

Note

The Case for Black Juries

Just as popular election helps to legitimize legislatures to members of a society, lay participation on juries provides legitimation for the judicial process.¹ Legitimacy, according to democratic theory, is enhanced when people feel they have participated in the promulgation of the laws by which they are governed. Legitimacy is similarly enhanced when people believe it within their power to participate, via the jury, in the application of the law. Jury service should not, however, be viewed as mere catharsis for the masses; lay participation is a creative process by which community standards are injected into the legal system to guard against possible harshness, arbitrariness, or inaccuracy in the administration of justice.² Since these community standards are determined by the attitudes and experiences of the jurors, the jury is a legitimating device only to those who are a part of the community whose norms the jury expresses. Hence the Anglo-American tradition of trial by one's peers, for otherwise legitimacy exists neither for the individual litigant nor for his sector of the community.

In addition to its legitimation function, the jury serves as a finder of fact. The jury is presented in both civil and criminal cases with at least two conflicting versions of the truth—two theories as to why, how and

1. Lay participation—in the form of the jury—has long been wedded to notions of representative government.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society and a representative government.

Smith v. Texas, 311 U.S. 128, 130 (1940).

2. The jury is not, nor should it become, a scientific factfinding body. Its chief value is that it applies "the law," oftentimes a body of technical and refined theoretical principles and sometimes edged with harshness, in an earthy fashion that comports with "justice" as conceived by the masses, for whom after all the law is mainly meant to serve. The general verdict is the answer from the man in the street.

5 MOORE, FEDERAL PRACTICE ¶ 49.05, at 2235-36 (2d ed. 1969).

The jury brings to the trial its own idea of how a certain situation is likely to come about, and what constitutes reasonable or acceptable behavior in that situation. The jury is asked not only to come to a decision regarding events, but also to consider the implications for the community of deciding one way as opposed to the other—both as the jury perceives community interest and as that interest is expressed in the form of law.

whether a certain event occurred. The community as represented in the jury utilizes its general knowledge and its familiarity with similar situations to find the "facts." This factfinding is not a process in which skill in "scientific" analysis is more important than insight into human behavior.³ Yet since the time when jurors ceased to be actual witnesses, our society has seemed in selecting its juries to value ability to reason scientifically over ability to tap the pulse of the community or familiarity with similar situations.⁴

The result in America has been a middle class, all-white jury. This is one good reason why the middle class in a community pushes for the "scientific" jury. The qualifications for a jury of the "scientific" type tend to be those which only the middle class can meet. When "scientific" factfinding is emphasized, the less powerful—be they rednecks in a Bourbon town or Puerto Ricans in the Bronx—have a considerably narrower chance to serve on the jury.⁵ Such exclusion all but destroys the legitimacy of the jury for large portions of the community.⁶ Moreover, since jurors, no matter how stellar their qualifications, find facts on the basis of their familiarity with similar situations,⁷ this exclusion impedes the factfinding process as well. Consider, for example, the tableau of a Park Avenue juror grappling with the ghetto plaintiff's

3. The very fact that an issue has been brought to court for resolution indicates that the succession of events involved are not subject to scientific proof. This kind of issue is better resolved by a body constituted to choose among competing "truths," rather than one designed to deduce the only existing truth.

It has been argued that the four major decision-makers in our society—scientists, technicians, administrators and politicians—form a continuum which is a function of their proximity or remoteness to problems which lend themselves to single, as opposed to competing, solutions. Scientific analysis, for example, which aims at a single solution, is not capable of dealing with a political problem. See generally D. PRICE, *THE SCIENTIFIC ESTATE* (1965).

4. See Note, *The Blue Ribbon Jury*, 60 HARV. L. REV. 613 (1947). That Note, however, stops at the point of observing that legitimacy may be worth a sacrifice of efficient factfinding. *Id.* at 614. See note 8 *infra*.

5. Just as scientific deduction yields one answer, one truth, so the constitution of a decision-making body on the assumption that there is one truth—and that its members must be trained to find it—produces a body which represents only one group in the community: the dominant group, the group that decides what that one truth is.

6. The fact that exclusion is worked in the name of "efficiency" has only a temporary palliative effect. Political machinery exists partially to mediate between the defenders of the status quo, whose concern with the smooth working of existing machinery closely parallels the protection of their own interests, and those whose concern with a change in priorities is great enough that they are willing to stop the machinery, if necessary. The "outs" may come to perceive justice to be absent and order therefore worthless, and the "ins" to perceive every demand for justice as a threat to order, at which point the machinery is useless. It ill behooves a society, then, to allow its political machinery to be constituted only for "efficiency" in the classic sense.

7. Personality, of course, has a good deal to do with the process also. See generally Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 735.

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experience with shysters and shylocks. A jury which represents only one segment of the community sacrifices factfinding ability as well as legitimacy.⁸

I. Race and the American Jury

Though the Supreme Court has considered the problem for nearly a century, and though there have been recent attempts at reform,⁹ a prime feature of the American jury remains the absence of black citizens. In our racially polarized society, the creative role of the jury is thrown off balance by the absence of black people. Racially oppressive decisions are the result.¹⁰

The oppressive effect of the American jury upon black criminal defendants is unquestionable. In the South a black person accused of a serious crime against a white victim is statistically the most likely to suffer the death penalty.¹¹ Few Southern whites are convicted of crimes against blacks and even fewer receive the death penalty. And throughout the nation as a whole the situation is no better, as juries unrepresentative of the black community are the rule rather than the exception.¹² The black defendant consistently "runs a greater risk of conviction, of conviction of a higher degree of crime, and of more severe punishment"¹³ where the victim is white than do white defendants accused of serious crimes against blacks. The jury is more likely to disbelieve a black's witnesses, particularly if the witnesses are themselves black.¹⁴ The black defendant is so much aware of his disadvantage that he is singularly susceptible to plea bargaining and to other compromises by

8. The argument presented here is *not* that, while "scientific" jurors are better fact-finders, we are willing to sacrifice that ability for "psychological and political functions that are fully as important as efficient fact-finding." Note, *The Blue-Ribbon Jury*, 60 HARV. L. REV. 613, 614 (1947). Our argument is rather that "scientific" fact-finders, because of the decisional context, make *inefficient* jurors, and while we would be willing to trade true efficiency for political effectiveness, that question need not even be reached. "Efficiency" is a deceptive concept. Managers of large auto plants have found that by operating on a strict division of labor, mass production basis, workers become so alienated that production suffers. Human innovations—assigning teams to parts of an automobile's assembly rather than one man to one bolt on every car—do not trade efficiency for human considerations, but rather maximize both.

9. *E.g.*, Federal Jury Selection and Service Act of 1968, Pub. L. No. 90-274, §§ 101-04 (1968); Jury Selection Act of 1964, 28 U.S.C. §§ 1861 *et seq.* (1964).

10. "Secure in the knowledge that Negroes will never sit in judgment upon him, the white juror may safely weight the scales of justice with loyalty to race." S.W. Tucker, *Discrimination in Virginia Jury Selection*, 52 U.VA. L. REV. 736, 743 (1966).

11. The crime of rape is a striking example: from 1930 to 1957, 361 blacks and 33 whites were executed for rape in the South. J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 336 (1959).

12. *Cf. id.* at 328-29.

13. Kuhn, *Jury Discrimination*, 41 S. CAL. L. REV. 235, 241 & n.29 (1968).

14. *Id.* at n.30; Tucker, *supra* note 10, at 742-45.

which he waives his right to jury trial.¹⁵ Since some studies have suggested that a defendant is twice as likely to be convicted by a judge as by a jury, such a waiver is hardly insignificant.¹⁶

Although most discussions of racial discrimination in jury selection focus on unfairness to defendants, it is important to remember that exclusion of blacks renders the jury as illegitimate to the black *community* as it does to the black criminal defendant or civil litigant. The jury lacks legitimacy not only because the black community does not participate, but also because black people perceive that white institutions of social order are considerably more concerned with ensuring that white citizens and the white community are not disturbed by blacks than with order *within* the black community.¹⁷ White juries are lenient towards white defendants accused of crimes against black people;¹⁸ but they are also lenient towards *black* defendants accused of crimes against other black people.¹⁹ At best, this tendency stems from a neocolonial view that the black community takes a permissive view of crime within its borders.²⁰ At worst, it represents a complete disregard for the lives and safety of black citizens. As a result, the black community is vulnerable to its own criminal element as well as to the criminal element of the white community.

The effect of black exclusion on civil litigation is similarly invidious.²¹ The juries are the same; only the stakes are different. It is bad enough that lack of bargaining power, and lack of access to a broad market, subject members of the black community to commercial practices that would be tolerated nowhere else; worse, when blacks seek redress, they face institutions rigged against them. Deprived of a mechanism with which to handle civil injustice after it occurs, the black community lacks an effective deterrent to such offenses, and remains vulnerable to all manner of tort, extortion, fraud and general sharp practice. Not only is the white civil offender unrestrained by the

15. KALVEN & ZEISEL, *THE AMERICAN JURY* 26-27 (1966).

16. *Id.* at 58-59.

17. As a result of slavery and contemporary oppression, the black community has been deprived of effective institutions by which to regulate behavior within its borders. The only mechanisms of social organization and control available at present to the black community are those that oppress them. Hence life within the black community remains relatively chaotic.

18. Tucker, *supra* note 10, at 743 *et seq.*

19. Kalven & Zeisel, *supra* note 15, at 341 *et seq.* See *Maxwell v. Stephens*, 348 F.2d 325, 330 (8th Cir. 1965); *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71, 79 (5th Cir. 1959).

20. J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 336 (1959); Kuhn, *supra* note 13, at 249.

21. *Cf. United States ex rel. Goldsby v. Harpole*, 263 F.2d 71, 79 (5th Cir. 1959).

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legal system: the law is his ally—an affirmative weapon.²² It is not surprising that neither the jury nor the law has “legitimacy” for black litigants or the black community,²³ when they so obviously do not work for black people.

II. Parameters of the Remedy

In an attempt to meet the problem of racial discrimination by juries, we might choose as jurors only citizens of substantial education and high social position in the hope that at least the coarsest brand of prejudice would be eliminated. This proposal seeks to screen out the more “irrational” portions of the community in favor of those whose prejudices are less likely to hinder them from reaching the one right answer—the one, “scientific” truth. There are, however, serious objections to such a proposal.

It is a mistake to think that by screening out the more poorly educated, the less sophisticated, we thereby screen out racism.²⁴ There is no evidence that “blue ribbon” juries, or administrative bodies chosen for their high “qualifications,” are less racist than today’s typical jury.²⁵ Blacks courtmartialed by the armed forces, for example, tend to draw longer sentences than do whites convicted of the same offense.²⁶ Further, by screening out the more poorly educated, we also screen out most

22. Consumer fraud in the ghetto is usually backed up by complex contracts and the expert use of legal loopholes as well as the threat of lawsuit. Ghetto residents can perhaps get some solace by considering the remarkable intricacy of the law that exploits them. Cf. Note, *Consumers and Antitrust Treble Damages: Credit-Furniture Tie-ins in the Low-Income Market*, 79 YALE L.J. 254 (1969).

23. It has been suggested that one of the biggest handicaps to the rent strike movement in New York was the legality of the rent strike in New York state. The strikers were thus put through the courts, manned by personnel of the same class and ethnic extraction as the slumlords, and according to rules that assumed middle-class levels of patience and expertise. The strike soon fell apart. Piven & Cloward, *Rent Strike*, THE NEW REPUBLIC, Dec. 2, 1967, at 55. When the poor play by the rules of the middle class, they can only lose.

24. Middle class authoritarianism, when blessed with the majestic authority of the state—jury service—may yield particularly harsh verdicts upon lower-status persons. Defendants in criminal cases tend to come from lower social strata. Boehm, *supra* note 7, at 738. See generally T. ADORNO *et al.*, THE AUTHORITARIAN PERSONALITY (1950).

25. Such a tactic would be not dissimilar to blacks opting, had they the power, to transform Congress into an administrative agency rather than seeking black representation within it. Would such a body as an “administrative Congress” be any less racist than that body as presently constituted? There is, after all, no evidence that a decision-maker who is politically unaccountable is more tolerant or balanced than one who is.

26. See Rockefeller, *Are Army Courts-Martial Fair?*, 4 FED. BAR NEWS 118, 119 (1957). Courts-martial are “blue ribbon” in the sense that they are comprised of officers—in no sense the peers of enlisted men—and most blacks who come before the tribunal are enlisted men. The problem of racial representation on court-martial tribunals was raised in *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3, 13 (1964), in which the court refused to follow *Collins v. Walker*, 329 F.2d 100 (5th Cir. 1964), and allowed purposeful inclusion of blacks on the panel.

blacks. The alternative posed would seriously interfere with the legitimation and factfinding functions of the jury—functions upon which our society places a high value.

The argument for blue-ribbon juries is similar to the argument made for “expert” decision-making bodies,²⁷ which assumes that middle-class decision-makers over whom the masses have no control are less likely to oppress minority groups than are those who are commonly exposed to racial conflict in its cruder forms. Beside the fact that administrative bodies tend to be staffed by the same people who comprise blue-ribbon juries—with no less racist an outlook²⁸—, trial by politically and socially removed “experts” is particularly dangerous for black people who, powerless and generally excluded from other channels by which Americans keep their institutions responsive, would be most adversely affected by a rise in the level of arbitrariness.

The strengths of the jury should not be needlessly foregone in a quixotic attempt to reduce prejudice in an essentially racist society. On the contrary, these strengths should be capitalized upon and black participation in the jury system massively increased.

Because of the way the jury functions and the extent of racial prejudice in this country, increased participation cannot involve token numbers of blacks. The charade of one or two blacks per jury may appease the white conscience, but it cannot alter discriminatory jury decisions. Although the minimum number of jurors necessary to resist a majority bent on conviction is a matter of conjecture, studies have suggested that the number is at least three.²⁹ In other contexts even greater numbers of black jurors would be needed to offset racial prejudice.³⁰

Tokenism must be avoided not only in the matter of numbers, but also in control of the jury selection process.³¹ When the white majority

27. The first alternative screens by limiting the community from which the jury is drawn; the second, by taking the job “out of politics,” screens the community altogether. This latter goal has been expressed in the jury context by proposals to substitute for the jury a panel of “experts” to determine punishment for a convicted criminal defendant.

28. A lack of political accountability makes it difficult to discipline bureaucrats who carry out a racist policy, or even to distinguish them from the ranks of bureaucratic pedants whose inertia—or caprice—we tend to write off as a cost of the machinery. The opportunity for political input via the jury should not, because of the spectre of racist white juries, be foregone and exchanged for an authoritarian impartiality that is dangerous for society as a whole. There have been proposals substantially to do away with jury trial in times of riot for the sake of “speed” and “efficiency.” See, e.g., Note, *Riot Control*, 68 COLUM. L. REV. 85 (1968).

29. Note, *Instructing Deadlocked Juries*, 78 YALE L.J. 100, 117 (1968) (citing authorities).

30. The actual composition of juries constituted with regard to the principles here suggested involves a different kind of analysis, one that studies in a perhaps more statistical fashion how a jury actually operates, in terms of shifting coalitions, majorities, and the like. A good starting point is Note, *Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968).

31. Equally important as numbers is the temperament and economic and political

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controls selection, we can expect the selection of black jurors who reflect as much as possible the values of that majority.³² This process may bring to the jury box a black person who is so eager to dissociate himself from the rest of his race that he decides against black people to appear impartial, or one who comes to the jury box under the assumption that he will perform as the white majority dictates.

These, then, are the parameters of the remedy. The jury system must be structured to produce a substantial number of blacks on juries trying cases directly affecting the interests of black litigants or of the black community.³³ In addition, there must be a pool of black veniremen large enough to allow the selection of jurors who are not white-controlled. Both of these conditions are necessary to ensure the appearance and reality of a jury system which works for blacks just as it does for whites.

III. Disposition of the Courts

The courts have generally held that the systematic exclusion of jurors because of their race is constitutionally prohibited. Decisions have suggested that juries should in some sense be truly representative of the community, but courts have generally focused upon the prejudice to the litigant rather than the injury to the community by unrepresentative juries. The Supreme Court has held that a sufficient disparity between the percentage of black people in the jury district and on jury venires—easier to prove than complete exclusion—will establish a *prima facie* case of discrimination.³⁴ Lower federal courts, however, have taken a more significant step in holding that consideration of race in forming juries is not constitutionally proscribed.

The majority of jury discrimination cases involve challenges to indictments of black defendants by all-white grand juries drawn together in Southern states. The charge has ordinarily been for the capital of-

situation of the juror. While on a particular case one very aggressive black man serving as a juror might be of little value, in the same case a jury of twelve black ultra-conservatives might be worth even less.

32. Of course, more than simple control of the jury selection process is involved. Black people are under complete political and economic control in many, if not most parts of the country. Physical intimidation is brought to bear when these subtler methods of control prove ineffective. *Cf.* *United States v. Guest*, 383 U.S. 745 (1966); *United States v. Price*, 383 U.S. 787 (1966); and *Wilkins v. United States*, 376 F.2d 552, 557 (5th Cir. 1967).

33. In addition to the obvious case involving a black person as litigant, criminal defendant, or victim, there are also cases not directly involving blacks in which there might be an interest—a few years ago, we might have used the example of a white civil rights worker. *Cf., e.g., Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966).

34. *Turner v. Fouche*, 38 U.S.L.W. 4090, 4093 (U.S. Jan. 19, 1970); *See Whitus v. Georgia*, 385 U.S. 545 (1967).

fense of rape or murder; the basis of the challenge has been denial of equal protection under the fourteenth amendment. It is not clear in these cases where equal protection leaves off and due process begins;³⁵ but more important, the equal protection clause as interpreted by the Court has failed almost completely to protect black people from racial oppression.

Equal protection has been interpreted as roughly equivalent to equal opportunity to serve on juries.³⁶ The Court has said, in effect, that the rights of a defendant are protected when black citizens have been given an equal *opportunity* to serve. So long as black people are not excluded because of their race, the commands of the Constitution are met.

There is a fundamental problem with this approach. The black litigant and the black community are protected equally not when there is equal *opportunity* for blacks to serve, but when blacks *do* serve on juries.³⁷ The factfinding process is no less racist when carried on by an

35. The equal protection analysis by the Supreme Court in the jury discrimination cases reveals an ambiguity which illustrates the companion considerations, argued in this Note, of injury to the community and injury to the litigant. In *Swain v. Alabama*, 380 U.S. 202 (1965), the majority, through Mr. Justice White, viewed the constitutional right involved as "the right and opportunity to participate in the administration of justice enjoyed by the white population." 380 U.S. at 224. And in *Carter v. Jury Commission of Greene County*, 38 U.S.L.W. 4082 (U.S. Jan. 19, 1970), the Court affirmed partial relief in a case brought by black citizens of the county, stating: "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Id.* at 4085. This presentation of the issue emphasizes the harm to the community, for the right to participate takes on importance not in the case of a single juror, but in the case where a minority group is prevented from effectively participating in a process designed to legitimate the judgments of courts in the eyes of the population.

The second and more often stated formulation of the principle involved emphasizes the denial of a right of the individual litigant rather than to the excluded jurors. This principle, used by the dissenters in *Swain*, was stated by Justice Reed in *Cassell v. Texas*, 339 U.S. 282, 283 (1950): "[A] Negro is denied the equal protection of the laws when he is indicted by a grand jury from which Negroes as a race have been intentionally excluded." Since this principle, applied to the states, cannot derive from the Court's supervisory power, and since there was no discussion of the lack of any other effective sanction for denials of the right (*compare* *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)), the Court must be taken to have recognized that the exclusion of one's racial group from the jury which tries his case has a significant bearing on the treatment of a defendant in the criminal process.

It is in this analysis, where an inequality of treatment (racial or economic) in any critical mechanism of the judicial process is seen to infringe the rights of the litigant, that equal protection and due process are interrelated ideals. *Cf.* *Douglas v. California*, 372 U.S. 353 (1963). A fruitful approach in the area of criminal law is to view the nexus of due process and equal protection as a "minimum protection" guarantee implicit in the equal protection clause. *Cf.* Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13 (1969).

36. *See, e.g., Swain v. Alabama*, 380 U.S. 202, 209 (1965). The same nondiscriminatory standards apply to petit as to grand juries *See Pierre v. Louisiana*, 306 U.S. 354 (1939).

37. *See id.* at 239 ff. (Goldberg, J., dissenting). *See also* Tucker, *supra* note 10, at 745. Equal opportunity was the catchphrase of the civil rights movement, particularly as it focused on the southern United States and on the rights of middle-class people. It called

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all-white jury upon which blacks have had some unrealized general opportunity to serve. Similarly, legitimacy of the process in the eyes of black people can proceed only from actual participation.

As long as opportunity and not actuality is the guideline, only the limits of the white majority's ingenuity will serve as a restraint on its ability to keep blacks from jury service. The majority's exclusion procedure has become more and more sophisticated; exclusion is now accomplished by legally permissible criteria which fall especially heavily on black people.³⁸ When the majority was relatively less sophisticated in its exclusion, the black challenger to unrepresentative juries stood some chance of relief.³⁹ He now faces, however, a nearly insurmountable burden of proof.

In *Swain v. Alabama*,⁴⁰ for example, the Court upheld the conviction of a black murder suspect in the face of his contention that the State had a history of systematic exclusion of blacks from Alabama juries. The Court found the statistics offered by petitioner to prove this systematic exclusion unpersuasive.⁴¹ Further, the Court found state action insufficient to constitute a violation of the fourteenth amendment, because during the time studied defense attorneys as well as prosecutors had used their peremptory challenges to exclude blacks.⁴²

It is hardly clear that protection under the fourteenth amendment can be waived by one's own actions. But it is incongruous that such

for no major reconstitution of power relations or redrafting of social standards. It was of some value to middle-class black people—a highly educated black man could reasonably expect that “equal opportunity” would bring him a satisfying and well-paying job. But for the majority of black people—poor, uneducated and with little political power—that dream was elusive. As the Civil Rights movement focused on the North, where the issues were poverty and powerlessness rather than arbitrary barriers to individual achievement, the call came not for equal opportunity but equal *results*. Giving to a black man undereducated or miseducated by a racist school system, kept marginal by poverty and oppression, the same “opportunity” for a job as a white for whom all facets of the system operate, was found not to serve the purpose of equality.

38. *E.g.*, educational qualifications which tend to weed out more blacks than whites by the simple fact of discrimination in education. In *Akins v. Texas*, 325 U.S. 403 (1945), the Court upheld a conviction where court officials attempted to mask wholesale exclusion by the simple expedient of hand-selecting one black for every jury. Justice Murphy, in dissent, cited testimony establishing the commissioner's quite candid admission that his purpose was the inclusion of one black and no more, apparently to make the conviction airtight. “Clearer proof of intentional and deliberate limitation on the basis of color would be difficult to produce.” *Id.* at 410. Compare *Turner v. Fouche*, 38 U.S.L.W. 4090 (U.S. Jan. 19, 1970), discussed *infra* note 58.

39. A law which excludes persons of the African race from service as grand jurors denies to a defendant of that race equal protection under the law. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879). Where there is a substantial population of black people and virtual exclusion from jury service, the burden of proof is on the state to establish that equal protection has not been denied. *Norris v. Alabama*, 294 U.S. 567 (1935).

40. 380 U.S. 202 (1965).

41. *Id.* at 205-10.

42. *Id.* at 224.

protection can be somehow "waived" by the action of defense attorneys over a period of years in cases unrelated to the one before the Court.⁴³ The defect in the argument is particularly striking when we consider that those defense attorneys, certainly not interested in the welfare of defendants other than those they represented, may not even have acted in the best interests of their own clients:⁴⁴ the attorneys in question were usually white, court-appointed, and often openly cooperated with the state in striking black candidates. The *Swain* decision, by its peculiar definition of state action and its high standard for proving systematic discrimination, implied that the Court would wink an eye at the discriminatory use of peremptory challenges. Equal protection is hollow in such a context.⁴⁵

The suggestion in *Swain* that defense counsel can somehow waive the Constitution's proscriptions against racial discrimination underlines another fundamental deficiency in the traditional approach to jury discrimination cases. Generally decisions have focused on the interests of the individual litigant to the exclusion of the interests of the community. These community interests are rarely brought to the judicial forum. Charges of jury discrimination are almost always raised by individual criminal defendants who feel their cases have been prejudiced by an unrepresentative jury. Prospective jurors—particularly the poor and the black who are for the most part excluded—view jury duty as a chore rather than a privilege, and seldom object to exclusion.⁴⁶

43. Since the majority framed the issue as the right of blacks to participate in the jury process, rather than as the right of the defendant to a jury from which blacks were not excluded (see note 34 *supra*), the "waiver" issue might seem to be avoided. But it is no less incongruous to hold that denial to blacks of the opportunity to serve on juries is more permissible where the prosecutor secures the cooperation of defense attorneys than where he carries out the whole project himself.

44. Such cooperation apparently often proceeds from a feeling on the part of defense attorneys that black jurors will be inimical to their clients' interests.

45. *Swain* has been a controversial decision. See, e.g., Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 U.VA. L. REV. 1157 (1966). A small part of its impact has been recently diluted: *Swain's* presumption that officials such as state prosecuting attorneys are "discharging their sworn official duties" has been weakened. See *Jones v. Georgia*, 389 U.S. 24, 25 (1967). But see *Davis v. United States*, 374 F.2d 5 (5th Cir. 1967), in which the conviction of a Black Muslim for refusing induction was upheld even though a United States Attorney—whom the court presumably has more power to supervise than it does a state official—struck all black jurors by means of peremptory challenges. An emphasis on jury service rather than on the percentage of black people on the venire has crept into Supreme Court decisions. See *Coleman v. Alabama*, 389 U.S. 22, 23 (1967); Note, 21 ALA. L. REV. 130, 132 (1968). Still, *Swain* stands as a major roadblock to progress in the area. Cf., e.g., *Mobley v. United States*, 379 F.2d 768 (5th Cir. 1967).

46. A recent exception is *Carter v. Jury Commissioners of Greene County*, 38 U.S.L.W. 4082 (U.S. Jan. 19, 1970), a class action brought by black residents against officials charged with administration of the jury selection laws.

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As a partial result of the context in which the question is raised, consideration of community representativeness has been couched in terms of guarantees to individual defendants or civil litigants. Considering the problem from this perspective, the Court has often been concerned only with "impartial juries," and has failed to prevent some of the inequities worked by the notion of highly "qualified"—and therefore "impartial"—jurors, examined earlier in this Note. In addition, this perspective poorly equips the Court to resolve cases involving a conflict between litigant and community interest, such as the anomalous situation in which it is in a black defendant's interest to have an all-white jury.⁴⁷

Some decisions have considered both litigant and community interests, but these have been federal cases in which the Court has used its supervisory power over lower federal courts to impose more strict requirements than it has been willing to apply to state jury discrimination.

In *Thiel v. Southern Pacific Railroad*,⁴⁸ a federal case, a salesman pressing a claim for damages arising out of a train accident sought reversal of the trial court's adverse decision on the grounds of a stacked jury—one which, excluding working-class people, had "the employer's viewpoint."⁴⁹ The Court found it unnecessary to determine whether petitioner was unfairly prejudiced by the wrongful exclusion,⁵⁰ and rested its decision on the grounds of community legitimacy: "Were we to sanction an exclusion of this nature, . . . [w]e would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged."⁵¹

In *Fay v. New York*,⁵² the Court refused to extend the doctrine to state cases. A labor union leader charged with extortion and criminal conspiracy argued that the "blue ribbon" jury which convicted him was an instrument of the privileged classes, and claimed that the systematic exclusion of the working classes denied him a representative jury. The Supreme Court distinguished *Thiel* as a supervisory case, not to be applied to state juries,⁵³ and upheld the conviction over vigorous dissent. It further decided that in a case not involving racial

47. See p. 534 *supra*.

48. 328 U.S. 217 (1946).

49. *Id.* at 219.

50. *Id.* at 225.

51. *Id.* at 223-24.

52. 332 U.S. 261 (1947)

53. *Id.* at 287.

exclusion, prejudice to petitioner must be demonstrated.⁵⁴ The Court found no prejudice: the working-class community seemed as incensed at petitioner as were those more sympathetic to management and business, and just as likely to convict him.⁵⁵ The petitioner may not in fact have been prejudiced, but the legitimacy of the jury and the interests of the working class were severely compromised.

Further, even though the exclusion by "qualifications" in *Fay* was explicitly distinguished from exclusion along racial lines,⁵⁶ the Court's failure to protect community interest was contagious. *Fay*, allowing working-class exclusion, was relied on in *Brown v. Allen* for the proposition that the state may "confine the selection [of jurors] to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications."⁵⁷ The result of property and educational qualifications in *Brown* was an all-white jury. Upholding the conviction of the black defendant, the Court remarked that the absence of black jurors was "doubtless due to inequality of educational and economic opportunities . . ."⁵⁸

A companion case, *Speller v. Allen*, was decided on the same grounds. Dissenting from the *Brown-Speller* rationale, Justice Black rebuked the Court:

The Court attempts to explain [the absence of black jurors] by relying upon another discrimination, one which can hardly be classified as more appealing in a democratic society [because it] was based not on race but on wealth The Court then even

54. *Id.* at 282.

55. There is evidence that juries constituted as in *Fay* tend to convict more often than juries drawn from the entire community. See REPORTS OF THE JUDICIAL COUNCIL, FOURTH ANNUAL REPORT 46 (1938). The "blue ribbon jury" system has been abandoned in New York State. Boehm, *supra* note 7, at 736 & n.12. But New York juries still for the most part overrepresent the affluent. See *United States ex rel. Fein v. Deegan*, 410 F.2d 18 (2d Cir. 1969); *Chestnut v. New York*, 370 F.2d 1 (2d Cir. 1966).

56. 332 U.S. at 292-93.

57. 344 U.S. 443, 471 (1953).

58. *Id.* at 473, *Compare* *United States v. Henderson*, 298 F.2d 522, 526 (7th Cir. 1962), a federal jury case (nevertheless distinguishing *Thiel*): "Defendant has no constitutional or statutory right that 'ignorance' be represented in the jury box."

In a case decided shortly before publication of this Note, the brazen application of "non-racial" criteria in the selection of a grand jury in Taliaferro County, Georgia, pierced the limit of even the Supreme Court's credulity. *Turner v. Fouche*, 38 U.S.L.W. 4090 (U.S. Jan. 19, 1970). The county jury commissioners were given the statutory discretion to exclude from jury service anyone they found not "upright" or "intelligent." Of 2,152 names on the voting list, 178 were excluded on this basis: 171 of them blacks. As a result of this and other techniques of exclusion, the grand jury was 26% black in a county where blacks comprised 60% of the population. Nevertheless, the Court refused to invalidate the "criteria," or even to accept on the record the fact of intentional exclusion: the district court's approval of the composition of the grand jury was vacated and the cause remanded to allow the state an opportunity to justify its wholesale removal of black citizens from the jury list. *Id.* at 4094.

declines to pass on the constitutionality of this property discrimination on the ground that petitioner's objections were based on racial, not on property discriminations. I cannot agree to such a narrow restriction of petitioner's objections to the jury that brought in the death verdict.⁵⁹

This succession of cases points up a special quirk in the history of the Court's dealing with the problems of black people. When the Court refuses to allow a principle designed to deal with those problems⁶⁰ its natural expansion to cover similar problems not involving race, it weakens that principle and hence deprives it of its fullest effectiveness for black people.⁶¹

Recent Supreme Court cases have demonstrated some willingness to ameliorate the harshness of *Swain*. In *Whitus v. Georgia*,⁶² though the holding was based upon a previously disapproved method of jury selection,⁶³ the Court took note of the obvious disparity between the percentage of blacks on the tax digest (the source of juror candidates) and the black representation on grand and petit jury venires.⁶⁴ Later cases followed *Whitus*,⁶⁵ and one, *Coleman v. Georgia*,⁶⁶ emphasized that few blacks ever served on the petit jury and none on the grand

59. 344 U.S. at 551-52.

60. Here, the representative jury. See note 1 *supra*.

61. The Supreme Court in the "Slaughter-House Cases," 16 Wall. 36 (1873), narrowly construed the fourteenth amendment in denying relief to butchers challenging a state monopoly. The Court distinguished the rights of state citizens from those of citizens of the United States, stating that the fourteenth amendment protected only the latter rights. It went on to define those latter rights as privileges and immunities which seem *fundamental*. In 1875 the Court upheld a motion in arrest of judgment granted three persons charged with conspiring to interfere—by lynching two black men—with the rights and privileges "granted and secured" by the Constitution. *United States v. Cruikshank*, 92 U.S. 542 (1876). Another charge, depriving citizens of "lives and liberty . . . without due process of law," was strongly disapproved: "It is [not] within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State . . ." *Id.* at 553-4. For the *coup de grace*, the Court in the Civil Rights Cases, 109 U.S. 3 (1883), overturned the Civil Rights Act of 1875, save the fourth section, which had already been held constitutional, on the grounds that the fourteenth amendment protected only the rights of United States citizens, and did not grant Congress the power to "legislate upon subjects which are within the domain of state legislation." *Id.* at 11.

The final irony, of course, was that the fourteenth amendment—narrowly construed to the rights of black people to freeze out a challenge of denial of "economic" due process, later, narrowly construed, failing to protect the rights of black people—was picked up by the Court in the 20th century to prevent states from passing humanitarian legislation to curb business excesses. The basis for decision? Denial of due process under the fourteenth amendment. *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905).

62. 385 U.S. 545 (1967).

63. Juries were selected from segregated tax lists. 385 U.S. at 551.

64. *Id.* at 552.

65. See *Jones v. Georgia*, 389 U.S. 24 (1967); *Sims v. Georgia*, 389 U.S. 404 (1967). Note that in both these cases the decision turned on the state's failure to provide sufficient evidence of nondiscriminatory exclusion to rebut the *prima facie* case established by disparity between source lists and venires.

66. 389 U.S. 22 (1967).

jury in question. This emphasis has been thought to signal undermining of the *Swain* doctrine.⁶⁷

The result of the *Swain* decision, the perpetuation of the all-white jury,⁶⁸ can be countered only by some method which guarantees a meaningful number of black jurors. Even with the undermining of *Swain's* stringent requirements of proof of purposeful exclusion, other, more "acceptable" methods of restricting jury service remain as major roadblocks to significant black representation.⁶⁹ These roadblocks might be overcome by a constitutional guarantee of meaningful numbers of blacks on juries trying cases involving black litigants, but *Swain*, though focusing on exclusion,⁷⁰ has rejected such a principle for the time being. A number of lower court cases, however, particularly in the Fifth Circuit, have paved the way for new solutions. *Brooks v. Beto*,⁷¹ the best example to date,⁷² allowed purposeful *inclusion* of blacks designed to offset the exclusionary effects of the existing juror selection process, and noted correctly that *Cassell v. Texas* did not prohibit such a result.⁷³

67. See Note, 21 ALA. L. REV. 130, 132 (1968).

68. See Comment, 52 U.VA. L. REV. 1157 (1966).

69. Attacks on more "acceptable" methods of restricting jury service are made more difficult by *Fay v. New York*, 332 U.S. 261 (1947), which allowed exclusion of lower economic classes. See *United States ex rel. Fein v. Deegan*, 410 F.2d 13, 22 (2d Cir. 1969), where the court refused to apply the principles of *Whitus v. Georgia* to economic exclusion, insisting that *Fay* would not allow such a result. See also *Christian v. Maine*, 404 F.2d 205 (1st Cir. 1968); *Chestnut v. New York*, 370 F.2d 1 (2d Cir. 1966), cert. denied, 386 U.S. 1009 (1967). But see *Witherspoon v. Florida*, 391 U.S. 510 (1968), citing *Fay*, *inter alia*, in overturning a conviction for murder where prospective jurors disfavoring the death penalty had been struck for cause.

70. See p. 539 *supra*.

71. 366 F.2d 1 (5th Cir.), cert. denied, 386 U.S. 975 (1966).

72. Other examples from the Fifth Circuit are *Mack v. Walker*, 372 F.2d 170 (5th Cir. 1966); *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966).

73. 366 F.2d at 16. It is interesting to note that *Cassell v. Texas*, 339 U.S. 282 (1949), was relied on in *Swain* for the proposition that proportional representation is constitutionally prohibited, but it is clear that *Cassell* does not stand for that principle. The *Cassell* Court was confronted with a system which hand-picked exactly one black juror to serve on each grand jury, a practice which the Court had previously upheld in *Akins v. Texas*, 325 U.S. 403 (1945). Recognizing that this token inclusion was a sham to circumvent the Constitution, the *Cassell* Court condemned the device, noting in passing that "an accused is entitled to have charges against him considered by a jury in the selection of which there has been neither exclusion nor inclusion because of race." 339 U.S. at 287. Since the issue was "token inclusion" and not a "proportional" system at all, *Cassell* did not address the situation for which *Swain* cites it.

In addition, the language in *Cassell* relating to purposeful inclusion is entirely dicta, since the Court chose to rest its decision on a finding of purposeful exclusion: "Our holding that there was discrimination in the selection of grand jurors in this case, however, is based on another ground The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes in an area where Negroes made up so large a proportion of the population, prove the intentional exclusion that is discrimination in violation of petitioner's constitutional rights." 339 U.S. at 287-90. It is interesting, also, to compare the language of *Cassell* ("an accused is entitled to have charges against him considered by a jury in the selection of which

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Predictably, *Brooks* drew critical law review commentary⁷⁴—mostly of the “racism in reverse” variety—expressing sincere hopes that the inclusion because of race condoned by *Brooks* would be a short-lived expedient. Anticipating such a reaction, the *Brooks* Court noted that while “forbidding race consideration in both exclusion and inclusion” has an “ostensibly logical symmetry,” it is “both theoretically and actually unrealistic.”⁷⁵ The *Brooks* Court dealt too mildly with this criticism. The “no exclusion or inclusion,” or “no racism in reverse” argument is a particularly specious and pernicious one.⁷⁶ It is an argument taken completely out of social context: white juries are the rule rather than the exception, and whites are therefore guaranteed juries that not only proportionately represent their race but which represent their race alone. A white defendant, for example, does not have to battle the court to have his race fairly represented on the jury; the juries are all-white.⁷⁷

A commentator on *Cassell v. Texas*, assuming the case to prohibit purposeful inclusion, aptly summarized the problem:

[T]he Court's [required process of selection of jurors] will make any ascertainable racial representation completely dependent upon chance. How can there be chance until there is openmindedness? A prejudice exists.

If the Negro is systematically excluded, the Court condemns; if he is systematically included, the Court condemns. But the prejudice that has pointed out the Negro in the social system since before the founding of the Republic still points him out

[T]he direction taken . . . must be a conscious one . . . a pre-

there has been neither exclusion nor inclusion because of race”), with that of *Swain* (“a defendant in a criminal case is not entitled to a proportional number of his race on the jury which tries him nor on the venire from which potential jurors are drawn”). *Cassell* granted a right. *Swain* converted the assertion of that right to a denial of other potential rights.

74. See, e.g., Note, 42 N.Y.U.L. REV. 364 (1967); Note, 41 TULANE L. REV. 473 (1967).

75. 366 F.2d at 24.

76. The argument is not a new one and the flaw in it has long ago been identified. It is used even now in the general political arena, where it at best represents a misguided blindness to social reality. At worst, it is a cynical attempt to rout bids for power by insurgent groups, by withdrawing from their grasp easily-controlled political and economic machinery, and claiming as a reason for that withdrawal past abuses of the machinery by those in power—whose positions are now so entrenched that they no longer need the machinery. See Rousseau, *A Discourse on the Origin of Inequality*, in *THE SOCIAL CONTRACT AND OTHER DISCOURSES* 250 (Cole, ed., 1950). When the majority can no longer win by the rules it has promulgated, it changes the rules.

77. The outcome of the *Swain* case points to another problem of equal protection: as equal opportunity, the doctrine resists an emphasis on equal results. In this fashion, equal opportunity becomes conservative doctrine. Opportunity is all that is needed by those whom the system serves. To achieve equal results, on the other hand, entails shifting priorities and retooling machinery to make it work for those whom it has previously overlooked and for whom it has hence made equal opportunity meaningless.

justice can not merely be forgotten. It is a psychic force that must be met with a psychic force.⁷⁸

The *Brooks* Court noted that, in other discrimination contexts, several circuits had voiced similar opinions. Using race as a decisional criterion is allowed where the objective is legitimate and the means reasonable:

If a school board is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so instituted. It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve "consideration of race" This effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the "consideration of race" which the Constitution discountenances.⁷⁹

IV. Black Juries

The Supreme Court considers equal protection to be equal opportunity rather than equal results. Though it has never considered the question on its merits, the Court seems to disapprove of considerations of race in bringing about a significant number of black jurors. It has acknowledged the value of juries representative of the community, but has allowed juries to be rendered unrepresentative by qualification barriers that have little to do with the jury function. Possible conflict between the interest of criminal defendants or civil litigants and the community have been inadequately resolved. In jury discrimination cases, the Court has never squarely considered the full range of problems black people face—problems requiring juries which represent black people.

Brooks and other Fifth Circuit cases have recognized that the significant question is whether there *are* blacks on juries, and not how legit-

78. Gibson, *Racial Discrimination on Grand Juries*, 3 BAYLOR L. REV. 29, 38-39 (1950).

79. 366 F.2d at 25, quoting Sobeloff, J., in *Wanner v. Arlington County School Board*, 357 F.2d 452 (4th Cir. 1966).

There has been extensive analysis of this problem, and more commentators are beginning to cast aside the rather rigid ideology that prevents them from seeing that race must be considered to solve a racial problem. See, e.g., Freund, *Constitutional Dilemmas*, 45 BOSTON U.L. REV. 13, 20 (1965): "The constitutional guarantee, it should be remembered, is one of equal protection and not one of color-blindness, and if the two concepts are sometimes irreconcilable equal protection should prevail." But cf. Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962).

imate is the means by which black people are excluded. The Court will find that meaningful black representation in race-related cases is constitutionally compelled when it accepts one or both of two principles. First, when black people are not represented on juries, the black community and the black criminal defendant or civil litigant are denied the equal protection of the laws; any process which results in the absence of black jurors is constitutionally suspect. While random selection may in some cases suffice,⁸⁰ any method of restricting jury service which is adopted creates a consequent obligation to ensure that that method does not result in the absence of blacks from juries. Second, in state criminal cases, any black defendant tried by a jury which does not significantly represent black people is denied a fair trial. The acceptance of either or both of these principles presumes that the Court will remove the hurdles it has set up. But whether black representation be achieved by constitutional command or legislative or administrative innovation, another, and equally crucial, question will remain: how large should the black presence be? Not "whether black jurors," but "how many?"

The number of blacks on juries is crucial both to the black litigant or criminal defendant and to the black community. It is true that a black defendant accused of a crime against a black victim would favor an all-white jury,⁸¹ which would probably be more lenient toward him than toward a white defendant accused of a like crime against a white victim.⁸² But this is not a valid argument against black juries. The interests of the community are not here pitted against a legitimate interest of the defendant. No defendant has the right to profit by discrimination against his race.⁸³ Equally important as numbers of blacks on the jury is that whites do not control the selection process. Purposeful inclusion, though it properly ignores specious arguments

80. Random selection, of course, is satisfactory in very few situations; by ignoring important distinctions, it may work severe injustice. A randomly assessed tax would ignore disparities between rich and poor in ability to pay the tax. And wherever a system is structured to reach a desired end, randomness will be inadequate. If we wished to increase the numbers of blacks in college by providing scholarship aid, we would not distribute aid without regard to the race of the recipient.

81. There are civil analogs. A black tortfeasor might get off with a very small settlement when his victim was black, because the jury sympathy which goes with large settlements—or a finding for the plaintiff at all—would be lacking.

82. See p. 534 *supra*.

83. Certainly not all black defendants accused of a crime against another black will desire an all-white jury. The current New Haven Black Panther trial, in which fourteen members of the Black Panther party are accused of the murder of one Alex Rackley, a black man, may be an example. If an all-white jury were constituted for this trial, and were the outcome *not* lenient, we could safely say that result proceeded from antipathy towards the Panthers rather than from concern for the safety of black citizens.

against considering race in the solution of a racial problem, leaves control of the jury selection process in white hands.⁸⁴

It is possible to solve the problem of both numbers and control. In Northern urban areas, jury districts could be redrawn so that each black community would constitute a jury district, or vicinage, the other vicinages being predominantly white. Juries drawn from vicinages duplicating the boundaries of the black community would be by natural consequence all-black.⁸⁵ In the Black Belt counties of the rural South, however, the black and white communities are not so readily distinguishable, and the problems outlined would not be solved simply by reconstituting jury districts. Here we would do better to require that every jury be proportionately representative of the black *population* in the vicinage.⁸⁶ In most cases this would yield juries that are at least three-quarters black.⁸⁷

The problem of numbers and control could be solved in the federal context by dividing federal jury districts into sub-districts paralleling the proposed state jury districts in the North,⁸⁸ and paralleling counties (that is, existing state jury districts) in the South. Legal problems that black people face tend to arise where they live and carry on their daily business. By requiring that juries trying civil cases be drawn from the community where the cause of action arose,⁸⁹ and in criminal cases where the crime occurred, we could ensure that civil and criminal law for black people would be administered by substantially all-black juries.

This solution would not help the small number of black defendants accused of crimes committed outside the black community, in the North, or outside Black Belt counties in the South. But a great many

84. The basic difference between white jury commissioners purposefully including Uncle Toms on a jury, and a system which, taking race into account, seeks an automatic black representation in meaningful numbers, is that of control.

85. The reconstitution of jury districts would produce the desired result, of course, only so long as other qualifications for jury service do not operate unjustly against blacks. The present constitution of Southern districts, for example, is already suitable to the vicinage proposal, but other qualifications and practices keep blacks off juries.

86. Not black voters, or blacks with a high school education, but black population. Of course, nearly all qualification hurdles—which have very little to do with the function of the jury, see pp. 532-33 *supra*, and which too often are unfairly applied or have inequitable results, see pp. 539-40 *supra*—would have to be eliminated.

87. Greene County, Alabama, for example, is 81.3% black.

88. Jurors would be called, as in the state system, from the district where the cause of action arose. Federal jury districts would have to be subdivided, because when the area or vicinage from which prospective jurors come becomes too large to draw in a way such that it is nearly all-black, the resulting jury is no different from that of the present system.

89. In some cases—torts for example—the problem of defining the site of the cause of action would be easier than in others. The use of standard procedural techniques, such as change of venue, would have to be carefully scrutinized to ensure that the purposes of the reform are not defeated.

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more black defendants, to say nothing of the black community, suffer as a result of the existing system. The proposed system will ensure some all-white as well as all-black juries. The present system, however, ensures white juries and no black ones; it does not even ensure individual black *jurors*. To those concerned (perhaps in earnest) that this alternative may perpetuate racial polarization, it can be pointed out that as the society becomes less racist—if it ever does—the different vicinages become less all-white or all-black. The vicinage solution goes directly past the “racism in reverse” argument, and puts the burden of eradicating racism in this country squarely where it belongs. As society itself becomes less racially polarized, so will juries. Call it a test of good faith.

We might consider another alternative⁹⁰ which does not raise the problems posed by redrawing jury districts. We could establish a formula that makes the number of black jurors dependent upon both the degree to which race is central to the decision and the number of jurors necessary to bring about an equitable result. The formula follows the pattern of an ideal modern legislature, and requires that those interests most clearly affected by an issue play the major role in its resolution. A labor bill in Congress, for example, draws the AFL-CIO and NAM, but rarely the National Rifle Association. Serious problems arise, however, when we consider that interest representation would have to be restricted by the size of the jury and the number of jurors necessary to acquit, to convict, or to get a hung jury would have to be determined. Neither of these tasks would be easy,⁹¹ and on balance the disadvantages of this formula would probably outweigh its benefits. The vicinage mechanism is much to be preferred. Discussion of how such districts would be drawn, and other questions of implementation, are topics for further analysis.⁹² But it should be remembered that in the best sense, the Constitution is both “color-blind and color-conscious”:⁹³

90. One other alternative can be dismissed out of hand: proportional representation of blacks on all juries in all cases, race-related or not, with respect to their percentage of the total population. It would yield only one black on every jury, and it would be impossible to ensure complete proportional representation of all elements of the community. (E.g., we'd need a half-Chinese, half-Indian juror).

91. For the difficulty of estimating the number of jurors needed to achieve a particular result, see note 30 and accompanying text *supra*. Permutations and combinations with respect to interest representation could easily be pushed into the absurd, given the limited size of the jury.

92. The Borough of Manhattan would divide fairly easily into jury districts following natural community lines. We might draw lines to constitute five districts: Harlem-East Harlem; The East Side from the eighties to the thirties, and Central Park; the West Side from the seventies to the beginning of Harlem and all the way uptown west of Amsterdam; the West Side from 50th Street to the Village; and the Lower East Side.

How . . . is this constitutional imperative to be achieved in a society that still bears the ugly scars of decades of racial segregation with all of its discriminations? For it is in this social structure—not that of some hoped-for idyllic state when the last vestige of this invidious distinction has gone away—that the constitutional ideal must be made to work.⁹⁴

It is in that society, with its cities torn apart by racial disorder, with lawlessness and violence plaguing the black community—that black juries are of such critical importance.

The first and fifth districts would be predominantly black and Puerto Rican, the second mostly white with a sprinkling of black professionals, the third and fourth black, Puerto Rican, and "ethnic white." Jury districts would have to be small enough, of course, to register the effects of shifts in population. Whites moving into a black area, blacks moving into a white area, or simple expansion of the ghetto and the consequent creation of new black areas would show up in the composition of juries drawn from a particular district. One undesirable result would be that the first groups of blacks moving into a previously white jury district would have only proportional representation to protect them. This is insufficient in many cases. *See* p. 536 *supra*. But this result is administratively preferable to constantly redrawing district lines. This is merely to concretize the proposal: obviously such an exercise cannot be fully undertaken within the scope of this Note.

93. *United States v. Board of Education*, 372 F.2d 836, 876 (5th Cir. 1967).

94. Gibson, *Racial Discrimination on Grand Juries*, 3 BAYLOR L. REV. 29, 38 *et seq* (1950).