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Anti-war Protestors and Civil Disobedience: A Tale of Two Juries

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OVER THE LAST THIRTY YEARS, I have done pro bono jury selection work on numerous political trials. I started with the 1973 trial of the Camden 28, members of the non-violent anti-war left, charged with breaking into Selective Service offices across the country to remove and destroy government draft records that identified young men available for military service.

That was my first introduction to the vagaries of political trials and how they differ significantly from traditional criminal trials. A criminal defense strategy typically includes a primary goal of acquittal or at least mitigation of a sentence following a guilty verdict or plea. However, the strategy in most political cases where the defendant(s) are charged with civil disobedience, "public order" related charges, such as disorderly conduct or criminal trespass, is to tell the story that the defendants want told. This story typically includes the injustice that was protested against, the goals of the protestors, and an explanation of why the protestors felt compelled to engage in civil disobedience.

Over the last ten years, I have done significant online profiling of members of jury pools, while creating a profile of the type of juror I want on my jury and rating potential jurors against the criteria in that profile. My team conducts extensive online research of potential jurors and I almost always attempt to utilize a written juror questionnaire. In my state, Maine, there are always serious negotiations with the presiding judge about the questionnaire, since questionnaires are typically used only in cases involving sex crimes, so as to allow the jury pool members to answer what may be sensitive questions in writing.

It is my goal to convince the judge that a privately completed questionnaire will not only elicit more honest answers from the jury pool members, but also make voir dire more efficient – meaning "completed more quickly." Some judges have grown to like the questionnaires and automatically allow them; others are more resistant. There are, however, objections to certain questions, even on the part of judges who have used the questionnaires in prior cases. One question is particularly troublesome to them: "Do you believe your Government lies to you?" A judge in a civil disobedience case more than a decade ago turned to me after reading that question and said, "Of course they do. You don't need a question on that, everyone knows

the answer."

When creating a juror profile for environmental and anti-war protestors, we are looking for the traditional liberal – contributor to/or supporter of NPR, PBS, Audubon, the Sierra Club, Peace Action, Veterans for Peace or other peace/environmental groups. Much of this information is available online from the organizations' annual reports, which often list contributors and volunteers. We also go to the potential jury member's Facebook page, if she has one, to look at her friends, literary bent, political affiliations, music choices – folk, great; country, not so great; heavy metal, can show anti-authoritarianism. The jury pool list that we receive from the court includes age and profession, as well as the highest academic degree received and the town where the individual lives. As a whole, though with exceptions, those with higher degrees tend to be more supportive of our clients. However, I once kept a high school graduate on a jury of anti-war protestors because he looked like a young Bob Dylan. Going with my gut paid off, since we got an acquittal of all six defendants in that matter.

The above-mentioned trial was of six protestors who sat in at Maine Senator Susan Collins' office for an entire day, to protest the war in Iraq. At five o'clock, the building manager went to the office, told the protestors that they had to leave because the building was closing, and they declined to do so. All were peaceably arrested for criminal trespass, booked and soon released on no cash bail, own recognizance. A colleague and I (we have seven political arrests of our own between us, but that was in our younger days) took on the case of the six who were arrested and soon named the "Bangor Six."

The issues for trial were not whether the defendants had engaged in the criminal conduct, since they freely admitted that they had committed criminal trespass. Rather, the argument was that such conduct was civil disobedience and justified. Maine, however, does not allow a necessity defense in matters of civil disobedience. Therefore our tasks included creating and telling the story, identifying and seating jurors who would be open to that story and also have a generally liberal bent. In order to make the research doable in the two weeks we had between receipt of the jury pool list and trial, we initially prioritized the list, tentatively giving a negative rating to those with occupations that I have generally found to correlate with authoritarianism, close-mindedness and lack of creativity, including supervisory personnel, school principals, security guards, and the like. Of the 82 remaining members of the jury pool, we were able to view Facebook pages for about half, and discovered some relevant information, such as those who volunteered at non-profits such as food banks, community radio stations and environmental education centers. Following leads on the Facebook pages, we researched whether the individual contributed money to any charities and/or political groups. And simply Googling someone's name led us down various trails, some of which were fruitful.

As with most of my cases, about 25% of the folks on the jury pool list had no online presence whatsoever. We therefore sorted those names by age, highest level of education and occupation. Given the lack of an internet presence, it was not surprising that the average age of this group was late sixties, with a few folks in their late eighties. Likewise, given their ages, most had only graduated from high school, and most of them listed their occupation as "retired." Unless there is at least one positive indicator, I tend to avoid seating elderly jurors. One such positive indicator in this matter was the fact that one 80-year-old gentlemen was a retired labor organizer and I would have liked him on this jury. However, the prosecutor used one of his challenges to strike the man.

Since attorneys cannot argue in favor of jury nullification, we always try to present a valid legal argument for the jury to hold its hat on, if it so chooses. Our clients were six attractive middle-aged men – including a nationally known artist, an organic farmer, a retired professor of poetry, a political science professor, a long-time activist and contractor and, lastly, a graduate of the Air Force Academy and a founder of Veterans for Peace. We felt that their own testimony, combined with our arguments and, we hoped, the jury instructions that we had written, would win the day.

The state of Maine criminal code includes a section noting the following: "Evidence of ignorance or mistake as to a matter of fact or law may raise a reasonable doubt as to the existence of a required culpable state of mind." M.R.S.A. Title 17-A Ch.1 §36. Since we were also precluded from using international law as a defense, per the judge's pretrial ruling, we chose to argue that while they may have been mistaken, the defendants sincerely believed that international law authorized them to sit in at the Senator's office. Consequently we needed to seat jurors that would be able to understand, and feel comfortable with, the nuances of that argument. We had a short written questionnaire in addition to the questions that the judge agreed to ask verbally, and one of the written questions was the following: "Do you think it is more important to be right or to be fair?" The goal of this question was to identify those with legalistic tendencies and those with a broader perspective on what "right" was, given that "fair" is not always in line with the law.

After the judge eliminated all veterans and current military, all law enforcement officers, and all of those with law enforcement officers in their immediate families, we were left with about 50 people in the pool. By utilizing our rating system based on internet research, we incorporated the responses to the questionnaire and produced a new ranking of most of the members of the jury pool. We had negotiated 10 peremptory challenges, given that we were representing 6 defendants. A few jury pool members remained unclassified. As the initial venire was chosen I had occasion to look up at their faces and saw one of the men smiling the broadest smile I have seen in a courtroom. We put him on the list to keep if at all possible.

After peremptory challenges, we sat a jury of 12 members and two alternates, and I was fairly comfortable that they would

at least give our argument a fair shake. I was particular heartened by the 8 middle-aged women that we had seated, the Bob Dylan lookalike and the smiling man. The other two jurors were unknown quantities but, of course, all it takes is one holdout.

In addition to the standard jury instructions, the judge adopted the jury instructions that we had drafted about the elements of criminal trespass and, most importantly, about mistake of fact or law. The trial took a day and a half and all of the defendants testified. After two hours deliberation, the jury returned nonguilty verdicts for all six defendants on the charge of criminal trespass. Many of the jurors seemed inclined to wait outside for our clients to exit and tell them how much they admired them. One woman told me that the reason that they took two hours instead of 45 minutes was that they wanted to get the free lunch. The Bob Dylan lookalike did not stick around to talk.

Four years later we had occasion to represent six defendants who were members of Occupy Augusta. The defendants had walked from their campsite in Augusta's Capitol Park to the lawn of the Blaine House, the governor's residence. For a while they stood on the lawn with signs and were then given an order to leave by the Maine State Police. They refused and were ultimately arrested and charged with criminal trespass.

Five of the defendants requested that my colleague and I represent them, and the sixth retained a private attorney. As always, we met with our clients to try to outline a strategy for the defense. Unfortunately, a number of the clients had admitted to law enforcement that they knew they were not licensed or privileged (elements of criminal trespass) to be on the Blaine House lawn and knew the order to disperse was legal and they would be arrested. The others told us that they did not feel comfortable arguing that there was a mistake of fact or law. That precluded utilizing a defense of mistake of fact or law.

I should note here, for those who have not represented defendants in political trials, that while the goal may be acquittal, the defendants are typically taking a moral position and do not want their attorneys to get them off at all costs. Once I represented six defendants on criminal trespass charges, again in an elected official's office, who pled guilty and each received a $250 fine. They refused to pay the fine since it was supporting the government that was supporting the war they were protesting. Consequently, they informed me that I needed to argue to the judge that he should incarcerate them for one night, which he agreed to do if they each paid for their "room and board," $88.00. One general prisoner waiting for arraignment was heard to say, "I hope I never have her representing me!"

The jury selection for this trial was very different from the trial described above. The defendants included five women and one man, much more working class that the previous defendants, not quite as smooth, although no less sincere. However, the Occupy movement had developed a certain persona, not a particularly positive one, except with those who were supportive of their encampments and issues. This was not an anti-war or environmental case, so I needed a new approach.

I did the usual online research on the jury pool, but struggled with a juror profile. Who did we want on this jury and why? Even on the morning of jury selection I knew we probably wanted a different profile from the anti-war protestor profile, but could not articulate what that should be. As I sat in the attorney section next to a very experienced criminal defense attorney who knew my work, he pointed to a name on the jury pool list and said "You don't want this guy on your jury". I asked him why and he said that the man was his handyman and every time he worked on projects at the attorney's house he listened to Rush Limbaugh and Glenn Beck. Bingo! Just what I wanted, people who hate America. I knew the judge would refuse to ask the jury pool whether they hated their government, nor did I want her to since that would tip my hand. So I needed to utilize the background information, the online research and my gut feeling about potential jurors to know who to use my peremptory challenges on. And I needed to keep that handyman on the jury.

The judge's questioning proceeded and, as usual, all law enforcement and those with law enforcement in their immediate family were eliminated, as were those who knew of the Occupy movement and, unfortunately, stated that they totally agreed with the movement. Likewise, the prosecutor used most of his challenges on young people, obviously assuming that Occupy was mainly a youth movement. I was able to keep my handyman, as well as a middle-aged man on SSDI, whose demeanor reeked "angry". I figured that was the best I could do and the rest was a toss-up, if not a slam-dunk for the prosecution. The jury was dismissed, to return the following morning.

Upon arrival at the courthouse the next day, I saw two protestors holding a sign calling for jury nullification and another man handing out literature, but not to the folks walking towards the juror entrance. The judge had been made aware of what was going on and called in each juror separately, questioning them about whether they were approached, whether they knew about the concept of jury nullification and whether they could be impartial. All passed her test. So, the trial began.

Unlike the trial described above, a few of our clients chose not to testify, and those who did admitted that they knew they were breaking the law and could articulate no legal excuse. The trial ended and the jury began deliberations. Four hours later they were still deliberating and were dismissed by the judge to resume deliberations the next day. The next day, after two hours, a note was sent out to the judge. The note was signed by the foreperson and stated, "There are four people in this room who hate their government. We will never come to consensus." The judge called it a hung jury and declared a mistrial.[1] Obviously the handyman and the angry man had convinced two others to go along with them. The seventh defendant had his trial immediately following the verdict in our trial. His jury deliberated for ten minutes before finding him guilty of criminal

trespass.

The lessons to take from these two trials are that even in the realm of political trials, there are always unique circumstances. Occupy Augusta included a few Tea Party folks, and that changed the entire dynamic of the jury selection. I needed to look beyond left and right, to the emotions that jurors would bring to the deliberations. The emotions that an anti-war activist trial brings out are very different than those that an Occupy trial brings out. With the anti-war defendants we needed to elicit empathy. It was about the defendants. In the Occupy trial, it was about the jurors. We needed to gauge their anger. It is incumbent on the individual conducting the jury selection to recognize those differences and address them. We often tend to categorize and equate words, such as "protest" and "activist" while such categories need further situational definition. We owe it to our clients to do a deep analysis of what jury configuration might serve them best, while rejecting standardized profiles.

Lynne Williams is an attorney and social psychologist. She frequently represents environmental and political activists who commit civil disobedience and is a skilled jury selection expert. Lynne also takes up the cause of tribal members in Maine who are frequently challenged on their sovereign rights, as well as folks with disabilities who are challenged on their human rights.

[1] The Occupy Augusta defendants were retried later and ultimately convicted.