JUROR SELECTION AND THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY

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INTRODUCTION

Over the last one hundred years the Supreme Court has attempted to read meaning into the Sixth Amendment's guarantee of a trial by a fair and impartial jury. Until the passage of the Jury Selection and Service Act of 1968,¹ this important right remained, for the most part, in the hands of federal courts. They acted on a more or less incremental basis, but with most attention focused on the issue of racial discrimination in juror selection. The necessity for jurors to reflect a cross section of the community did not receive constitutional standing until the case of Thiel v. Southern Pacific Company² which was decided in 1946. In delivering the majority opinion, Mr. Justice Murphy declared, in ruling that the exclusion of daily wage earners was unlawful,³ that:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the

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² 328 U.S. 217 (1946).
³ Id. at 225.

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jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.4

There are at least four reasons why the cross section is necessary. First is the belief that, given differences in group behavior, a cross section will help cancel group biases. As Jerome Frank noted:

For each jury makes its own “law” in each case with little or no knowledge of, or reference to, what has been done before, or regard to what will be done thereafter, in similar cases. . . .

For prejudice has been called the thirteenth juror, and it has been said that “Mr. Prejudice and Miss Sympathy are the names of witnesses whose testimony is never recorded but must nevertheless be reckoned with in trials by jury” . . . .

For “jury made law” is . . . capricious and arbitrary, yielding the maximum in the way of lack of uniformity, of unknowability. . . . Indeed, through the general verdict, coupled with the refusal of courts to inquire into the way jurors have reached their decisions, everything is done to give the widest outlet to jurors biases.5

Awareness of such discretion led Harry Kalven and Hans Zeisel, in their Chicago jury project, to construct a “sympathy index” for defendants in criminal cases.6 Philip Herman found that occupational background influenced decisions in personal injury cases, and that many jurors did not “even recognize their own bias.”7 A hypothetical 1970 study showed that those with the “most bias” in accident cases were either the very young or the very old, those with elementary school educations, the unemployed, government employees, and union members. Those with the “least bias” were men in their forties, college graduates, native born, white, and persons with incomes in the $7,500 to $15,000 range.8 Strodbeck’s study of 49 mock jury trials also indicated that persons with higher status had higher levels of participation, influence, and perceived competence for the jury task. In addition, the jury foreman was expected to be male and from a higher status occupa-

4. Id. at 220.
5. J. FRANK, COURTS ON TRIAL 120, 122, 132 (1949).
Finally, Adler stated that "socioeconomic level [of the jury] appears... to be the most important single extralegal factor associated with jury decisions." Thus in criminal cases, the higher the socioeconomic status of the jury, the more likely it appears it would convict the defendant, especially if the disparity between the defendant's socioeconomic status and that of the jury is great.

It is assumed that if a jury reflects a cross section of the community, these biases will be lessened. Judge Lumbard believes that "sifted through a group, any biases or prejudices tend to cancel out..." This is probably an optimistic evaluation; prejudices are too long lasting and too deeply rooted to be eliminated by simply including in the jury the object of one's prejudice. What is more likely to happen is the second reason for the cross section requirement namely, the presence of persons from groups that are the object of prejudice inhibiting the expression of prejudice by other jurors. In the South, for example, the white juror did or does place loyalty to race above justice because he knows that no Negro did or will sit in judgment over him. Although there is no guarantee that black representation will bring an end to wrong convictions, it is probable that it would lessen such practices. Nor is jury prejudice limited to southern racism. The defense attorneys in the Berrigan brothers' trial felt that the presence of at least one Catholic juror was necessary to reduce any overt anti-Catholic feelings in the heavily Protestant and fundamentalist Harrisburg area.

The third assumption behind the cross section requirement is concerned with the issue of legitimacy. "When large classes of people are denied a role in the legal process, even if that denial is wholly unintentional or inadvertant, there is bound to be a sense of alienation from the social order." Of course, the individual defendant experiences a greater sense of injustice, since it is he who is sent to prison by the unrepresentative jury.

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11. Id. at 128.
Finally, jury service is the most direct contact that a citizen has with his government and, next to voting, about the only chance he has to participate in it as a basic decision-maker. As one Southern black remarked about being selected for jury duty, "When I got my summons . . . I got a sense of really belonging to the American community. . . . It was a very proud moment when I opened my letter and found that I had been . . . selected to serve on a Federal jury."17

HISTORICAL DEVELOPMENT

Yet the Supreme Court moved very slowly to guarantee the basic right of trial by an impartial jury. The major issue until the 1940's was racial discrimination. The earliest case was, of course, Strauder v. West Virginia18 in which the Court ruled that a statute limiting jury service to whites was invalid under the 14th Amendment. The second "Scotsboro Case," Norris v. Alabama,19 declared that the exclusion of Negroes from grand and petit juries solely because of race was a denial of equal protection of the law. Five years later, the Court in Smith v. Texas,20 set aside the conviction of a black indicted by a grand jury from which Negroes were excluded. In Hill v. Texas21 the Court held that a prima facie case of discrimination existed because no Negro had served on a grand jury for sixteen years. By 1947, the Court decided that the state had the burden of proving no discrimination where no Negro had served on a jury in thirty years.22 The selection of jurors by commissioners from only those with whom they were acquainted was ruled a violation of equal protection in Cassell v. Texas.23 The Court also extended the protection of the 14th Amendment to Mexican Americans in Hernandez v. Texas,24 by declaring that a prima facie case of discrimination existed when no persons of such heritage had served on county juries for a period of twenty-five years, even though such persons were a sizable percentage of the county's population. Finally, in Eubanks v. Louisiana,25 a jury se-

17. Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 63 (1967) [hereinafter cited as Hearings].
18. 100 U.S. 303, 310 (1879).
lection plan that failed to produce one Negro juror from a large pool of eligible blacks was held invalid.

The Court has also been active in non-racial fields. In 1942, it invalidated jury panels selected only from those who had attended special "jury classes."26 Four years later, in *Ballard v. United States*,27 it struck down the practice of eliminating women from federal jury panels. The informal practice of excluding daily wage earners from jury service without their consent was ruled illegal in *Thiel v. Southern Pacific Company*.28 In 1968, in *Witherspoon v. Illinois*,29 the exclusion of those who had a general objection to the death penalty was declared a violation of due process because it stacked the deck against the defendant. Finally, in 1975, the exemption of women from state jury service unless they filed a written declaration specifically asking to serve was declared unconstitutional.30

**JURY SELECTION PRIOR TO 1968**

Given these guidelines, how did the selection of juries actually operate? In both state and federal jurisdictions (the national government had chosen jurors in accordance with state selection procedures until the Civil Rights Act of 195731), there were three main practices which worked against attaining representative juries.

The first of these was the use of the "key man" method. Jury commissioners sent nominating petitions to "key" people in the community. They were then asked to nominate persons known to them who had the characteristics of "good" jurors. Of course, this had the effect of eliminating blacks in the South, because nomination petitions usually were sent only to whites. Secondly, most of the key men were people from high occupational and social status, although labor union leaders were sometimes consulted. The obvious subjectivity and room for discrimination led federal Judge Joseph Lord to oppose this method of selection because of the lack of any kind of objective standards and the broad opportunity for intentional abuse.32 Judge Irving Kaufman said the key man procedure produced juries which were the social peers of jury

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32. *Hearings*, supra note 17, at 75.
commissioners. Finally, Professor Mills' study of jurors selected or excused in the United States District Court for Maryland shows an over-representation in the professional managerial and sales occupations. Consequently, by 1968 there existed ample evidence to show the unrepresentative nature of juries selected by the "key man" procedure. However, this procedure remained both legal and the most common method of selecting veniremen.

The second procedure producing unrepresentative juries was the use of exemptions for all members of specific occupational groups. Most common exemptions included lawyers, physicians, dentists, nurses, teachers and professors, governmental officials, clergymen, veterinarians, bank tellers and cashiers, employees of telephone and telegraph companies, optometrists, etc. The general impact of this type of exemption was to exclude from juries professionals and persons with higher educational backgrounds. When the hardship exemptions given to persons who could not afford to serve on juries were added to the above, the jury was even less representative of the community. Kalven and Ziesel believed that the daily wage earners and the poor were disqualified more often than professionals, but regardless of which group was excluded more, the point still stood: juries were unrepresentative.

The final practice distorting jury service was the use of subjective standards in determining jury qualifications. Both federal and state governments had used such vague phrases as: "persons generally reputed to be honest and intelligent men"; "persons of good character, of approved integrity, sound judgment, and reasonable information"; "sober and judicious persons"; "of fair character, of approved integrity, and sound judgment"; and "only such persons as the selecting officers have good reason to believe are law-abiding citizens of approved integrity . . . and intelligence."

Although such standards have been discarded by the federal government, many states still require jurors to meet these criteria. The retention of these qualifications may rest on one's conception of the nature of the jury. If main emphasis is placed on the need for a representative cross section of the community, then subjective standards are inappropriate; but if major importance is given to

35. ABA Project on Minimum Standards for Criminal Justice § 2.1(c), Comment (Approved Draft, 1968).
36. See Hearings, supra note 17, at 131 (testimony of Harry Kalven, Jr.).
37. ABA Project on Minimum Standards for Criminal Justice § 2.1(b) at 53, Comment (Approved Draft, 1968).
the duty of jurors to decide cases to the best of their ability, then such subjective standards are necessary to keep the incompetent and uneducated from influencing the jury system with increasing emotion and irrationality.\textsuperscript{38}

Some critics compared these standards to the literacy and understanding tests used to disfranchise black voters in the South. These commentators believed that the best way to eliminate these subjective criteria, was to attack them as vague and violative of due process of law. But in Turner v. Fouche,\textsuperscript{39} the use of terms like "discreet," "upright," and "intelligent" in a Georgia statute was not regarded in and of itself to be a violation of due process.\textsuperscript{40} The Court did not say, however, that if the actual application of these terms resulted in a jury that was not a cross-section of the community, then there would be a violation of the equal protection clause of the 14th Amendment.\textsuperscript{41}

\section*{JURY SELECTION AND SERVICE ACT OF 1968}

To reduce these difficulties, the United States Congress passed Jury Selection and Service Act of 1968.\textsuperscript{42} This was the first modern attempt to guarantee a trial by a fair and impartial jury through legislative action. But the law was as important for what it did not do, as for what it did. The most crucial decision was to leave state jury selection methods as they were. There was no doubt that Congress could have regulated state procedures; it had recently passed legislation in the area of voting rights which could have served as a precedent. In fact, the Committee on the Operation of the Jury System of the Judicial Conference of the United States\textsuperscript{43} had recommended just that. Following the lines of earlier civil rights bills, the Committee sought to give the Attorney General the power to bring suit against states in federal courts, allow federal courts to use injunctive remedies (e.g., suspension of

\textsuperscript{38} See Hearings, supra note 17, at 40, 93. (Testimonies of Senator Sam Ervin and William L. Marbury).

\textsuperscript{39} 396 U.S. 346 (1970).

\textsuperscript{40} Id. at 353-55.

\textsuperscript{41} Id. at 361-64.


\textsuperscript{44} Id. at 367.
any state test or device and the appointment of special masters), and force states to keep records of juror selection for four years and make them available to the Attorney General of the United States.  However, Congress failed to pass such provisions.  Given the generally unfavorable climate for civil rights legislation in 1968, most of the required resources were spent in the passage of open housing legislation. Congress probably felt that a struggle for uniform jury selection would result in a lengthy defeat. Although a Uniform Jury Selection and Service Act has since been drawn up by the National Conference of Commissioners on Uniform State Laws, this proposal, too, has received unfavorable support in Congress.

The main purposes of the Jury Selection and Service Act are to provide litigants with a jury "... selected at random from a fair cross section of the community" and to assure that all citizens "have the opportunity to be considered for service on grand and petit juries ... and shall have an obligation to serve as jurors when summoned for that purpose."

The first of the four major sections of the Act prohibits discrimination in jury service on the basis of race, color, religion, sex, national origin, or economic status. This last category is the most far-reaching because most of the prior court decisions did not fall into this area. It may well result in more litigation than the other categories, and has the potential for bringing about more representative juries.

The second part of the Act specifies how a random jury is to be chosen. Each court is to compose its own plan within the following guidelines. The basic source of names for jurors must be either a voter registration or actual voting list (in some parts of the country registration is not required). If there is reason to believe that these lists are not sufficiently representative, they must be supplemented from other sources. Names are to be selected randomly from these lists and placed into the master jury wheel. The total number of names required may vary from one-half of one percent of the total or a minimum of one thousand names. Then names are drawn at random from the wheel for jury service. The wheel itself

45.  Id.
48.  Id.
49.  Id. § 1862.
50.  Id.
51.  Id. Examples of other sources of potential jurors include city directories or public utility customer lists.
must be refilled at least every four years.\textsuperscript{52}

The third section of the Act attempts to limit excuses from jury service to those who would experience undue hardship or extreme inconvenience.\textsuperscript{53} It also provides specific exemptions to those on active duty in the military, members of fire and police departments, and public officials who are actively engaged in official duties.\textsuperscript{54} Each plan must fix a mileage limit for jury service beyond which such service would constitute an undue hardship.\textsuperscript{55} To insure adequate information for jury challenges, each district must keep records available for inspection\textsuperscript{56} and must make certain that each juror qualification form contains certain pertinent information.\textsuperscript{57}

The fourth major part of the Act sets out disqualifications for jury service. The age limit was originally set at twenty-one, but is now eighteen.\textsuperscript{58} Any prospective juror who is unable to read, write, or understand English well enough to fill out the questionnaire is also disqualified.\textsuperscript{59} This provision was disputed in Congress by those who thought that such low standards would reduce the quality of jurors, but the proponents of the representational argument won out.\textsuperscript{60} Nor can anyone serve on a jury who is unable to speak English.\textsuperscript{61} Next, a catch-all provision disqualifies anyone who is "... incapable, by reason of mental or physical infirmity, to render satisfactory jury service ..."\textsuperscript{62} Finally, no one can be eligible for service if he has either a charge pending or was convicted of a crime carrying a sentence of more than one year.\textsuperscript{63} It is interesting to note that the Act itself establishes a one year residency requirement.\textsuperscript{64} The United States Supreme Court declared such a length of time impermissible for voter registration.\textsuperscript{65} The maximum period the Court has allowed in a state voter registration statute is a fifty day span.\textsuperscript{66} However, a one year residency requirement for prospective jurors has been sustained by the lower federal

\textsuperscript{52} Id. § 1863(b)(4) (Supp. 1977).
\textsuperscript{53} Id. § 1863(b)(5).
\textsuperscript{54} Id. § 1863(b)(6).
\textsuperscript{55} Id. § 1863(b)(7).
\textsuperscript{56} Id. § 1863(d).
\textsuperscript{57} Id. § 1864(a).
\textsuperscript{58} Id. § 1865(b)(1).
\textsuperscript{59} Id. § 1865(b)(2).
\textsuperscript{60} See note 38 supra.
\textsuperscript{62} Id. § 1865(b)(4).
\textsuperscript{63} Id. § 1865(b)(5).
\textsuperscript{64} Id. § 1865(b)(1).
\textsuperscript{65} Dunn v. Blumstein, 405 U.S. 330 (1972).
THE ACT IN OPERATION

Given this far-reaching attempt at guaranteeing a representative jury, has the Act met the expectations of its framers? To answer this question we must first determine the nature of governmental obligation. It can be argued that all government has to do is to see that no positive discrimination takes place. Returning to Justice Murphy in \textit{Thiel}, we find him saying "... this does not mean, of course, that every jury must contain representatives of all the economic, social, religious, political, and geographical groups of the community." More recent cases have said the same thing. In \textit{United States v. Ross}, a court of appeals held that there was no need for juries to be a "mirror image of the community." In \textit{United States v. Greene} another court of appeals declared that the 1968 Act did not require the jury pool to be a "statistical mirror of the community." Thus government's obligation does not extend to assuring actual representation in any particular case by the inclusion of minorities.

But if the focus shifts from the emphasis on equal protection of groups of citizens to the right of due process accorded to each defendant, a case can be made for requiring positive governmental action. As early as 1962, Arthur Miller argued that the due process clause could be read in such a way as to require affirmative governmental action. Douglas and Noble, also believed that courts could compel positive steps if they shifted from equal protection to due process grounds. It has also been suggested that proportional representation could be required in state trials under the equal protection clause. Thus it is arguable that both the Fifth and Fourteenth Amendments might require some sort of quota. In fact, a court of appeals indicated that "purposeful inclusion" of certain classes of persons in grand jury pools might be justified to redress imbalances. The Second Circuit has stated that in certain

68. 328 U.S. at 220.
69. 468 F.2d 1213 (9th Cir. 1972).
70. \textit{Id.} at 1217.
71. 489 F.2d 1145 (D.C. Cir. 1973).
72. \textit{Id.} at 1149.
cases affirmative action is appropriate to insure an at random selection from a fair cross-section of the community.\textsuperscript{77}

Cognizable Groups

But it is unlikely that the Burger Court will be so adventurous. Consequently, the federal district courts and courts of appeals will determine the actual impact of the 1968 Act. One of the main issues these courts have dealt with is the problem of which groups must be represented to meet the cross-section requirement. It is not necessary to include all groups in a jury panel—only “cognizable groups” must be represented. A cognizable group is one with “sufficiently distinct views and attitudes. . . .”\textsuperscript{78} Before a group becomes cognizable it must: (1) have a definite composition; (2) have members who share common attitudes or ideas or experience; and (3) have a community of interest which cannot adequately be protected by the rest of the populace.\textsuperscript{79} There are two main difficulties with this type of definition. The first is that what is cognizable to one person may not be cognizable to another. The second is that a group may be cognizable on only one or two issues, but those issues may be of great importance.

Let us look at court rulings which have denied that certain groups are cognizable. Arguably, since relatively young persons (i.e., under thirty) vote less and are more mobile, they are underrepresented on juries. Does this underrepresentation violate the intent of the 1968 Act? It has been held that persons between the ages of twenty-one and twenty-nine do not comprise such a group and that underrepresentation of those from eighteen to thirty does not constitute an infringement of the Act.\textsuperscript{80} Nor do persons between the ages of twenty-one and twenty-four need to be represented in exact proportion to the population as a whole.\textsuperscript{81} Finally, underrepresentation of the young does not constitute a violation of the 1968 Act if purposeful exclusion is absent.\textsuperscript{82} Thus, young persons may be underrepresented because they do not constitute a cognizable group. But on some issues, for example, the use of

\textsuperscript{77} United States v. Jenkins, 496 F.2d 57, 65 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975).

\textsuperscript{78} Comment, Challenging the Juror Selection System in New York, 36 ALB. L. REV. 305, 309 (1972).


\textsuperscript{81} United States v. Ross, 468 F.2d 1213, 1218 (9th Cir. 1972), cert. denied, 410 U.S. 989 (1973).

\textsuperscript{82} United States v. Greene, 489 F.2d 1145 (D.C. Cir. 1973).
drugs, sexual mores, and the weight given to the testimony of law enforcement officials and defendants, they may be underrepresented. Here it seems clear that the courts have not acted to ensure a representative jury.

The second group which has failed to achieve cognizable status is that of nonvoters. If someone neither registers nor votes, he or she cannot become eligible for jury duty. Because nonvoters are more frequently from the lower end of the socio-economic spectrum, juries will have a middle class bias. At least three lower court decisions have upheld the absence of nonvoters from jury panels. Despite arguments concerning the significance of political alienation involved in nonvoting, courts believe that those who wish to stay away from the political process forfeit their right to serve on juries.

There are three groups besides racial minorities and daily wage earners which are considered cognizable. The first is women. An appellate court ruled that men and women can have points of view so dissimilar as to comprise separate groups. In this particular case, women were underrepresented by thirty percent in the grand jury pool and, consequently, the burden of proof shifted from the defendant to the government. But two decisions found nothing wrong in women constituting only thirty-three and twenty-nine percent of the jurors. Since the first of the cases mentioned was the only one since the passage of the 1968 Act, it would seem to be the weightiest of the three precedents.

Education is the second cognizable group. A court of appeals has held that those with lower education were numerous enough and had such distinct attitudes that they constituted such a group. But another court held that a system which resulted in the selection of twenty-four percent of the grand jurors and thirty-three percent of the petit jurors with less than high school diplomas in a community where fifty percent of the people lacked such degrees was not invalid. In another case, only seven percent of the jurors had an eighth grade or less education while within the entire community there was over thirty-six percent. Again, the

83. United States v. Dellinger, 472 F.2d 340, 365 (7th Cir. 1972); Camp v. United States, 413 F.2d 419, 421 (5th Cir. 1969); United States v. McDaniels, 370 F. Supp. 298, 301 (E.D. La. 1973).
84. 420 F.2d at 571.
86. 420 F.2d at 571.
87. 275 F. Supp. at 740-41.
court found no violation of the Constitution. Thus it seems that education is cognizable, but the deviation must be quite large before any violation will be found.

In a Massachusetts federal district court case, paupers were declared a cognizable group. The defendant, who had received public assistance funds in the past, though he was not at the time of the case a welfare recipient, was given standing to challenge the Massachusetts law which prohibited paupers from voting. The court declared that any barring of paupers by fear, inertia, or local municipal acts from registering to vote constituted a violation of the 1968 Act because they were discriminated against on the basis of their economic status. However, a Louisiana federal district court said that food stamp recipients and the poor were not cognizable groups.

In summary, the definition of cognizable groups does limit the protection of the 1968 Act. Courts are not reluctant to overturn cases involving traditional types of discrimination based on race or sex; but when the issue is a novel one, or one requiring judicial activism, they do not act with inventiveness. Thus the Act protects those already covered by ad hoc court decisions up to 1968, but does not extend much further.

VOTER LISTS

A second problem affecting the cross-section requirement is the use of registration or voting lists as the source of prospective jurors. There is no dispute that lower socio-economic groups vote less; they do so from apathy, alienation, and discrimination. If we can hold in suspension the argument that such persons are not "fit" jurors, what alternatives are there to voting registration lists? The most obvious one is the United States census. It includes, supposedly, everyone. But it has one major disadvantage; since it will be taken only once every five years, it can become out of date. Certainly there is nothing to prevent using census data as a base year and then supplementing it with voter registration lists. This would reduce, initially at least, lower class underrepresentation.

Another approach is to use the voting lists as basic sources, but also augment them with names obtained elsewhere. For exam-

89. Id.
91. Id.
92. 310 F. Supp. at 312.
ple, one could use city directories, telephone installations, utility hookups, and the like. However, there is little proof that these are more representative than the voter lists. Yet, this may not be an unwarranted assumption. If we count the families with television we get a number which far exceeds voter registration. A second alternative is to make voter registration easier. Congress has considered legislation which would allow registration by mail, or at the polling place. Undoubtedly this would increase the percentage of lower income groups in the pool. In the end, it is really a value choice. Do we want to make juries more representative by including persons less involved with political process? It would be a none-too-difficult task to do, but should it be done? This writer believes it should.

EXEMPTIONS

Besides cognizable group and voter registration problems, there is a third obstacle to obtaining a real cross section in jury representation. Provisions for exemptions from jury duty are specifically set out by law. These provisions allow a judge to dismiss a prospective juror if such service constitutes an undue hardship, extreme inconvenience, or serious obstruction or delay in the fair and impartial administration of justice.

Based on this provision, the representativeness of juries can be seriously diluted. Certainly a large measure of discretion should be given to the judge or those directly under his supervision, but this discretion can warp the composition of juries. For example, automatic exclusion has been given to the following groups under a plan devised by a Maine federal district court: (1) all persons above seventy; (2) all ministers of the gospel and members of religious orders; (3) all attorneys, physicians, surgeons, pharmacists, nurses, and funeral directors; (4) all school teachers in public, parochial, or private schools; (5) all women who are caring for a child or children under the ages of sixteen years; and (6) all sole proprietors of businesses. Note that this is an automatic exemption; none of the groups even has a chance to serve; perhaps they are hardship cases, but perhaps they are not. The point is that they do not have the opportunity to serve, and, consequently, representation by a cross section of the community is diluted. As we have already seen, despite a Supreme Court limitation of fifty days

95. Id.
residency for voting, one year residency requirement for jury service was upheld by a court of appeals in 1974.97

Then there is the problem of individual exemptions. Financial hardship has always been grounds for excuse, and does not constitute systematic exclusion.98 Nor does dismissing, upon request, "students in actual attendance at a university, college, academy, or school having a regular schedule of classes."99 Such professionals as clergy, physicians, and nurses may also be exempted.100 Thus, although individual excuse by request is less unrepresentative than automatic exclusion, it still dilutes the representativeness of the jury.

CHALLENGES

The most obvious remedy for an unrepresentative jury is to attack it in the courts. This raises the question of standing. There are two specific groups able to challenge the venire. The first group is defendants. The original understanding was that defendants could challenge a jury only if members of their group were systematically excluded. Then in 1970 a court of appeals ruled that defendants need not be members of the challenged group.101 Three years later, a six-member majority of the Supreme Court said that a white man could raise the issue of the exclusion of Negroes from his jury panel.102 But what about those persons systematically excluded from jury service? Do they have standing to attack juror selection laws? According to Carter v. Jury Commission of Greene County, they do.103 In this case, a group of Negroes brought a class action suit alleging racial discrimination in the selection of jurors. They sought injunctive relief, including non-enforcement of the statute, and an order requiring the governor to put blacks on the jury commission. In a three part decision, the Court unanimously ruled that there was no jurisdictional bar to the suit,104 but it also upheld the law on its face105 and refused to compel the governor to appoint black jury commissioners.106

97. United States v. Owen, 492 F.2d 1100, 1109 (5th Cir. 1974).
98. United States v. Bowe, 360 F.2d 1, 7 n.3 (2d Cir. 1966) (citing United States v. Flynn, 216 F.2d 354, 386-87 (2d Cir. 1954)).
99. United States v. Ross, 468 F.2d 1213, 1219 (9th Cir. 1971).
100. See, e.g., Donaldson v. O'Connor, 493 F.2d 507, 528-29 (5th Cir. 1974); United States v. Gurney, 393 F. Supp. 688, 701 (M.D. Fla. 1974).
101. 420 F.2d at 567 n.2.
104. Id. at 330.
105. Id. at 332.
106. Id. at 338.
A second requirement in addition to standing is the timeliness of the jury challenge. Section 1867 (a) of Title 28 of the United States Code declares that in criminal cases the challenge must be made "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefore. . . ." Lower court decisions generally have rigidly upheld this section. Thus a challenge to a petit jury raised after the conclusion of the trial was invalid. A challenge made after the commencement of voir dire examination was also turned down. Finally, a court of appeals prohibited an attack on selection procedures that was not made before or during the voir dire.

Given these requirements of standing and timeliness, what standards are used to determine if juries are chosen according to the 1968 Act? Since courts do not take frivolous suits, the defendant must bear the initial burden of proof, but he does not necessarily have to prove actual intent to discriminate. A showing of de facto discrimination may suffice. To prove that illegal discrimination exists, the following factors are important. First, the greater the size of the disparity, the more weight the court will give to the defendant's case. Second, if the disparity has existed over a long period of time, the court is generally more suspicious. Third, if the group is traditionally discriminated against, the court will scrutinize the jury selection more closely. Fourth, if the group is easily recognizable, and if there is an opportunity for discrimination, (e.g., Negro names on yellow papers and white names on blue papers or notations of race on application forms), judicial suspicion is again aroused. Finally, if the selection is done in such a way as not to comply with state statutes or court orders, the burden is more easily sustained.

Since most attacks on jury selection have concentrated on the disproportion factor, the question of how much disparity is permissible becomes very crucial. We have already seen from the Thiel case that no proportional representation is required. And, courts have been reluctant to develop a fixed standard. For example, a federal district court declared that there can be no absolute measure of what is a "substantial" deviation. Thus, the decision has

112. 370 F. Supp. at 303-04. For a fuller discussion of underrepresentation of
been made on a case by case basis. A jury containing eighteen percent blue collar workers was permissible even though such workers constituted about thirty percent of all potential jurors. But a grand jury pool that underrepresented women by thirty percent did raise the issue of potential unrepresentativeness and shifted the burden of proof to the government. In another case, a court of appeals upheld a jury plan adopted in accordance with the 1968 Act even though it produced only two blacks from a panel of thirty-six. But a two-to-one disparity between eligible blacks and those on a jury panel constituted enough of a disproportion to shift the burden of proof to the state. Although we have already seen that a seven percent versus thirty-six percent variance among persons with eighth grade education or less constituted substantial underrepresentation, a seventeen and twenty-six percent variance for those with a high school education did not. In summary, the courts have developed a doctrine that underrepresentation of cognizable groups must be substantial, but there is little agreement as to what constitutes substantial underrepresentation.

There are two solutions to this difficulty. The first and most obvious is to find some set figure and declare it to be substantial. Cases involving reapportionment of Congress and, until lately, state legislatures, were judged by the standard of "one man, one vote." Since registration and voting lists are in themselves unrepresentative, the permissible deviation from the general population would have to be set at a higher level. If exemptions for financial and other hardships are also considered, a reasonable variance might be in the twenty percent range.

A second alternative is to use statistical probability. The Supreme Court has already noted the usefulness of probability theory and taken judicial notice of statistical disparities. All that is needed is to compute the probability level—that the variance observed occurred by chance and then set a permissible level. A standard of five chances out of a hundred is recommended as an

economic groups on juries, see Comment, Underrepresentation of Economic Groups on Federal Juries, 57 B. U. L. Rev. 198 (1977).
113. 405 F.2d at 392.
114. 420 F.2d at 571.
117. 291 F. Supp. at 551.
118. 275 F. Supp. at 740-41.
119. See 370 F. Supp. at 303.
acceptable level.\textsuperscript{121}

SELECTION OF INDIVIDUAL JURORS

The second major area affecting a fair, impartial jury is the selection of individual jurors. Each juror is supposed to decide the case based on the facts; no personal biases or prejudices are supposed to interfere. Therefore, it becomes very important for the defendant and the government to know enough about jurors to challenge them for cause or to exercise peremptory challenges wisely. Parties can do this at two stages—at the pretrial investigation and at the voir dire, or the direct examination of jurors in the courtroom.

In federal courts, information about prospective jurors is generally unavailable unless one is going to challenge the venire. Section 1867 (f) of Title 28 of the United States Code requires that "[t]he contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan"\textsuperscript{122} or for the purpose of challenging the venire. Thus a court of appeals has ruled that a jury list could be retained until the morning of the trial as long as there was no evidence that the discretion exercised by the court was arbitrary.\textsuperscript{123}

PRE-TRIAL INVESTIGATION

Once the names of potential jurors are known, they can be investigated. Private jury-investigation firms exist which provide such information as commercial credit reports, business and work records, religious, fraternal, and veterans’ memberships, community activities, hobbies, education, service on other juries, and accident history.\textsuperscript{124} The legitimacy of such firms was accepted by the Court of Appeals for the Third Circuit in 1955.\textsuperscript{125} Government attorneys have their own information sources. Local district or prosecuting attorneys keep records during voir dire and sometimes have records of past jury service.\textsuperscript{126} This enables them to know which former jurors have voted to acquit in prior criminal cases,

\begin{footnotesize}
\begin{enumerate}
\item[121.] Kairys, Juror Selection: The Law, A Mathematical Method of Analysis, and A Case Study, 10 AM. CRIM. L. REV. 771, 787 (1972).
\item[123.] United States v. Stokes, 506 F.2d 771, 777 (5th Cir. 1975).
\item[124.] Goldstein, Selection of the Jury, 14 TRIAL LAW. GUIDE 145, 147 (1970), contained in I. GOLDSTEIN, TRIAL TECHNIQUES (1969) (hereinafter cited as \textit{Selection of the Jury}).
\item[126.] \textit{Selection of the Jury}, supra note 124.
\end{enumerate}
\end{footnotesize}
thus allowing use of peremptory challenges if the prosecutor feels the prospective juror is anti-prosecution. Police in Massachusetts and in some Southern states investigate jurors for prosecutors and may have access to extensive state data files on their citizens.\textsuperscript{127} Finally, the federal government's attorneys may have access to FBI reports, selective service files, military records, and industrial security files.\textsuperscript{128}

This type of information does give the government an advantage over defense attorneys. Is this advantage a violation of fundamental fairness? At least one court of appeals decision upheld the use of such data obtained from local credit bureaus, police departments, state police agencies, and the FBI as long as there was no appearance of prejudice to the defendant.\textsuperscript{129} Some state courts have been willing to come down on the side of the defendant, however. In \textit{Commonwealth v. Smith},\textsuperscript{130} a Massachusetts murder trial, the police questioned prospective jurors or members of their families concerning place of birth, health, occupation, organizational memberships, and views concerning the upholding of law and capital punishment. The Massachusetts high court declared that "[t]he police, as agents of the public, should not, for such an investigatory purpose, be available for only one side in the pending contest."\textsuperscript{131} The Supreme Court of Colorado ruled in a similar manner concerning police checks for possible convictions of prospective jurors.\textsuperscript{132} Finally, a Michigan court of appeals ruled that denial of access to information collected by the police and given to the prosecutor constituted a violation of fundamental fairness.\textsuperscript{133} The court also said that if such information was in the possession of the defense, the state should also be given access to it.\textsuperscript{134} If the side possessing the information wished to claim the work product privilege, the information should be given to the judge for an \textit{in-camera} inspection.\textsuperscript{135} But the Michigan Supreme Court has ruled that as long as the information compiled by the prosecutor is from publicly available sources there is no due process violation if the information is not shared with the defense.\textsuperscript{136}

\textsuperscript{128} Id.
\textsuperscript{129} United States v. Flange, 426 F.2d 930, 932-33 (2d Cir. 1970).
\textsuperscript{130} 350 Mass. 600, 215 N.E.2d 897 (1966).
\textsuperscript{131} Id. at 600, 215 N.E.2d at 901.
\textsuperscript{132} Losavio v. Mayber, 178 Colo. 184, 496 P.2d 1032, 1034 (1972).
\textsuperscript{134} Id. at 642, 209 N.W.2d at 801.
\textsuperscript{135} Id. at 642, 209 N.W.2d at 801.
\textsuperscript{136} People v. McIntosh, 400 Mich. 1, 209 N.W.2d 796, 798-801 (1973).
A new and very important technique, especially in trials of either a political nature or which are highly visible to an emotional public, is the use of survey research. This is done by selecting a random sample of persons within the area of the trial to find out what kinds of attitudes certain groups hold on specific questions. This information can then be used as the basis for questioning and challenging during voir dire.

The most highly publicized use of this method occurred in the trial of the Berrigan brothers who allegedly conspired to raid draft boards and destroy records, kidnap Henry Kissinger, and blow up heating tunnels in Washington. The defense called in a group of social scientists as advisors. A list of registered voters was obtained, and a proportional sample from the eleven counties within the federal district was drawn. Then 840 phone interviews were conducted. The information gathered included the usual demographic characteristics, and also whom the respondent favored in the 1972 election. Using the demographic information, the defense contended that the jury pool underrepresented the young. Partially on the basis of this information, a new panel was selected.

Next, personal in-depth interviews were conducted with 252 persons, mostly from around Harrisburg, Pennsylvania. The major classifications of information sought included the following:

1) type and amount of media contact,
2) knowledge of the defendants and their case,
3) the greatest Americans during the past 10 or 15 years,
4) trust in government,
5) ages and activities or respondents' children,
6) religious attitudes and commitment,
7) spare time activities,
8) organizational memberships,
9) attitudes potentially related to the trial, e.g., sanctity of private property, support for country, police, and use of force to maintain public order, presumption of innocence,
10) scale of acceptable anti-war activities.

From this information two sets of characteristics were developed. "Bad" jurors were more likely to be fundamentalist Protestant, to have higher educational levels, and to have more contact with metropolitan media. The ideal juror was a "female Democrat with no religious preference who had a white collar, or skilled blue collar job and some tolerance of anti-war activities and attempts to

137. See Shulman, Recipe for a Jury, Psychology Today, May 1977, at 44.
138. Id. at 40.
resist governmental authority." The best defense juror was categorized as: (1) under 30, (2) black, (3) possessing elements of a "counterculture" style of life, (4) "showing strong opposition to the Viet Nam war and sympathy for the defendants," and (5) "having a son or close male relative who was of or near draft age."

What all of this means is that social science may help in selecting a partial jury. But there are several limitations to this approach. It is always risky to generalize from group characteristics to the attitudes of an individual juror. As Hans Zeisel says, it is like using batting averages to predict performance for a specific time at bat. Shulman also warns that the selection of a juror involves a "complex mix of subjective impressions, hearsay, objective information and data from surveys." Finally, jury verdicts are much more than the sum product of individual attitudes. Also to be considered are the conception a juror has of his role, the special characteristics of the trial, and the influence of the group on an individual's perceptions, beliefs, and independence.

There are two further problems of constitutional magnitude. Since these surveys seem to be useful in producing a desired verdict, those who can afford them have a headstart over those who do not. If the government chooses to use them, then the prosecution will have a huge edge over the defense. It may become necessary to limit the use of such surveys or to require that they be given to the other side as well. In addition to this equal protection issue, there is a problem in the cross section area. No one wants impartial jurors; we all prefer those partial to use. The use of social science methodology may, then, produce a jury that is far from a cross section of the community; it may produce one that is severely unrepresentative. Perhaps the best solution is to curtail such studies and then make more information about each prospective juror available both to the prosecution and defense.

EXAMINATION IN COURT

It is the direct examination of jurors which is the most common way to get a less partial jury. Consequently, this stage may greatly affect the cross section composition of the jury. The extensive use of voir dire to examine jurors is "practically unique" to the United States. But the usefulness of voir dire often depends

139. Id. at 40-41.
140. Id. at 42.
142. Shulman, Recipe For a Jury, PSYCHOLOGY TODAY, May 1977, at 83.
upon who questions the jurors. In federal courts, for example, rule 24(a) of the Federal Rules of Criminal Procedure allows for voir dire conducted by the judge only, by the judge with supplementation by the attorneys, or by the attorneys alone. Currently, about fifty-three percent of all federal courts use judge-only voir dire, thirty-one percent provide for supplemental questioning by the attorneys, thirteen percent allow attorneys to ask all the questions, and three percent permit questioning by attorneys or clerks outside the presence of the court. In state criminal cases, thirteen states use judge-only, seventeen states use judge and attorney, and twenty states allow for attorney-only voir dire. However, the trend is toward judge-conducted voir dire: “During the 1960’s and early 1970’s judges sharply curtailed the opportunity for lawyers to question prospective jurors and increasingly assumed the task themselves, sometimes with skill and sometimes with disinterest and disdain.”

Part of the problem with extensive examination of jurors is that the needs of the judicial system often clash with the needs of the defendant. In order to save time and avoid delay, judges may limit the numbers and kinds of questions asked during examination. But what seems unimportant to judges may be very significant to defendants. For example, in Ham v. South Carolina, the Supreme Court upheld the refusal of a trial judge to allow questions concerning reactions to facial hair in the trial of a black civil rights worker for the possession of marijuana. Many critics believe that judges are not very probing, and are reluctant to offend prospective jurors.

Nor are attorneys unaffected by the needs of the system. A lengthy examination over sensitive areas may antagonize many jurors. The attorney also knows that the judge is watching him, and may be fearful of an extended, probing search because he knows he will have to go before that judge again. Yet one of the arguments used against attorney-conducted voir dire is that it does result in unrepresentative juries. For example, in a California case,

146. Id. at 95-97.
147. Id. at 74.
149. Id. at 528.
150. Hearings, supra note 17, at 232. (testimony of Sheldon Elsen).
People v. Crowe, the California Supreme Court declared that "direct examination by counsel has perverted the purpose of voir dire, and transformed the examination or jurors into a contest between counsel for the selection of a jury partial to his cause . . . ." The arguments concerning time and efficiency lost by attorney-conducted voir dire are also open to question. One commentator, for example, concludes there are no dramatic time differences between attorney and judge-conducted voir dire and that there is no conclusive evidence as to which method saves the most time.

But voir dire has other purposes besides the selection of jurors. A second function is indoctrination. One observer felt that based on the cases he watched, most attempts at indoctrination were failures. Yet lawyers still try to condition prospective jurors. In cases involving black political activists, voir dire should be used to explain to middle class juries the conditions of the ghetto, the problems of political activists, and the degradation of the welfare system. Preparation may also be made for issues of evidence and rules of law.

Third, since it is the jurors themselves who will decide the case, it is vital that the attorney establish rapport with the jury, and he can use voir dire to do so. Many lawyers would agree with the remark of an attorney specializing in accident cases: "I have felt for many years that a law suit quite often resolves itself into a battle of personalities between lawyers." An attorney who seems aloof or arrogant does his client little good.

Finally, a chance to examine jurors through his attorney gives the defendant more of a feeling of legitimacy. He has had his crack at the jury, and got the best one he could. Of course, this generalization holds less true for political activists, but even in these cases the rest of the community may believe the trial was fair when they see that ample opportunity was given to the defendant to question his jurors.

Once the attorneys begin examining jurors, they have two alternatives in discharging those with bias or prejudice. The first is the use of the peremptory challenge. This means a person may be
removed without any showing of prejudice; the challenge is issued and the prospective juror is dismissed. The peremptory challenge is not required by the Federal Constitution, but once it is granted, it becomes a necessary part of the jury trial.\textsuperscript{158} The peremptory challenge serves four purposes: (1) "to avoid trafficking in the core of truth in most common stereotypes," (2) to get rid of the juror who is either consciously or unconsciously deceptive, (3) to give the litigant the satisfaction of having a role in the selection of jurors, and (4) to dismiss the alienated juror who could not be removed for cause.\textsuperscript{159}

The number of peremptories available to each side in federal cases varies according to the nature of the offense. In capital offenses the number is set at twenty.\textsuperscript{160} In felony cases the government is entitled to six peremptories and the defendant is entitled to ten.\textsuperscript{161} There are three challenges when the offense is a misdemeanor.\textsuperscript{162} Multiple defendants may be required to share the challenges.\textsuperscript{163} Of course a presiding judge may grant more peremptories if he feels the cause of justice requires it. This might be especially true in cases involving a great amount of publicity and intense community attitudes. When the peremptory is used is generally up to the trial judge. He may require it to be exercised immediately or he may allow the parties to wait until the entire venire has been examined. The latter course is preferable from the parties' standpoint because they then have knowledge of the entire panel.

The most important feature of the peremptory challenge is that it is almost unreviewable. For example, in \textit{Swain v. Alabama},\textsuperscript{164} blacks residing in an Alabama county, constituted twenty-six percent of the population, but only ten to fifteen percent of the jury panels; and none survived voir dire to serve on a jury.\textsuperscript{165} The Supreme Court ruled that this percentage variation

\textsuperscript{158} See Stilson v. United States, 250 U.S. 583, 586 (1919).
\textsuperscript{161} Fed. R. Crim. P. 24(b).
\textsuperscript{162} Id.
\textsuperscript{163} Id. See United States v. Stidham, 459 F.2d 297, 298 (10th Cir. 1972).
\textsuperscript{164} 380 U.S. 202 (1965).
\textsuperscript{165} Id. at 205.
was not large enough in itself to prove discrimination by race.\textsuperscript{166} Secondly, the equal protection clause could not reach the peremptory.\textsuperscript{167} But, thirdly, such striking by the state might raise a prima facie case of discrimination if the defendant could carry the burden of proof by showing affirmative evidence of the prosecutor's participation.\textsuperscript{168} Although this standard leaves little recourse unless the prosecutor is blatant in his conduct, it does set a very weak potential limitation on the use of the peremptory.\textsuperscript{169}

That such prosecutorial conduct does occur has been shown in one less than ideal study.\textsuperscript{170} Prior to realizing that a reporter was court watching, a local prosecutor used his peremptories on eighty-three percent of all qualified blacks; after finding out that a reporter was present, the rate dropped to sixty-seven percent.\textsuperscript{171} Subsequent interviews with eight local judges, however, disclosed no awareness of any official or unofficial policy of exclusion and no judge felt that the high percentage of peremptories on blacks alone proved exclusion.\textsuperscript{172}

The value of the peremptory challenge is not without its limitations. If used by both sides, it can produce a jury free of extremes, assuming it is exercised on the basis of enough knowledge about the prospective jurors. It is most valuable if it is used at the end of voir dire, rather than on a one-by-one basis. Of course, in a case involving pervasive community prejudice, there simply are not enough peremptories to go around. The real difficulty lies in the use of the peremptory to produce less than random juries. If blacks or any other group are kept from serving on juries, then a statutory right is used to override a constitutional one.

The second type of challenge is a challenge for cause. There are eleven categories that establish challenge for cause,\textsuperscript{173} but the most significant one for our purposes is the one which declares that a challenge may be made if the juror

\begin{quote}
has a state of mind in reference to the cause or to the defendant or to the person alleged to have been injured by the offense charged, or to the person on whose complaint the prosecution was instituted, which will prevent him from acting with impartiality; but the formation of an opin-
\end{quote}

\begin{flushleft}
\textsuperscript{166} \textit{Id.} at 208-09. \\
\textsuperscript{167} \textit{Id.} at 221-22. \\
\textsuperscript{168} \textit{Id.} at 222-26. \\
\textsuperscript{169} See, \textit{e.g.}, United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971). \\
\textsuperscript{170} See Comment, \textit{A Case Study of Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process}, 18 St. Louis U. L. J. 662, 675 (1974). \\
\textsuperscript{171} \textit{Id.} at 676. \\
\textsuperscript{172} \textit{Id.} at 681. \\
\textsuperscript{173} ABA Standards Relating to Trial by Jury 68-69 (1968).
\end{flushleft}
an impression regarding the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the evidence.\footnote{174}

The real difficulty with challenges for cause is that such decisions are basically judgment calls, especially in borderline cases. Those advocating an intensive probe into prospective jurors' backgrounds and attitudes feel that short or court-conducted voir dire is ineffective.\footnote{175} In addition, the rules or guidelines developed by appellate courts have left a great amount of discretion to the trial judge. This is especially true if there has been no recording of voir dire. Thus we end up with decisions like these:

1. The judge must make a serious effort to find out if the juror is biased and must seek to protect the rights of the accused.\footnote{176}
2. Even though the judge does have a great amount of discretion, the essential demands of fairness have to be met.\footnote{177}
3. The defense must be given a full and fair opportunity to expose bias, and there must be an intense questioning when a case has developed strong feelings in the community.\footnote{178}

But despite the vagueness of these standards, judges can be reversed for not being vigorous enough.\footnote{179} However, such decisions seem to be the exception rather than the rule, for in most cases the judge has been upheld.\footnote{180}

Nor is the actual conduct of voir dire supervised closely by the appellate courts. The trial judge is given great discretion in conducting the examination of prospective jurors, and consequently, local rules determine who conducts the voir dire and what questions are to be asked.\footnote{181}

\footnote{174} Id. at 69.
\footnote{176} \textit{See, e.g.}, Dennis v. United States, 339 U.S. 162 (1950).
\footnote{177} \textit{See, e.g.}, Aldridge v. United States, 283 U.S. 308 (1930).
\footnote{178} \textit{See, e.g.}, United States v. Robinson, 475 F.2d 376 (D.C.Cir. 1973).
\footnote{179} \textit{See, e.g.}, United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); United States v. Lewis, 467 F.2d 1132 (7th Cir. 1972); United States v. Carter, 440 F.2d 1132 (6th Cir. 1971).
\footnote{180} \textit{See, e.g.}, Ristaino v. Ross, 424 U.S. 589 (1976); Ham v. South Carolina, 409 U.S. 524 (1972); Spies v. Illinois, 123 U.S. 131 (1887); United States v. Van Drunen, 501 F.2d 1393 (7th Cir. 1974); United States v. Hamlin, 481 F.2d 307 (9th Cir. 1973); United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1973); Hoapili v. United States, 395 F.2d 656 (9th Cir. 1968).
\footnote{181} \textit{See, e.g.}, United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974); United States v. Holley, 493 F.2d 581 (9th Cir. 1971); United States v. Amick, 439 F.2d 351 (7th Cir. 1971); United States v. Troiano, 418 F.2d 1069 (2d Cir. 1969); Justice v.
JUROR SELECTION

In summary, then, it is clear that courts have great control over voir dire and sometimes recognize only a very limited range of biases. But the necessity of an extended voir dire in controversial cases can be seen from suggested questions for use in trials of political activists:

1) background or break the ice questions concerning marital status, age, number of children, occupation, memberships in political, social, and church groups, etc.,
2) prior jury duty and prior military service,
3) attitude toward presumption of innocence.
4) amount of confidence the juror has in his ability to be fair,
5) ability to stand by opinion,
6) views held toward universities, professors and students,
7) influence of news media on opinions,
8) connections to and support for national guard and police,
9) knowledge of radical organizations,
10) support for or belief in freedom of speech and assembly,
11) amount of fear toward youth culture.\textsuperscript{182}

The general utility of the voir dire, however, is in dispute. Many agree that it is grossly ineffective. If jurors do not tell the truth, if judges are hostile to extended examination, if some questions cannot be asked because of fear of offending jurors, if other challenges anger jurors already seated, and if in many cases pertinent information is never sought, why even bother to conduct the examination of jurors?\textsuperscript{183} The answer is to repeat what we have already said about the need for legitimacy and the use of the voir dire for indoctrination and ingratiation. Thus when it comes to the real and subjective issue of the rights of the defendant in a criminal trial, voir dire is indispensable.

Prospective jurors also communicate their attitudes through non-verbal behavior. When it may be impossible to get jurors to reveal themselves by their own testimony, their other actions may indicate their true feelings. In some trials, defendants have used psychologists and psychiatrists to help them select jurors. The most notable of these cases was the Angela Davis trial.\textsuperscript{184} The defense concerned itself with the impression Miss Davis would make on the prospective jurors. It was felt that her strongest qualities

\textsuperscript{183} Id., at 525-28.
included beauty, determination, and an instinct for self preservation. They wanted jurors who would react favorably to such characteristics. When jurors were being questioned, observers in the courtroom made independent notes concerning seating, facial gestures, reactions to the defense and prosecuting attorneys, response to questions asked of other jurors, and even groupings of jurors at lunch breaks. The gathered information was then used to challenge certain jurors. In the end, Miss Davis was acquitted. 185

**RECOMMENDATIONS AND CONCLUSIONS**

**Group Representation**

What suggestions can be made to make juries more representative? Although some observers consider the right of society to demand the broadest possible participation in juries an open question, democratic theory does not. 186 The easiest area to deal with is the composition of the jury pool. First, since the voter registration list is probably the best one that can be obtained, it should be used. But there should be supplementation to include nonvoters because these people do, despite court rulings, comprise a separate, identifiable class with distinct attitudes. Voting statistics are available by precincts or other small units. In those areas with low voter registration and turnout, additional lists, such as city directories or utility connections can be used. If federal legislation is passed allowing easier registration, much of the unrepresentative nature of registration may be corrected and, consequently, the problem will be less serious in the future. Finally, there seems to be no insurmountable difficulty in refilling or updating the jury wheel more frequently than every four years.

Second, the problem of exemptions must be solved. Jury service can be made more attractive in a number of ways. The length of service can be limited to short periods, e.g., less than thirty days. Nor would any juror have to serve more than once during each selection period. Some courts have experienced good results by allowing the prospective juror to indicate the best times for service. If the juror selection form contains detailed information about a person's occupation, etc., the jury commissioner can keep running counts of those excused and attempt to rectify any imbalance by replacing the excused juror with someone of approximately the same background. This would differ from the quota system in that

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185. *Id.*
the selection is random, but the replacement is not. Blanket exemptions or exclusions must be eliminated; each individual called should be made to apply in person for a hardship excuse, and such requests should be closely examined. Nor does there seem to be any reason against compelling the return of the selection form. Those who fail to return forms are not representative of the entire population and, consequently, underrepresentation will occur if they are allowed to select themselves off juries. Sending notice by registered mail and setting fines for failure to return forms will reduce nonservice. These suggestions are intended only to cut down on the underrepresentativeness caused by selection procedures.

Third, as far as state juries are concerned, the use of subjective qualifications for jurors is so open to abuse that it must be eliminated. If the federal government can conduct trials on the basis of only objective qualifications and survive, the states can too. Because the Supreme Court has upheld the non-discriminatory use of such qualifications, the only effective remedy may lie in national legislation. Such change does not seem to be in the immediate future.

Fourth, challenges to the venire should be made easier. The amendments to the 1968 Act require information about race, occupation, etc., to be kept. The main difficulty lies in determining when a specific group has been denied equal representation. As we have seen, courts are reluctant to move into new areas, such as age discrimination, and attitudes held by certain groups of people. Until this is done, juries will remain underrepresentative. Finally, the wide disparity of approved statistical differences between jury pools and the areas from which they are chosen should be eliminated by setting some type of statistical standard; the previously mentioned .05 level seems adequate enough to give both flexibility and representativeness.

Fifth, compensation for jury service should be increased to end the number of economic hardships. One alternative is to raise the level of pay to that comparable to some standard based on average per capita income within the district from which the panel is drawn. A second possibility is to require employers to continue pay during jury service. Such a state law has been upheld by the Supreme Court.187 Since this second choice is one that will cost less for government to implement, it will have a greater chance of adoption.

The second question is how to secure an impartial juror from the panel. One alternative is to keep the status quo, but the amount of discretion given to officials has not produced representative juries. A second choice is to improve the techniques of voir dire. In order for appellate courts to have more supervisory control, the Supreme Court must decide to allow reasonably extensive voir dire and to set some procedural rules. Certainly the questioning of jurors should be made an official part of the court record. Then appellate judges would have much more information upon which to base their judgments concerning challenges to the composition of the jury or the action of the judge. Nor does it seem too extreme to allow the exercise of peremptory challenges after the entire jury panel has been questioned; that way the attorneys will have a general idea of who will replace whom. The abuse of the peremptory challenge is more difficult to correct. The easiest solution would be to limit the number of peremptories to less than five. Finally, examination of jurors should allow for more than en masse questioning by the judge.

These suggestions will lengthen the time needed to pick jurors, and thereby extend trials in an already overburdened system. Another approach is to increase the amount of information given to the adversaries about the jurors before they are chosen. Extensive background questionnaires for jurors have been used to avoid long preliminary screening. One commentator indicates that such a questionnaire was used in Washington, D.C., in a 1974 mass murder trial. From an initial list of 654 jurors, a panel of 389 was selected as qualified to serve by a computer. Then 270 of the 289 names were selected at random by the computer for further questioning. Of these 270, another 100 were eliminated “for cause” and then after another random computer selection and use of peremptory challenges, twelve jurors and alternates were selected. Thus, it seems obvious that if attorneys had more information about prospective jurors in advance, there would be both a more informed and shorter voir dire.

But group characteristics tell only part of the story. How about the attitudes and beliefs of the individual prospective juror? Since attitudinal testing has been widely used in educational, medical, and psychological fields, may it also be successfully employed in

189. Van Dyke, supra note 145, at 82.
190. Id. at 82-83.
choosing jurors? Boehn believes such testing can distinguish between three basic personality types. The authoritarian personality is punitive, endorses indiscriminate acts of constituted authority, and has a personal hostility toward lower class defendants that makes it more prone to convict. On the other end of the spectrum is the anti-authoritarian, who both indiscriminately rejects acts of constituted authority, and blames all anti-social acts on society. In the middle is the equalitarian, or the person with a traditional, non-extreme position on legal questions and who is likely to believe that most questions could have two answers. Boehn has used her test on subjects given hypothetical cases. Those at either end tended to distort their judgments in the direction of their ideology. She concluded that her test did screen non-objective jurors from service.

A second, and more acceptable type of juror test, has been designed by Redmount. His legal attitude test seeks to find those with critical thinking ability, i.e., those who can reason logically by deduction and interpolation, make relevant inferences from data and observations, and assess the strength and relevancy of arguments. In addition, the test can assess a personality for mental disorders and emotional instability, measure social perceptions in terms of naivete or gullibility, and determine how much general information about the law each person has.

The difficulty with such tests is the procedure used to administer them. New tests can be developed to meet the particular needs of the judicial system, but judges and lawyers must accept them and be trained to use them. Such tests will have to be administered at the beginning of jury service, and used only for a limited time by the judges, attorneys, and psychologists. Then, in order to preserve privacy, the tests should be destroyed. If done correctly, this will either make impartiality more likely or will serve as substantive evidence to appeal a decision made by the trial judge.

There are a number of stumbling blocks to such a screening technique, however. We have already mentioned the general un-

192. Id. at 746.
193. Id. at 746-47.
195. Id. at 398.
196. Id. at 401.
willingness of judges to accept such devices; if there is trouble in getting statistical probability used in cross section cases, there is ample reason to think judicial reaction will be even stronger in this area. The second issue is privacy. Can a prospective juror be asked these types of questions? He can if one reasons by analogy to all the other types of questionnaires (including the census) that a citizen has to complete. Third, will the use of such tests result in the elimination of a cross section of the community? What if, for example, nearly all members of a certain class or ethnic group are eliminated from service because they are "authoritarian"? Will this result in an overrepresentation of the white collar class?

In conclusion, we have shown that the Jury Selection and Service Act of 1968 and its amendments have increased representation in federal jury trials. The standards used in state trials, however, have not been closely regulated by the federal government, even though those standards impinge upon such constitutional rights as due process and equal protection. The actual effect of the Act has not been as beneficial as it could be. The suggestions made in this article can improve the randomness of selection and, consequently, increase the likelihood of a cross section jury. Not all of these suggestions need be nor will be adopted, but any one of them would maybe be beneficial. The area that will get the least attention may be the one that requires the most; the selection of jurors from the pool is done in such a way as to limit the opportunities to find actual bias or prejudice. Those suggestions regarding the increase of information made available to the litigants prior to the trial will make the selection of an impartial juror more likely, but they, too, will be hard to initiate. Like most other decisions in the American political system, jury reform will be on an ad hoc, incremental basis. That is how the cross section requirement was instituted, and that is how it will be perfected.