After three trials (in which none of the main charges were returned "guilty") and two guilty pleas, all remaining charges were dropped by the state for lack of sufficient evidence. The voir dire transcripts for the three trials may be obtained by writing the Portage County Courthouse, Ravenna, Ohio, and by requesting same for case numbered 7440, 7442, 7422.

[51] *See supra* note 44.

[52] It has generally been held that questions framed in ambiguous terms are not valid. State v. Faciane, 233 La. 1028, 99 So.2d 333 (1958). Also held as invalid have been those questions which are purposeful mistatements of the law. State v. Ricks, 242 La.823, 138 So.2d 589 (1963). Though in *Dowd-Feder, Inc. v. Truesdell*, 130 Ohio State 530, 200 N.E. 762 (1936), it was held that the actual form of the question is at the trial judge's discretion as long as that discretion is not abused. Pavilanis v. Valentine, 120 Ohio St. 154, 165 N.E. 730 (1929).

[53] Sherman v. Ryan, 126 Conn. 574, 577, 13 A.2d 134, 135 (1940); State v. Williams, 230 La. 1059, 1079, 89 So.2d 898, 905 (1956).

[54] Kurczak v. United States, 14 F.2d 109 (6th Cir. 1926); Chicago § A.R. Co. v. Fisher, 141 Ill. 614, 31 N.E. 406 (1892). Hughes v. Mendendorp, 294 Ill. App. 424, 431, 13 N.E.2d 1015, 1018 (3d Dist. Ct. App. Ill. 1938).

[55] McGuire v. Richard Guthmann Transfer Co., 234 Ill. 125, 84 N.E. 723 (1908). *But see* State v. Huffman, 86 Ohio St. 229, 99 N.E. 295 (1912).

[56] State v. Huffman, 86 Ohio St. 229, 99 N.E. 295 (1912).

4. A question which *introduces a fact* to the juror upon which a *challenge* is issued because of the *juror's knowledge* of the fact.[57]

In addition, there are two other types of inquiries which can cause problems. The first is a question which does not go to the discovery of prejudice or bias.[58] The second is an inquiry which is not within the framework of a question.[59] Both of these are open to objection by either the prosecution or the court.

V. SAMPLE QUESTIONS PREPARED FOR THE "KENT 25" TRIALS[60]

The first series of questions in the *Kent 25* trials were introductory inquiries designed to obtain general information and to "break the ice" between counsel and the juror. They were constructed such that the defense could obtain background data on the juror and at the same time expand upon the question in almost a socializing manner. It is probably sufficient to state that these questions touched upon subjects such as marital status, age and number of children, occupation, educational background, membership in political, church and social groups, and the juror's age.

The next group of questions were still of a general nature, but designed to check experiences with the judicial system. They came under the heading of "Prior Jury Duty" and some samples follow:

Q. Have you ever served on a jury before? Have you ever been called to jury duty, but were not able to serve? If so, why?
Q. What type of case was it?
Q. Did you find it hard to be impartial?
Q. Did you enjoy serving?
Q. If chosen to serve again, could you be impartial in this trial?

The third group of questions were very important in this case because of the fundamental position which the National Award had in the entire affair. They questioned prior or current military service:

Q. Have you ever been, or are you now, a member of the armed services?
Q. What branch and rank?
Q. Regular or Reserve? (It was necessary to look for National Guard members.)
Q. Did you find it a worthwhile experience?

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57 Sherman v. Ryan, 126 Conn. 574, 577, 13 A.2d 134, 135 (1940); State v. Williams, 230 La. 1059, 1079, 89 So.2d 898, 905 (1956).

58 Vega v. Evans, 128 Ohio St. 535, 191 N.E. 757 (1934). *See also* State v. Huffman, 86 Ohio St. 229, 99 N.E. 295 (1912).

59 *See supra* note 52.

60 The questions presented here represent extracts of the voir dire and are printed in outline form.

Q. Did you take orders well?
Q. Would you go back in?
Q. Do you think everyone should serve?
Q. Do you have any harsh feelings toward those who do not serve?
Q. What would you do if your son refused to be drafted?
Q. Could you be impartial toward the Defendant even if he has not served in the military?

The fourth series of questions went to the juror's understanding of the "Presumption of Innocence":

Q. Do you realize that in our judicial system a man has to be proven guilty—that he is assumed innocent until proven otherwise?
Q. Do you agree with this approach?
Q. Do you think Mr._____is innocent?
Q. Can you accept the fact that Mr._____is presumed innocent at this very moment?
Q. Do you understand it is not the defense's job to prove Mr._____ _____innocent?
Q. Do you realize we need prove nothing?
Q. Do you realize it is the prosecution's task to prove Mr._____ _____guilty—beyond a reasonable doubt?
Q. What is a reasonable doubt?
Q. Do you believe that because the Grand Jury indicted Mr._____ _____that he must be guilty of something?

The next series of questions were the start of the attempts to have the jurors demonstrate their prejudices. This particular series was to see how confident the juror was in his own fairness.

Q. Is there anything about this case which troubles you?
Q. Do you believe you can be impartial?
Q. Supposing your son or daughter were on trial here—would you feel confident with 12 jurors of your mind? (Hesitation in the juror's responses was to be observed.)
Q. Tell me again—do you think you can be impartial?

The following series was directed at the juror's ability to stand by his opinion. The design was to test the juror's self-assurance

Q. If you are chosen as a juror, and upon the evidence you believe the defendant innocent, you will stick by that, right?
Q. Even if the jury is divided 11 to 1, you won't let anyone push you around, right?
Q. You would still stand by your opinion even if you thought it socially inadvisable?

With this group of questions, the intent was to start the actual challenge process and also to begin educating. This series was on views held toward universities, professors and students.

Q. What do you think of American Universities?
Q. Do you believe it is the aim of the Universities to make students radical?
Q. Do you think they are making students radical?
Q. Do you think some professors are communists?
Q. Should those professors be fired?
Q. Do you think University administrators are soft on student radicals?
Q. Do University administrators perform a disservice to students' parents if they allow pliable rules and radical courses?
Q. Do you think many students are radical?
Q. What would you do if your son or daughter went away to school and came back radical?
Q. Is there such a thing as a radical right wing?
Q. Do you know Thomas Jefferson was instrumental in the American Revolution?
Q. Do you know he is considered by many to have been very radical?
Q. What is a radical?
Q. Is that good or bad?

The influence which the news media had on the jurors was the object of this series of questions. Here the purpose was to display media bias and to educate the juror to the fact that the local media was anti-student.

Q. Do you think the media projected an image of the Students being guilty of the occurrences between May 1 and May 4?
Q. Do you believe the *Kent Record Courier* slanted its stories against the students?
Q. Do you think they slanted their stories in favor of the Grand Jury report?
Q. In the sense of what is impartial—you know, like when I asked if you could be impartial—do you think the *Record Courier* was impartial?
Q. Then you think it was pro-National Guard, pro-Grand Jury, and pro-Law and Order, right?
Q. Then how can you say it didn't affect you when that was the only paper which you read?
Q. Can you overcome this effect?
Q. Then you are saying that the news media was not fair, but that you are capable of being fair even in light of this, right?

The next two series of questions dealt with any connections the juror had with local police or National Guard and what degree of support the juror would lend these organizations. The section which follows tested the juror's knowledge of radical organizations.

Q. What is a radical organization?
Q. Does that include, say, the John Birch Society?
Q. What do you know about S.D.S.?
Q. What do you know about the Weathermen?
Q. Should organizations like this be allowed in the United States?
Q. What kinds of people join these organizations?
Q. Why do they join?
Q. Are Black Panthers radical?
Q. Is Richard Nixon a radical?
Q. Do you believe in free speech?
Q. Do you believe in the right of assembly?
Q. Did George Washington lead a radical group?
Q. Could you be fair with a radical on trial?
Q. Does this person have rights?
Q. Do you know any radicals?
Q. Then you admit you know little about these people, right?
Q. But you could still be fair, right?

The questions which were asked next were designed to monitor the amount of fear the juror had toward the youth culture. This was of considerable import because of the ages, appearance and life styles of the defendants.

Q. Are all people with long hair radicals?
Q. What do you think of long hair on men?
Q. Would you let your son have long hair?
Q. Do people with long hair take drugs?
Q. Is marijuana habit-forming?
Q. Are hippies dirty?
Q. Are communes morally wrong?
Q. Is rock music drug-oriented?
Q. Do you think it is wrong for women to go without a bra?
Q. What is a hippie?
Q. Would you let your daughter marry one? How about if they lived together?
Q. Do you believe in pre-marital intercourse?
Q. Are hippies basically good or bad people?
Q. Do you believe in demonstrations?
Q. Do you know who the Jefferson Airplane is? Frank Zappa? Led Zepplin?
Q. Actually, you don't know much about all of this, do you?
Q. But you can still be fair, right?

Any encounters the potential juror had experienced with members of the youth community and the juror's feelings towards these individuals

as witnesses were covered next. Both sections are deleted here because they centered around problems which were almost exclusively local in nature. The final section, which is reprinted below in a considerably condensed form, was composed of many general questions, some of which were repeats of earlier inquiries.[61] Some samples are as follows:

Q. Was the Kent R.O.T.C. building worth more than one student? How about the library? The Administration Building? Let me ask you this—is one student worth more than the Empire State Building?

Q. What is this country's number one problem?

Q. Should communists be allowed in the United States?

Q. Why are poor people poor? Why are rich people rich?

Q. What do you think about the Chicago Seven? Huey Newton? Daniel Ellsberg? Bobby Seale?

Q. Are you an honest person?

Q. Do you believe that you are capable of viewing things objectively —impartially?

Q. Then you can honestly tell me that you would not mind a Black family living next door to you, right?

VI. SAMPLE QUESTIONS FROM THE TRIAL OF HUEY P. NEWTON[62]

What follows is an abstract of Charles Garry's questioning of a juror on the subject of white racism.[63]

Mr. Garry: Now, Mrs. Read, you have heard me talk about white racism. You know what white racism is?

A. Just by reading, I guess, and also by the explanations on the panel here.

Q. And, of course, white racism only means something if it reflects on how you react to white racism. You understand that?

A. (Juror nods affirmatively.)

Q. Where in the ladder do you belong in this white racism standard that I have talked about this morning—as a matter of fact, I have been talking about it for seven or eight days, but you have only had to be victimized by one day of it. How do you feel about it? Where do you personally fit into this white racism?

A. Well, I guess I feel just as good as the next person, and then, too, the next person might be better than I am.

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[61] This technique is recommended to "check" the juror's responses. GINGER, *supra* note 3, at 17.

[62] GINGER, *supra* note 3, at 156-60.

[63] Reprinted by permission, *supra* note 45.

Q. In other words, there are certain areas where you are guilty or a victim of white racism; is that what you are trying to tell me?

A. I guess—yes.

Q. Now, is this area of white racism that you have within yourself, or white supremacy you have, is that in the area of subjective or objective approach? The objective is something that you can see, that everybody in the world can see that you are a racist, a white racist. But the subjective is the one that you, yourself, are the only one that knows anything about it where you secretly have certain prejudgments about black people.

A. No, I haven't.

Q. I am just trying to find out what area—that you have certain elements of white racism in you [sic]. Can you tell us, or do you know?

A. I guess I don't know.

Q. How long have you lived in San Leandro, Mrs. Read?

A. I have lived in San Leandro about thirteen years, and previously I lived in Oakland.

Q. Oakland?

A. From 1925.

Q. You and your family never moved out of an area because too many black people moved in, did you?

A. We used to live in Brookfield Village.

Q. Where?

A. Brookfield Village, Oakland.

Q. You never moved out because too many black people moved into the area?

A. Yes.

Q. Did you?

A. Yes.

Q. You moved out—

The Court: Do you understand the question?

The Juror: Pardon?

The Court: Do you understand the question?

The Juror: He asked if I moved out because there were too many black people moving in. Yes.

The Court: You did?

The Juror: Yes.

The Court: Where you lived before, is that why you moved out?

The Juror: Yes.

The Court: All right. You may proceed.

Mr. Garry: You didn't like to live around black people?

A. We felt we would be better off in San Leandro.

Q. San Leandro doesn't have any black people there; maybe one or two families—is that right?

A. I believe there is more than that.

Mr. Garry: If Your Honor please, I am going to challenge Mrs. Read for cause.

The Court: Now tell me this: you moved out because of the fact that you say there were too many black people moving in where you lived before?

The Juror: The whole village moved for that cause.

The Court: Now you understand this defendant is on trial for three charges. Now, do you think that might in any way affect you that you couldn't be fair to him because he happens to be not white, he is black.

The Juror: The color makes no difference.

The Court: Do you think it would have any effect at all?

The Juror: The color makes no difference. As I say, it's the deed, not the color.

The Court: Why did you move out of the place there, because there were too many black people?

The Juror: Pardon?

The Court: Why did that make you move, because there were too many black people? Why did you move on that account? Did you have children, or something?

The Juror: Well, I just felt that we would be better off in a different neighborhood. They wanted that village for that. They were tearing down housing projects and they needed the village to have the colored people have some place to live. We weren't the first ones to move out. We were practically the last.

The Court: Well, then, you have a feeling concerning black people, haven't you? You must be truthful in these matters. I am not trying to get you to say answers. I just want to get the facts. If you have a feeling, you should so state. Some people have and some people don't have. What is your honest feeling?

The Juror: Well, I have known very nice colored people.

The Court: How is that?

The Juror: I have friends as colored people.

The Court: Yes, I know. But you evidently didn't like them enough to stay there when there were other people around.

The Juror: There were no other white people there.

Mr. Garry: I submit the challenge, Your Honor.

The Court: Want to examine further, gentlemen?

Mr. Jensen (the prosecutor): Well, no, I have no other questions.

The Court: In view of the circumstances—the point is this: Do you feel you can act with entire impartiality in this case, or do you feel that you might have some reservations because the defendant is black?

The Juror: Well, I would just say to the best of my knowledge and whatever testimony is given.

The Court: You are offering the challenge?

Mr. Garry: I am submitting the challenge, Your Honor.

The Court: I think we had better excuse her. You are excused.

Within the context of the twin goals of the voir dire, minimizing the effect of predisposed jurors and education of the jurors, the *Kent* and *Newton* examples hopefully provide guidelines and add direction to those who are facing, or are about to face, the problem of selecting a jury. In both examples, the framework of the voir dire strategy is evident and can easily be adapted to other similar situations. Though it surely is not assumed that questions structured as these will eliminate prejudice or bias, it is submitted that this type of organization will go far toward weeding out the worst jurors and minimizing the probability of a verdict representing predisposed opinions based on race, political beliefs, or standing in the social hierarchy.

VII. CHALLENGES: FOR CAUSE AND PEREMPTORY

There are two types of challenges which may be executed: the challenge for cause, which may be exercised as often as needed; and the peremptory challenge, which is not for cause, and is limited in number. As mentioned earlier, both share inherent weaknesses,[64] a fact which must be coped with if their use is to be at all effective. The process of challenge within this framework thus becomes a second-rate tool or a band-aid to be applied to a wound which needs major surgery. It should be understood from the outset that the problem does not revolve around the mechanics of the challenge, but around its application, which can be used to fortify unrepresentative as well as representative juries. Within this structure, the challenge shall be explored.

The challenge for cause, though a somewhat cumbersome tool,[65] is nevertheless the main implement for determining which members of the panel will be rejected as jurors. In most jurisdictions, this challenge is controlled by statutory law,[66] which sets rigid standards for exercising

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[64] *See supra* notes 11-12.

[65] Because of the statutory standards for its exercise and the trial judge's discretionary power, the challenge for cause becomes rather awkward to utilize. Much detail is needed to effectuate this type of challenge. *See* GINGER, *supra* note 3, at 81-198.

[66] OHIO REV. CODE § 2945.25 (1953).

the challenge.[67] Further, it is within the trial judge's discretion as to accepting or rejecting the challenge.[68] (It is important to note here that this is only reversible error if one can prove an abuse of discretion.

Much of the likelihood of the court accepting the challenge will be hinged on whether it is based on actual or implied bias. Actual bias exists when the potential juror's state of mind is such that he can not be impartial in reference to the case or the parties involved.[69] This situation is the most difficult one in which to issue the challenge because the juror is required to demonstrate a state of mind to the court that shows him to be predisposed in a prejudicial manner towards a major element of the trial, be it race, life style, or philosophy. Actual bias is founded upon the perceptual element—how one views a given set of circumstances. If the juror is racially biased, such constitutes actual bias since this reflects the juror's perception of his environment, and is grounds for challenge.

Implied bias differs from the above example in that the focal point is on the juror and his relationship to the case or parties.[70] This test, unlike actual bias, is not based upon perception; rather, it is a physical evaluation of the juror in relation to the case. It has been defined to be an intentional non-disclosure of a material fact.[71] Though helpful, this definition leads one to think of the juror consciously deceiving the court as the prerequisite for challenge. This is not the case—the juror is merely required to answer those questions directed at him; it is counsel's task to ask the right questions, such that the various elements of the relationship may be assembled. An example of an implied bias relationship may further clarify this point. A police officer is injured during a demonstration and whether assault comprises one of the charges or not, it is likely the officer will testify as a prosecution witness and further, that on the list of prospective jurors there may be someone associated with the officer—such as a married sister who no longer has the same name or the nurse that attended the officer. Both of these women would be open to challenge for implied bias on relationship, not on their state of mind. The difference between implied bias and actual bias thus comes down to the point of not the prejudiced bias itself, for that exists in both, but how the bias has been affectuated.

The peremptory challenge is both an effective weapon for and

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67 OHIO REV. CODE § 2945.25 (1953) [though the actual form which the challenge takes is not designated]. *See* Burnett v. State, 30 Ohio Ct. App. 465, 467 (1917).

68 Pavilanis v. Valentine, 120 Ohio St. 154, 165 N.E. 730; OHIO REV. CODE § 2945.27 (1957).

69 GINGER, *supra* note 3, at 13. *See also* Kerr v. B.F.Goodrich Co., 22 Ohio L. Abs. 685, 31 N.E.2d 709 (9th Dist. Ct. Summit County 1936).

70 GINGER, *supra* note 3, at 13.

71 Petro v. Donner, 137 Ohio St. 168, 28 N.E.2d 503 (Ct. App. Cuyahoga County 1940).

against the defense, a condition which cancels out much of the benefits of its use. Both sides in the litigation are given an equal number of peremptory challenges based on state statute.[72] The theoretical asset is that either side may strike from the panel a limited number of jurors who are thought to be biased but could not be removed for cause because this could not be demonstrated to the court. Counsel need only inform the court that it is exercising the challenge and the juror is then excused.[73] The problem develops when, as in many cases, the prosecution uses the challenge to remove blacks,[74] or as in the *Newton* case, when young persons and Berkeley residents were excluded.[75] Though the issue of peremptory challenge of blacks has been approached on a number of appeals,[76] only once has the Supreme Court confronted the problem directly. In *Swain v. Alabama,*[77] the Court held that it was the petitioner's burden to prove systematic exclusion of blacks by peremptory challenge, a burden which they failed to meet. The Court found that blacks were underrepresented by only ten per cent as compared to their relation to the population, a figure which was held insufficient to prove prima facie discrimination and thus evade the systematic exclusion rule.[78] It should be noted that the Court's mathematics in *Swain* have not gone without criticism, both by writers[79] and the Court.[80] In retrospect it would appear that a combination of poor mathematics and strained logic have done a rather thorough job of halting further review of the practice which enforces white racism at the whim of the prosecution.

The difficulties expressed above lead one to approach the peremptory challenge not as a weapon of offense, but as a prophylactic plug to checkmate its use as a tool of racism or social prejudice. Inasmuch as this condition establishes the boundaries of reality with the peremptory challenge, the task then becomes one of optimizing its use. A number of general suggestions may assist in obtaining full performance of this challenge. First, as one writer suggests, it may be helpful to chart the challenges as they are exercised.[81] This is done by drawing a box chart of

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[72] OHIO REV. CODE §§ 2945.21 (6 challenges in capital cases), 2945.22 (4 challenges in non-capital).

[73] OHIO REV. CODE § 2945.1 (1953). *See also* Pavilanis v. Valentine, 120 Ohio St. 154, 165 N.E. 730 (1929).

[74] *See supra* note 33.

[75] GINGER, *supra* note 3, at xx, xxi.

[76] Watkins v. State, 199 Ga. 81, 33 S.E.2d 235 (1945); State v. Barkdale, 247 La. 198, 170 So.2d 374 (1964), *cert. denied,* 382 U.S. 291 (1965).

[77] Swain v. Alabama, 380 U.S. 202, 226 (1965).

[78] *Id.* at 208, 209.

[79] Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 HARV. L. REV. 338, 346 (1966).

[80] Rabinowitz v. United States, 366 F.2d 34, 56 (5th Cir. 1966).

[81] *Selection of the Jury,* 14 TR. LAW. GUIDE 21, 24, 25, 35, 36 (May 1970), as reprinted from GOLDSTEIN TRIAL TECHNIQUES.

P_1			D_1		
	D_3	D_2		P_9	

the jury seats as shown above and registering each side's challenge as it is exercised. It is asserted that this method eliminates confusion and as such, protects against the odds of announcing a challenge only to find none left.[82] This approach may in fact be of value when one considers that in many jurisdictions, such as Ohio,[83] the number of challenges is per defendant, not per trial, and that in many political trials there are multiple defendants. Elementary mathematics in that type of case can result in a fairly high number of challenges and likewise a rather substantial degree of confusion. Secondly, in cases where it is possible, it may be advisable to abandon the peremptory challenge until the "final" jury is all but sworn in. This gives one a better perspective of its composition and protects against alienating jurors early in the voir dire, a situation which can easily occur if the jurors see their fellows removed for "no reason." Although this approach has been challenged on appeal, it has been upheld as a valid technique.[84] Lastly, if the circumstances of the case are such that all the peremptory challenges are not exercised (a very unlikely occurrence), it should be inserted in the record that requests for change of venue, continuances and appeals are not being waived by failure to execute all the challenges.

The political or social trial, because of the vast sociological problems inherently woven through it, leaves the peremptory challenge in a position of diminished value. It is reasonable, therefore, to conclude that, at best, this challenge will minimize the presence of predisposed jurors and, at worst, it will act as a countervailing force on the prosecution. The peremptory challenge is a positive factor, its value is merely one of degree.

VIII. CONCLUSION

Drawing conclusions is a risky business. To do so infers that the subject matter is either stagnant or of such a nature that it may be suspended in a cataleptic state while the observer traces its form and boundaries unencumbered by its lifelessness, a manner of inquiry which finds sanctuary in few areas of investigation. This is not to suggest that pulse reading and barometer gauging are always without merit. These practices may be worthwhile, if engaged in without the guise of finality.

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[82] *Id.* at 35, 36.

[83] OHIO REV. CODE § 2945.22 (1953). *See also* Bixbie v. State, 6 Ohio 86 (1833).

[84] Hooker v. State, 4 Ohio 348 (1831).

As such it would be singularly inappropriate to draw conclusions about voir dire in political and social trials, particularly because much of the difficulty does not exist in the actual voir dire in these trials; rather, it is the fact that these trials exist at all.

Historically, it has not been the tyranny of open destruction of the throne's enemies which has marred history, for intellectually that would be too honest; the darkest moments have come with the inquisition of the dissenter. And so it is with political and social inquests, for they represent the aborted utilization of the very principle which those in power purport to so zealously protect. It is upon these facts that one finds it difficult to construct final remarks and conversely, that one finds it necessary to have indulged in the first place. As such the "conclusion" of this comment can only be the disconcerting fact that the subject matter even exists.

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* The writer, a second-year law student, did the voir dire research and question design for the *Kent 25* trials, as a member of the Kent Legal Defense Fund. For the details of the trials *see supra* note 50.

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APPENDIX

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