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Constitutional Law -- Jury Selection -- Defendant Not a Member of the Excluded Class

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dard to determine whether the jury release was proper. The latest decision applying the *Perez* standard, *Downum v. United States*,[34] held that a jury dismissal due to unpreparedness of the prosecution was improper and a bar to retrial because it did not fall within the *Perez* exceptions. In *Tateo*, the Court was divided on the significance of *Downum*. The majority distinguished jury discharges due to prosecutorial negligence and jury discharges after coercion of the defendant by the trial judge. Mr. Justice Goldberg dissented and stated that the majority unjustifiably limited *Downum* to its particular facts. He was of the opinion that coercion by the trial judge is an even more severe abuse of a defendant's rights than is prosecutorial negligence.[35] The majority, however, found support for its decision to allow retrial on the questionable assumption that granting Tateo immunity from retrial because a trial judge coerced his guilty plea would necessarily result in similar immunity after all trial reversals due to error.[36]

It is submitted that *Tateo* should be considered a mistrial case—*i.e.*, one where the judge improperly chose to exercise his discretion and terminate the trial before the jury reached a verdict. The judge himself coerced the plea that resulted in dismissal of the jury. Such a termination before verdict is not within "manifest necessity" or in the interests of "public justice," the only circumstances justifying retrial under the *Perez* rule.

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Constitutional Law—Jury Selection—Defendant Not a Member of the Excluded Class

In *Allen v. State*,[1] the Georgia Court of Appeals was faced with the question of whether the constitutional rights of a white defendant were violated by the systematic exclusion of Negroes from

[34] 372 U.S. 734 (1963).

[35] "If anything, Tateo's deprivation is more serious. The *purpose* of the judicial coercion in his case was to deny him the right to have the impaneled jury decide his fate, whereas this was merely the effect of prosecutorial negligence in Downum." United States v. Tateo, 377 U.S. 463, 473 (1964) (Goldberg, J., dissenting).

[36] See *id.* at 466. In England, unlike the United States, reversal due to error means that the defendant goes free. Criminal Appeal Act, 1907 § 4. See generally KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND (1963).

[1] 137 S.E.2d 711 (Ga. Ct. App. 1964).

the jury that indicted and convicted him. Defendant, a member of the white race, was engaged in voter registration among Negroes. He was indicted and brought to trial on a charge of assault with intent to murder a police officer. Defendant entered a plea of not guilty and followed this with a motion[2] to quash the indictment of the grand jury. He also challenged the array of traverse jurors for that term of court.[3] The motion and the challenge were made on the ground that the systematic, arbitrary, and deliberate exclusion of members of the Negro race from both the grand and traverse juries violated the equal protection and due process clauses of the fourteenth amendment.[4] The trial court overruled both the motion and the challenge, and defendant was convicted.

On appeal,[5] the court reversed and held that equal protection and due process of law require that a defendant be indicted and convicted by a jury from which no class is systematically excluded. The court said that when an accused is tried by a jury, the equal protection clause of the fourteenth amendment guarantees him, regardless of his race, a jury that is "impartially drawn from a cross-section of the community."[6] Furthermore, the court said that due process is denied when the procedures meant to insure trial by a

[2] The motion alleged that of the population twenty-one years of age and over residing in the county, 46.42% was Negro, and that of the listed taxpayers, from whom the jury list was drawn, 27% were Negroes. The tax returns, from which the tax list was composed, were segregated on the basis of race and filed in separate volumes, with the tax returns of all Negroes being on yellow sheets marked "colored" and the tax returns of Caucasians on white sheets designated "white"; and that the tax digest from which prospective jurors were selected was segregated, with the two races being grouped on separate sheets headed by a racial designation. The defendant further alleged that no Negro had been selected from the tax digest by jury commissioners for over forty years and that no Negro had been called to serve on either the grand or the traverse jury. 137 S.E.2d at 712.

[3] The procedural steps to be taken by a defendant in protecting his constitutional rights with respect to jury formation often require meticulous attention to detail. For a detailed analysis of the problems involved and the proper procedure for raising the constitutional issues, see Jefferson, *Race Discrimination in Jury Service,* 19 B.U.L. REV. 413, 432-47 (1939). See also 33 N.C.L. REV. 262, 265-66 (1955).

[4] U. S. CONST. amend. XIV, § 1, which provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[5] Under Georgia law the state cannot appeal an adverse judgment in a criminal action except in contempt cases. Glustrom v. State, 206 Ga. 734, 740-47, 58 S.E.2d 534, 538-42 (1950). Therefore the decision of the Court of Appeals was final as to the question which was before it in *Allen.*

[6] 137 S.E.2d at 715.

fair and impartial jury are not used, *i.e.*, when the jury is not selected in accordance with the constitutionally valid laws of the state.[7]

It is settled constitutional law that the systematic exclusion of Negroes from a state court jury before which a Negro is tried violates either the equal protection[8] or due process clauses.[9] This rule of law has been extended to protect any member of any class that has been systematically excluded from jury service.[10] However,

[7] *Id.* at 717.

[8] *E.g.*, Arnold v. North Carolina, 376 U.S. 773 (1964) (per curiam); Reece v. Georgia, 350 U.S. 85 (1955); Cassell v. Texas, 339 U.S. 282 (1950); Brunson v. North Carolina, 333 U.S. 851 (1948); Norris v. Alabama, 294 U.S. 587 (1935); Martin v. Texas, 200 U.S. 316 (1906); Carter v. Texas, 177 U.S. 442 (1900); Strauder v. West Virginia, 100 U.S. 303 (1880). See generally Annot., 1 A.L.R.2d 1291 (1948); 26 N.C.L. REV. 185 (1948). The intentional inclusion of Negroes on a Negro defendant's jury is also grounds for finding a denial of equal protection. Cassell v. Texas, 339 U.S. 282, 287 (1950) (dictum); Collins v. Walker, 329 F.2d 100 (5th Cir. 1964), *cert. denied*, 33 U.S.L. WEEK 3169 (U.S. Nov. 10, 1964). In *Collins* the jury commissioners deliberately included Negroes on the jury list from which the jury panel that indicted the Negro defendant was chosen. The defendant instituted a habeas corpus proceeding; in reversing the indictment and conviction, the court of appeals said that a "Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not as a Negro." 329 F.2d at 105.

[9] *E.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880). Although the verbal vehicle used in cases on exclusion in jury selection is equal protection, the technique is that invoked in cases formally based on due process. The reason a Negro defendant is allowed to invoke the due process clause is that a jury from which Negroes have been excluded will not give him a fair trial. Cassell v. Texas, 339 U.S. 282, 301-02 (1950) (dissenting opinion). The equal protection foundation for reversing such convictions is that a white defendant would get better treatment from an all-white jury than would a Negro. Fay v. New York, 332 U.S. 261, 285 (1947). See Bittker, *The Case of the Checker-Board Ordinance: An Experience in Race Relations*, 71 YALE L.J. 1387, 1406-07 (1962); Scott, *The Supreme Court's Control Over State and Federal Criminal Juries*, 34 IOWA L. REV. 577, 584 (1949).

[10] Hernandez v. Texas, 347 U.S. 475 (1954), is the most significant case pointing out that the equal protection clause is not limited in application to members of the white and Negro race but extends to any class against whom community prejudice exists. The Supreme Court therein stated that "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. . . . The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." *Id.* at 478. *Accord*, United States v. Standard Oil Co., 170 Fed. 988 (N.D. Ill. 1909) (court upheld challenge to a jury comprised primarily of farmers); Commonwealth v. Powers, 139 Fed. 452 (E.D. Ky. 1905), *rev'd on other grounds sub nom.* Kentucky v. Powers, 201 U.S. 1 (1906) (discrimination against political groups); Searle v. Roman Catholic Bishop, 203 Mass. 493, 89 N.E. 809 (1909), and Juarez v. State,

a defendant is not entitled to demand that members of his race or class be placed upon the jury before which he is tried,[11] nor is he entitled to demand any type of proportional representation of his class on the jury.[12] Rather, the fourteenth amendment requires that an accused be indicted and tried "by a jury from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent."[13] In order to have an indictment quashed or a petit jury discharged on grounds of discrimination in selecting jurors, the defendant must show that members of his class were excluded because they belonged to that particular class, rather than because they failed to qualify under state or federal law.[14] However, a prima facie case of discrimination against a race or class by the officers in charge of jury selection is made out when there is (1) proof of the exclusion of a racial group for a number of years,[15] or (2) an undenied affidavit alleging discriminatory practices by jury officials,[16] or (3) a failure to follow a procedure or a "course of conduct" that would prevent discrimination on the basis of race or

102 Tex. Crim. 297, 277 S.W. 1091 (1925) (discrimination against religious groups).

[11] Martin v. Texas, 200 U.S. 316 (1906); Neal v. Delaware, 103 U.S. 370 (1880).

[12] Akins v. Texas, 325 U.S. 398 (1945); Thomas v. Texas, 212 U.S. 278 (1909).

[13] Hernandez v. Texas, 347 U.S. 475, 482 (1954).

[14] Akins v. Texas, 325 U.S. 398 (1945); Snowden v. Hughes, 321 U.S. 1 (1944); Martin v. Texas, 200 U.S. 316 (1906); Tarrance v. Florida, 188 U.S. 519 (1903).

[15] In Patton v. Mississippi, 332 U.S. 463 (1947), the Supreme Court declared, in a unanimous opinion, that "when a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand." *Id.* at 469. Complainant had shown that no Negro served on the grand jury for thirty years. *Accord,* Arnold v. North Carolina, 376 U.S. 773 (1964) (in twenty-four years one Negro served on grand jury); Eubanks v. Louisiana, 356 U.S. 584 (1958) (only one as long as the clerk of court could remember); Hill v. Texas, 316 U.S. 400 (1942) (none in sixteen years); Smith v. Texas, 311 U.S. 128 (1940) (five in seven years); Norris v. Alabama, 294 U.S. 587 (1935) (none for a long number of years); Neal v. Delaware, 103 U.S. 370 (1880) (none for at least ten years). Discrimination may also be established by the admission of officials of intentional exclusions of a racial group. *E.g.,* Eastling v. State, 69 Ark. 189, 62 S.W. 584 (1901); Washington v. State, 95 Fla. 289, 116 So. 470 (1928).

[16] Hale v. Kentucky, 303 U.S. 613, 616 (1938).

class.[17] When the defendant is a member of the excluded class, he is presumed to have been prejudiced by the exclusion,[18] and a trial under such conditions therefore constitutes a denial of equal protection or due process. But when the defendant is not a member of the excluded class, it is uncertain as to whether he may successfully challenge such discrimination in jury selection. State courts, other than that in *Allen,* have been unanimous in holding that no constitutional right of the defendant is violated in such an instance.[19] While the Supreme Court has never entertained the question, the actions[20] and language[21] of the Court have indicated that the de-

[17] In Avery v. Georgia, 345 U.S. 559 (1953), evidence disclosed that white and yellow tickets were used by the jury commissioners in drawing a jury list. Only the names of white persons were on the white tickets, and only the names of Negroes were on the yellow tickets. This, combined with the fact that no Negro had been selected for jury service, was held to establish a prima facie case of discrimination. *Accord,* State v. Speller, 229 N.C. 67, 47 S.E.2d 537 (1948).

[18] *E.g.,* Avery v. Georgia, 345 U.S. 559 (1953); Pierre v. Louisiana, 306 U.S. 354 (1939).

[19] Alexander v. State, 160 Tex. Crim. 460, 274 S.W.2d 81 (1954), *cert. denied,* 348 U.S. 872 (1954), illustrates the position of state courts. Defendant, a white man, attacked his indictment, alleging systematic exclusion of Negroes from the grand jury. The court refused to entertain defendant's objection to exclusion of Negroes from the jury since he was not a member of the excluded race. In Commonwealth v. Wright, 79 Ky. 22 (1880), the Kentucky court, in affirming a white defendant's conviction, said that "it cannot be true that one belonging to the race not excluded, but from which the whole jury was required to be selected, can have been prejudiced by the fact that another race was excluded." *Id.* at 24. *Accord,* Griffen v. State, 183 Ga. 775, 190 S.E. 2 (1937); State v. Lea, 228 La. 724, 84 So. 2d 169 (1955), *cert. denied,* 350 U.S. 1007 (1956); State v. Dierlamm, 189 La. 544, 180 So. 135 (1938); Petition of Salen, 231 Wis. 489, 286 N.W. 5 (1939). *Cf.,* State v. James, 96 N.J.L. 132, 114 Atl. 553 (Ct. Err. & App. 1921); State v. Trantham, 230 N.C. 641, 55 S.E.2d 198 (1949); State v. Sims, 213 N.C. 590, 197 S.E. 176 (1938); Commonwealth v. Garletts, 81 Pa. Super. 271 (1923). The Arkansas Supreme Court in Haraway v. State, 203 Ark. 912, 159 S.W.2d 733, *cert. denied,* 317 U.S. 648 (1942), upheld the conviction of a Negro defendant by an all-Negro jury. The defendant sought to overturn the conviction on the ground of systematic exclusion of members of the white race from the jury which convicted him. The court said that appellant had no more right to complain than a white man would have for being convicted by an all-white jury, and that if there was any discrimination, it was in appellant's favor.

[20] *Compare* State v. Koritz, 227 N.C. 552, 43 S.E.2d 77, *cert. denied,* 332 U.S. 768 (1947), *with* Brunson v. North Carolina, 333 U.S. 851 (1948) (per curiam), which were companion cases and alike in every respect except that Koritz was a member of the white race and Brunson a Negro. Both cases were appealed to the Supreme Court, but certiorari was granted only in the case of Brunson and his conviction was reversed because of the systematic exclusion of Negroes from the jury. The same jury tried and convicted both men, and both had appealed on the grounds of systematic

fendant in a state court must be a member of the excluded class in order to object to the systematic exclusion of a class from jury service.

In departing from the majority view and holding that equal protection is denied when the jury panel is not chosen from a cross-section of the community, the Georgia court looked to Supreme Court decisions dealing with federal proceedings. The position taken by the court in *Allen* is best set forth in *Thiel v. Southern Pac. Co.*,[22] which arose out of a civil suit in a federal court and in which the Supreme Court held that systematic exclusion of daily wage earners was reason for striking the jury panel even though the petitioner was not a member of that class. In *Thiel,* the Court said that the American system of trial by jury contemplated "an impartial jury drawn from a cross-section of the community."[23] The Court made it clear that this did not mean that every jury should be representative of every class found in the community, but rather that juries should be selected without systematic and intentional exclusion of any class.[24] The Georgia court also relied upon Supreme Court decisions more directly on point, in which the convictions of male defendants were reversed because of the exclusion of women from the juries that indicted or convicted them.[25] In these decisions, the

exclusion of Negroes. The Court has denied certiorari when defendant was not a member of the excluded race in a number of instances. The cases are collected in note 19 *supra.*

[21] In Reece v. Georgia, 350 U.S. 85 (1955), the Court said that the "indictment of a defendant by a grand jury from which members of *his* race have been systematically excluded is a denial of *his* rights to equal protection of the laws." *Id.* at 87. (Emphasis added.) In Norris v. Alabama, 294 U.S. 587, 589 (1935), the Court said that excluding Negroes from serving as grand jurors in criminal proceedings against Negroes denies equal protection to the Negro defendants. The Court, in Martin v. Texas, 200 U.S. 316 (1906), said that, "what an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the empaneling of the petit jury, there shall be no exclusion of *his* race . . . because of race or color." *Id.* at 321. (Emphasis added.)

[22] 328 U.S. 217 (1946).

[23] *Id.* at 220.

[24] *Ibid.*

[25] The court also cited Ballard v. United States, 329 U.S. 187 (1946); Glasser v. United States, 315 U.S. 60 (1942); United States v. Roemig, 52 F. Supp. 857 (N.D. Iowa 1943). In *Glasser,* the Court said that "democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any specific group or class." 315 U.S. at 86. The court relied heavily upon Smith v. Texas, 311 U.S. 128 (1940), a case appealed from the Court of Criminal Appeals of Texas. The conviction of appellant, a Negro, was reversed by the Supreme Court on evidence that

Court again emphasized that the jury panel should be truly representative of the community. The attitude of the Supreme Court in federal proceedings is best reflected by the following statement of Mr. Justice Douglas in *Ballard v. United States*:[26]

> The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of . . . a racial group, . . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society.[27]

However, the fact that these decisions arose out of federal proceedings detracts from their value as precedent because the Court exercises a supervisory power over federal proceedings not applicable to the states.[28] Under this supervisory power, a standard of impartiality even more stringent than that required to date under the sixth amendment[29] is imposed upon federal jury selection methods.[30] Thus, the Court's disapproval of a particular procedure

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there had been discrimination against Negroes in the selection of the grand jury that indicted him. In this case the Court first spoke in terms of a jury being "truly representative of the community." *Id.* at 130. The significance of *Smith* is that the Court seized upon this dicta in later cases, and made of it a standard for federal jury selection to which standard the state courts have not been held.

[26] 329 U.S. 187 (1946).

[27] *Id.* at 195.

[28] See McNabb v. United States, 318 U.S. 332 (1943), where it was said:

> [T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason . . . .

Id. at 340. For an illustration of the effect of supervisory powers on state and federal proceedings, *compare* Marshall v. United States, 360 U.S. 310 (1959), *with* Fay v. New York, 332 U.S. 261 (1947). See generally Note, 76 HARV. L. REV. 1656 (1963). For an exhaustive compilation of cases and source materials relating to jury selection in federal and state judicial proceedings, see VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 147-205 (1949).

[29] The sixth amendment guarantees that in all federal prosecutions the accused "shall enjoy the right to . . . trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

[30] See Frazier v. United States, 335 U.S. 497 (1948), where the Court found no denial of trial by an "impartial jury" in violation of the sixth amendment when defendant was convicted of violating a federal statute by a jury composed primarily of federal employees. Four justices dissented, saying the Court should exercise its supervisory power over lower federal courts and reverse the conviction. *Id.* at 514.

in the federal courts does not mean such a procedure is unconstitutional if practiced in the state courts.[31]

Although the Georgia court recognized that its authority consisted of decisions dealing with federal proceedings, it deemed the principles enunciated in those cases applicable to the states through the fourteenth amendment.[32] However, the court did not discuss more recent decisions by the Supreme Court rejecting the extension of these principles to the states. Only one year after the *Thiel* decision, the Court, in *Fay v. New York*,[33] upheld a state statute which provided for special "blue ribbon" juries.[34] The petitioner in *Fay* alleged that there had been systematic exclusion of women and wage earners from the jury which convicted him and argued that the principle of *Thiel* was applicable through the fourteenth amendment.[35] The Court rejected the argument and stated that prejudice was not to be presumed merely because the jury was not representative of the community.[36] Mr. Justice Jackson, speaking for the Court, said that those decisions requiring a jury to be representative of the community were not

> constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts . . . .[37]

A year later the Court re-enforced *Fay* by again upholding the constitutionality of a "blue ribbon" jury even in the face of allegations

[31] Fay v. New York, 332 U.S. 261 (1947).

[32] 137 S.E.2d at 715.

[33] 332 U.S. 261 (1947).

[34] A "blue ribbon" jury represents attempts to obtain jurors more highly qualified than ordinary jurors—those of high business standing and broad educational standing—while a special jury suggests those selected with a view to obtaining expert qualifications in a given field. CALLENDER, SELECTION OF JURORS 43-50 (1924).

[35] Brief for Petitioner, pp. 33-36, Fay v. New York, 332 U.S. 261 (1947).

[36] In answer to complainant's objection to the systematic exclusion of women, the Court said:

> [W]omen jury service has not so become a part of the textural or customary law of the land that one convicted of crime must be set free by this court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood.

332 U.S. at 290.

[37] *Id.* at 287.

of systematic exclusion of Negroes.[38] Another case rejecting the application of the federal requirements to the states is *Hoyt v. Florida,*[39] in which a woman appealed a conviction and claimed that she had been denied equal protection because the jury was selected under a statute that effectively excluded women from jury service. The statute accorded women absolute exemption from jury service unless they volunteered for it by registering with the clerk of court.[40] The Court in upholding her conviction condoned that which it had so forcefully condemned in federal proceedings, *i.e.,* the exclusion of a class from the jury list and the resulting impossibility that the jury represent a cross-section of the community.

The requirement of a "cross-sectional" element recognizes that inherent in the concept of trial by jury is the idea that "the verdict of the jurors is not just the verdict of twelve men; it is the verdict of a *pays,* a 'country,' a neighbourhood, a community."[41] When a jury list fails to contain representatives of the entire community, the judicial system is denied the very thing it seeks, *i.e.,* the "opinion of the community,"[42] as opposed to the opinion of a particular race or class. The fact that the Supreme Court has not imposed upon the states the federal requirement that a jury be selected from a list representing a "cross-section" of the community by no means forbids its adoption by a state court. Rather, the federal practice provides an example for the state courts that has the approval of the Supreme Court.[43]

Both state and federal courts have recognized that discrimination in jury selection can exist against classes other than those distinguishable because of race or color, and that any class may need protection from systematic exclusion, especially if there is a chance of community prejudice.[44] In an approach along this line, the

[38] Moore v. New York, 333 U.S. 565 (1948). Negro defendant challenged his conviction by a panel of "blue ribbon" jurors on the basis of systematic exclusion of Negroes and women. The Supreme Court found that the evidence did not support a reversal and that *Fay* was applicable.

[39] 368 U.S. 57 (1961).

[40] *Id.* at 60-61.

[41] 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 624 (2d ed. 1923).

[42] *Ibid.* A more complete analysis of this concept can be found in an address by D. H. Chamberlain before The American Social Science Asociation at Saratoga, New York, in 43 DAWSON PAMPHLETS 18-21 (1887).

[43] Bute v. Illinois, 333 U.S. 640 (1948).

[44] See note 10 *supra.*

Georgia court left open the possibility that defendant might be a member of a class which had been systematically excluded in the selection of the jury panel, *i.e.*, those interested in advancing the "civil rights" cause.[45] As the court pointed out, "where prejudice exists against the advocacy of the Negro's full privileges and duties of citizenship, a white person active in promoting participation in government by Negroes would be the object of as strong adverse prejudice as would a Negro engaged in such activities . . . ."[46] In light of recent activities in some Southern communities, the court has put it mildly to say the least.[47] If defendant proved, as a matter of fact, that he was a member of a class of "civil rights workers" discriminated against in jury selection, a violation of the traditional constitutional right of trial by a jury from which members of defendant's class have not been systematically excluded would be established.[48] Furthermore, proof of membership in a class discriminated against would eliminate the problem of lack of standing to raise the constitutional issue of discrimination, if there had been no finding of a denial of a constitutional right.[49]

[45] "Furthermore, we cannot say as a matter of law that this defendant, who was active in voter registration among Negroes, was not a member of a group systematically excluded in selecting the grand and traverse juries." 137 S.E.2d at 715.

[46] *Ibid.*

[47] See, *e.g.*, Anderson, *That New-Fangled Thing Called Voting,* New Republic, March 28, 1964, p. 8; Huie, *The Untold Story of the Mississippi Murders,* Saturday Evening Post, Sept. 5, 1964, p. 11; *Mississippi Prepares for War,* Christian Century, April 22, 1964, p. 509.

[48] See cases cited note 18 *supra.*

[49] The fact that neither the Supreme Court nor state courts have found a denial of a constitutional right in the situation of the principle case makes the standing question one of obvious importance. That standing is not an absolute requirement of a petitioner was made evident in Barrows v. Jackson, 346 U.S. 249 (1953), where a white vendor was allowed to assert the constitutional rights of Negroes as a defense in a suit for damages based on her breach of a racially restricted covenant. Professor Sedler has stated that there were several factors in *Barrows* that led the Court to bypass the general standing rule and allow the vendor to defend on the basis of another's rights. These factors were: "(1) the interest of the . . . petitioner, (2) the nature of the right asserted, (3) the relationship between the . . . petitioner and third parties, and (4) the practicability of assertion of such rights by third parties . . . ." Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599, 627 (1962). A comparison of *Barrows* and *Allen* in light of these factors warrants the conclusion that the Georgia court could have held that defendant was entitled to assert the rights of a member of the race excluded from jury service. This conclusion is buttressed by United States v. Raines, 362 U.S. 17 (1960), where the Court, in attempting to clarify the requirement of standing, reiterated the

In holding that defendant's allegations of exclusion established a denial of due process of law, the court stated that when a state uses a jury trial the "accused is entitled to those procedures which will insure, so far as possible, that the juries selected are fair and impartial,"[50] and that the constitutional requirement of a fair trial is violated when "a criminal defendant is not accused and tried by a jury selected . . . in accordance with the law of the land—the law of this State regulating the procedure for criminal justice."[51] The Supreme Court has stated in the past, even though subject to question today,[52] that the sixth amendment's requirement of trial by jury is "not picked up by the due process clause of the Fourteenth so as to" limit the states.[53] But if a state provides a jury trial, then there is a requirement that the jury be impartial, in the sense of being free from bias or prejudice.[54] The most significant point of the

general rule that a petitioner has no standing to assert the constitutional rights of another, but recognized exceptions to the rule. One exception is that when the constitutional rights of one not a party to the litigation are threatened, and he has no way to preserve them himself, then the Court may consider those rights as before it. *Id.* at 22. It is not denied that an individual excluded from jury service because of *race* or *color* has a statutory remedy, 18 U.S.C. § 243 (1959). However, the value of this statute is attested to by the fact that it has been used only two times in its eighty-nine years of existence. *Ex parte* Virginia, 100 U.S. 339 (1880); Brown v. Rutter, 139 F. Supp. 679 (W.D. Ky. 1956). Also, continuing discrimination in selection of juries further illustrates that it has no deterrant effect. See cases cited note 8 *supra.* Thus the application of this exception would seem proper in the *Allen* situation.

[50] 137 S.E.2d at 716-17.

[51] *Id.* at 717.

[52] Mr. Justice Brennan has expressed doubts that the Court would hold that the fourteenth amendment does not require jury trials in state criminal proceedings if it "is ever faced with a case in which a state has abolished trial by jury for serious criminal offenses." Brennan, *The Bill of Rights and the States,* in THE GREAT RIGHTS 67, 80 (Cahn ed. 1963).

[53] Fay v. New York, 332 U.S. 261, 288 (1947). *Accord,* Palko v. Connecticut, 302 U.S. 319 (1937); Maxwell v. Dow, 176 U.S. 581 (1900).

[54] In Irvin v. Dowd, 366 U.S. 717 (1961), the Court reversed a conviction on the basis of a denial of a fair and impartial jury resulting from pre-trial publicity. The Court stated that "in essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . 'The theory of the law is that a juror who has formed an opinion cannot be impartial.'" *Id.* at 722. *Accord,* Rideau v. Louisiana, 373 U.S. 723 (1963). *Cf. In re* Murchinson, 349 U.S. 133 (1955). "There is another fundamental requirement which is clearly of the essence of trial by jury; the jury must be so selected and so constituted as to be an impartial and fairly competent tribunal." SCOTT, FUNDAMENTALS OF PROCEDURE 79 (1922). See Note, 60 COLUM. L. REV. 349, 353 (1960). *But see* 111 U. PA. L. REV. 1000 (1963).

Georgia decision is the court's willingness not only to find inherent in due process the requirement of an impartial jury but also a requirement that the jury be selected in strict accordance with the relevant laws. The Supreme Court itself has said that if there is a trial by jury, that jury shall be fairly and impartially chosen.[55] To do otherwise is to violate the procedure which will insure a defendant a trial by an impartially constituted jury.[56] The words of Mr. Justice Murphy, dissenting in *Fay v. New York,* are particularly applicable in pointing out why this requirement should be met: "We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof."[57] The very possibility of prejudice ought to be sufficient reason for condemning any exclusion. This is not to say, however, that a state may not exclude from jury service those who do not meet valid statutory qualifications or whose exclusion is for the good of the community.[58] The Supreme Court's requirement through its supervisory power that prospective jurors be selected without systematic or intentional exclusion of any race or class[59] takes on considerable significance for the states when con-

[55] That by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; That law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.

Leeper v. Texas, 139 U.S. 462, 467-68 (1891).

[56] Akins v. Texas, 325 U.S. 398 (1945). "An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses." *Id.* at 400-01.

[57] 332 U.S. at 300.

[58] In Rawlins v. Georgia, 201 U.S. 638 (1906), the Court held that "if the state law itself should exclude certain classes on the bona fide ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the Fourteenth Amendment to prevent it." *Id.* at 640. See VANDERBILT, *op. cit. supra* note 28, at 172; Scott, *The Supreme Court's Control Over State and Federal Criminal Juries,* 34 IOWA L. REV. 577, 581-84 (1949).

[59] Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

sidered in light of the following statement by Mr. Justice Burton in *Bute v. Illinois*:[60]

> While such federal court practice does not establish a constitutional minimum standard of due process which must be observed in each state under the Fourteenth Amendment . . . [it] does afford an example approved by the courts of the United States. It thus contributes something toward establishing a general standard of due process currently and properly applicable to the states under the Fourteenth Amendment.[61]

Applying this strict standard of impartial selection through the due process clause to criminal proceedings insures to a defendant those procedures that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[62] The adoption by all courts of this standard would do much to insure that all people, regardless of class, receive the same treatment under the same laws, an essential requirement of ordered liberty.

Established as the rules against discrimination are, violation of these rules continues with alarming regularity. By adopting a rule such as that applied by the Supreme Court to federal proceedings, all convictions in which there was systematic exclusion of a race or class contrary to statutory provisions would be subject to reversal. Under such circumstances a state would have no choice but to eliminate discrimination or abolish trial by jury, the latter a result which most state constitutions prohibit[63] and which public conscience would not tolerate.

RALPH MALLOY MCKEITHEN

Contracts—Credit Cards—Liability of Holder for Unauthorized Use—Issuer's and Merchants's Duty of Due Care in Accepting Charges

In *The Diners' Club, Inc. v. Whited*,[1] a California intermediate appellate court discussed a problem on which there are few re-

[60] 333 U.S. 640 (1948).

[61] *Id.* at 659-60.

[62] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[63] *E.g.*, N.C. CONST. art. I, § 13, which provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court." For a compilation of state constitutional requirements as to the necessity of a jury trial in criminal proceedings, see JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, REPORT OF THE COMMITTEE ON SELECTION OF JURORS 33-35 (1942).

[1] Civil No. A 10872, App. Dep't Cal., Aug. 6, 1964.