

# Sociologists exploring new ways to pick a jury

## Lawyers gleaning insights from 'innocuous' questions

By Hillary Hauser  
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As the \$24 million Sycamore Fire lawsuit went to trial, two Santa Barbara social scientists had some advice for the insurance companies involved.

The specialists suggested selecting the jury on the basis of several seemingly innocuous questions asked by attorneys during the voir dire ("look and see") interviews with potential jurors about their backgrounds. One example: "When was the last time you had a medical checkup?"

The answer to that computer-generated question, the specialists said, could reveal hidden biases — biases so deep that the would-be juror himself might be unaware that he had them.

And those biases should help to reveal which jurors to select and which to avoid — decisions that one of the specialists, Jim Burgund, said is "60 to 80 percent" of winning a case in court.

Burgund, 38, and Herbert Wong, 30, are jury research specialists with a Santa Barbara computer company, one of the few organizations in the country offering a "social scientific" approach to jury selection.

It is a concept that is new and controversial. Is it computerized jury rigging? Some feel the jury selection process itself may be an abuse of the court system and that the social scientific approach to choosing jurors may be yet another example of how people with the most money win court cases.

But, there are others who feel that using social sciences in selecting juries is no different from taking advantage of the battery of research services already available to litigants, that it is fair because it is available to both sides, and that it is in fact a much-needed modernization of what they call an antiquated aspect of the court system.

In jury selection, "anything helps," they say, and to this, Burgund adds his postscript: lawyers picking jurors by "instinct" is archaic, he says.

The job of the social scientists, said Burgund, is to find the juror who will respond favorably to the side they are hired to represent.

The process works like this: A lawyer comes to Wong and Burgund, gives them the facts of his case. The two researchers use their battery of computers to tap the immense data banks of social scientific literature that have to do with human nature, then plug in the elements of the case — murder, fire or malpractice, and the litigant's age, sex and ethnic background.

After the computerized data is analyzed, Burgund and Wong recommend which jurors to choose and which ones to avoid, the "fine-tuning" done by questions that might seem totally insignificant to the case at hand.

"The question about checkups reveals whether people feel if they can control their own lives," said Burgund. "Clearly a person who has checkups would be a better juror (for the insurance companies)."

The electric company, said Burgund, could only so

far with the idea that a kite hitting an electric wire was fate, an act of God, chance, a powerful force impossible to prevent. Someone who gets health checkups, he explained, "obviously doesn't believe in chance."

Those who believe in chance — the gamblers — would be more inclined to side with the electric company, said Burgund, explaining that in the field surveys his company did, people who gambled, the "Las Vegas types," were contacted and given a hypothetical situation.

"They were without hesitation against the insurance companies," said Burgund. "The gamblers will say that the insurance companies are being bad losers — they gambled and lost, pay up. All you have to do is take the profile of the gambler and run it through a computer."

Burgund said that other dynamics of the case included the fact that jurors siding against the electric company knew that a judgment against Southern California Edison would mean an increased rate for public safety.

Burgund and Wong form the jury selection research arm of Santa Barbara Applied Research, Inc., a five-year-old computer company in Goleta that also does special research projects for county, city and federal government agencies, matches employers with job seekers, and trains people in the use of computers.

Burgund, who is also a private investigator, was a probation officer in New York City and California, and has a masters degree in political science and two years of law school. He said that jury selection is the most important part of a case.

Statistics show, he said, that in a list of one to three, jurors weigh evidence last. More important than the facts of the case to jurors, he said, are the appearances and attitudes of litigants and their lawyers, their responses to these elements based on backgrounds, feelings and hidden prejudices.

Wong, who holds a doctorate in psychology, has an extensive background in prejudice and discrimination research. Wong said that finding prejudices is at the root of good jury selection.

The insurance companies involved in the Sycamore Fire trial rejected the advice of Burgund and Wong, but their suit against Southern California Edison Co. raised all sorts of socio-psychological issues, said Burgund.

Fear of fire is only one of the basic emotions that can trigger anxiety in people, said Burgund.

"People never in a fire are more afraid than those who have been in one," said Burgund. "Older people have less fear, children and younger people more fear. A jury on a fire case can be made to think they're here not to help the plaintiff, but to help themselves. It could happen to you, happen to your children."

Similarly, each juror might see himself as the kite flyer whose stray kite sparked the blaze when it

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## SCIENCE FINDS ITS WAY INTO COURT

Scientific jury selection had its beginnings in the famed Harrisburg Seven trial of 1971-1972 in Harrisburg, Pa., when Philip Berrigan and seven other defendants were indicted by the federal government and charged with conspiring to raid draft boards and destroy records, of conspiring to kidnap Henry Kissinger, and conspiring to blow up heating tunnels in Washington D.C.

Since Harrisburg is a conservative area with a pro-government population, the team of defense attorneys headed by Ramsey Clark feared that the anti-war activists would not get a fair trial. At this point, a group of social scientists volunteered their services to the attorneys.

"The attorneys had said, 'Look for people who are liberal,' and that was good up to a point," said Jim Burgund of Santa Barbara Applied Research.

"But had the attorneys focused on college graduates, that would have been a mistake. The more conservative graduates stayed in Harrisburg, but the liberals had left. It turned out that in Harrisburg the churchgoers and blue-collar workers were more liberal."

Which goes to show, said Burgund, that demographics also play an important role in finding jurors who will not be biased.

(The Berrigan trial ended in a hung jury, split 10-2 in favor of the defense, and the government dropped the charges.)

Social scientists also helped in the jury selections of other socio-politically sensitive cases, such as the Angela Davis trial (she was acquitted) and the Wounded Knee trial, in which

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# Picking the right jury can be the key to victory

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touched a power line, said Burgund.

The tendency of jurors to transfer a litigant's experience to themselves, said Burgund, is important in choosing a jury: a predominantly female jury in a rape case could be an advantage to the defendant, he said.

"Women can look at the victim and say to themselves that she behaved imprudently," said Burgund. "They say if they had been in such situation, it wouldn't have happened."

Such feelings, he explained, are natural, self-protective responses.

Similarly, in a case involving an older person who has been injured, the worst possible juror would be an older person, according to Burgund.

"We had a case with an older person, retired in his 70s," said Burgund. "We advised the attorney to go with young people. If a litigant is in a predicament because of his age, the jurors — if they are old, too — will be full of anxiety."

Burgund said that older jurors tend to award less money in civil cases than do young jurors.

"Their money came at a time when money meant a lot more," he explained. "There is data to support this, it's not just speculative."

The fact that jurors identified with victims, said Burgund, is something to be considered in every case involving injury.

The social scientific approach is not only useful in selecting juries, said Burgund, but it can be a valuable tool in cases being decided by a single judge — as was the situation with the recent case involving nationally known dietician Nathan Pritikin.

"Pritikin stood to lose 48 percent of everything he owned," said Burgund. "It was serious."

He said that Pritikin had originally been a director and shareholder in an electronics corporation in Goleta, starting his small health business on the side under the corporate shell of the electronics firm. When the health business exploded into overnight success, Burgund said, Pritikin proceeded to divest it from the electronics firm.

The electronics firm alleged that Pritikin had a fiduciary responsibility and therefore no right to divest the corporation of a profitable subsidiary, Burgund said.

"In this one, we found out everything about the judge," said Burgund. "We analyzed his background, looked at it from both sides."

The judge, said Burgund, was Chinese-American, his parents coming from a "higher class" in old China and immigrating to the United States during the war.

"In classical China, one didn't become a lawyer for the purpose of going into private practice, but because he aspired to become a member of royal bureaucracy," said Burgund. "In tracing the career of this judge we learned he had never been in business, had never been in private practice."

Wong and Burgund therefore advised Pritikin's attorney, Mike London, to minimize the business aspects of the case and instead emphasize the scientific advances achieved by Pritikin.

"Also, we advised that Pritikin have his family present," said Burgund. "If the family and children respect you, then you are respected in the Chinese culture."

Pritikin's son had studied science and biology in college so that he could be part of his father's diet and exercise program. Further advice to attorney

London was to emphasize the son following the father.

"The case could have gone either way," said Burgund. "The judge had insisted on full payment for his services in advance, which suggested his latent reservations about these men, typical of Chinese class bias."

Pritikin won.

The reactions of Santa Barbara lawyers and judges to computerized jury selection range from skeptical to enthusiastic.

Attorney Bill Gordon said that judges and juries listen primarily to evidence, and that he didn't believe cases were decided on emotional issues.

"I think what it boils down to is getting 12 people who have a modicum of common sense," said Gordon.

"Sure, you get aberrations, but most of these aberrations are not hidden biases on the part of the jury," he said. "Rather, it's that they picked up some fact that you didn't really consider carefully enough, something you overlooked. The key lies in trial preparation. I just don't know. I haven't had the benefit of their (Burgund and Wong's) statistics."

Mike London, however, said that the computerized approach was invaluable to him in his presentation of the Pritikin case.

"It is helpful as a trial lawyer to have some tool as to whether people can be receptive or close-minded to what you're saying," said London.

District Attorney Tom Sneddon said that in criminal law what one side finds out in research becomes available to the opposite side. Because of that, said Sneddon, and because of the expense of hiring such a service, the procedure would be "impractical."

However, Bob Glogow of the district attorney's office said that he saw the process as "bringing art into the scientific realm."

"When it comes to jury selection," said Glogow, "anything and everything helps."

Gordon wondered whether the computerized approach would create financial and other inequities.

"It seems to me to be something that works to the advantage of the people who have the resources to do it," said Gordon. "Assuming that there are inequities in the system already, is there any purpose in adding to it?"

(The cost of computerized jury selection services, said Burgund, ranges anywhere from \$500 for simple consulting, to \$10,000 for a complete field survey and construction of a "shadow jury" upon which strategies are tried.)

L. Donald Boden, who recently retired as Superior Court judge to go back into private practice, said that he has his doubts about jury selection research, but also questions the entire jury selection (voir dire) process itself.

"We might have to rethink the system," said Boden. "This is my personal feeling, not based on any empirical experience. I've been wondering whether we should abolish the whole voir dire process, which might be preconditioning the jury to the case."

Boden said that in Britain and Canada there is no voir dire process and that this might be the more fair procedure in jury trials. He also said that a committee of judges and lawyers is currently drafting a ballot initiative to reduce the use of juries in the courts.

"There have been efforts in the past to do something about this in the legislature," said Boden,



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"but there is a strong lobby of trial lawyers against it."

Boden cited one periodical that said that 25-40 percent of trial time is spent in jury selection and that this was very likely an inefficient use of the courts.

He also said that in any case a lawyer is "probably as well equipped or better equipped to select jurors than jury selection experts."

Andrew McMullen, acting chief court clerk, who worked under Boden during the latter's term as Superior Court judge, said that jury selection is only one aspect of a case. As an example, he said that while there may have been psychological aspects to the Sycamore Fire case, there were "a lot of legal problems" weighing against the insurance companies.

About the kite flyer, said McMullen, "The law says that if there is a foreseeable danger, then (the electric company) might then have to make compensation for it. In this case, the kite flyer designed his own kite, using 150-pound test line. If suspect the jury found that what happened was unforeseeable. Getting the right jury has an effect, but it is only one factor of many."

James M. Slater, recently appointed to the Superior Court bench after serving as a Municipal Court judge, said that social scientific probings into juries are a new concept to him.

"Well, you know, in this day and age we are all subjected to a lot more," said Slater. "Communication is better, we hear more. Life has become more complicated."

Complicated or no, the people who have won their cases by using computerized jury selection techniques think the system is wonderful — even if they can't tell for sure whether those techniques are a factor in their winning.

## JURY SELECTION CAN BE A SCIENTIFIC MATTER

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Indian militants were also acquitted.

Then, in the Watergate trials, former Attorney General John Mitchell and Maurice Stans tried (and failed) to get the same group of social scientists who had worked on the Harrisburg Seven trial. They then turned to a marketing research firm in New York.

Marketing, said Burgund, has had its applications to jury selection because a plaintiff or defendant has to be "sold" to the jury.

"You've got to control the customer, choose your audience," said Burgund.

(Mitchell and Stans were acquitted, although Mitchell was later found guilty on different charges related to Watergate. Stans was never retried.)

Burgund likens the marketing approach in jury selection to a recent campaign by the Greenpeace organization to correct its fund-raising problems.

"There was a time they were losing donors and didn't know why," said Burgund. "They had a film about animals being beaten and they didn't understand what was happening. They hired someone who told them they were making a mistake with the steady stream of violence. Greenpeace was told to have more violence, but to have a coping strategy: show violence (animals being beaten), then when the anxiety level is raised, introduce

Greenpeace — how to stop what they just saw."

The rhythm, said Burgund, was one of raised anxiety followed by reassurance.

"That is essentially group hypnosis — brainwashing," said Burgund. "With a jury it's the same thing."

Computers, said Burgund, can supply a list of words and phrases that have the ability to create anxiety in different groups of people.

Drowning, fire, rape, accidents — these are only a few of the elements that surface at trials and which trigger certain emotional responses in people, said Burgund, and these responses can be worked to advantage, both for and against the litigant.

As for the idea that scientific jury selection is "computerized jury rigging," Burgund said that litigants use money for all kinds of pre-trial research and expert advice. Although they can only work for one side of a case (first come, first served) the social scientific approach, said Burgund, can essentially benefit everyone.

"We're available to both sides," said Burgund. "It's not as though one party has an advantage. Our service supplements the skill and experience of the attorneys and, we believe, gives our clients an important statistical advantage."

— Hillary Hauser