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VOTER REGISTRATION LISTS: DO THEY YIELD A JURY REPRESENTATIVE OF THE COMMUNITY?

I. INTRODUCTION

Until the passage of the Jury Selection and Service Act of 1968,¹ Congress had not established a uniform method of jury selection in federal courts but had relied instead upon state procedures for the selection of jurors.² The predominant state jury selection process and consequently the method used in most federal jurisdictions had been the "key man" system whereby certain "key members" of the community would submit a list of names to the jury commissioner for prospective jury service.³ In practice, this system, even when impartially administered, led to unrepresentative juries,⁴ and many jurists seriously questioned the propriety and efficacy of the system in achieving the goal of a jury selected from a representative cross section of the community.⁵

¹ 28 U.S.C. §§ 1861-1869 (1970) [hereinafter referred to in the text as Federal Act].

² For a discussion of congressional activity in the area of jury selection, see S. REP. NO. 891, 90th Cong., 1st Sess. 9-12 (1967) [hereinafter cited as S. REP.]. This committee report pointed out:

A jury chosen from a representative community sample is a fundamental of our system of justice. Yet, ironically, little attention has been given to the methods of jury selection actually used in our Federal courts. Instead, this Nation has stated and restated its commitment to the goal of the representative jury without making any significant effort to insure that this goal is attained.

Id. at 9. See also Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States, 42 F.R.D. 353, 354-59 (1967) [hereinafter cited as Judicial Conference]; Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349, 351-57 (1969).

³ S. Rep. 10-11.

⁴ *Id.* For a critique of the "key man" selection system, see *Hearings on S. 383, S. 384, S. 385, S. 387, S. 989, S. 1319 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 74-83 (1967). (remarks of Hon. Joseph S. Lord III, Judge, U.S. District Court for the Eastern District of Pennsylvania) [hereinafter cited as *Senate Hearings*].

⁵ See, e.g., *Rabinowitz v. United States*, 366 F.2d 34, 38-39 (5th Cir. 1966), where the court emphasized that although no conscious effort on the part of the jury commissioners to exclude Negroes had been demonstrated, the "key man" system used in the Macon Division of the Middle District of Georgia had yielded a jury list in which only 5.9 percent of those selected were Negroes whereas the Negro population over age twenty-one constituted 34.5 percent of the total population. The court refused to consider the commissioners' lack of intent to exclude Negro jurors as controlling:

In defense of the jury commissioners, it is said that they did not specifically intend to exclude Negroes from federal juries. The jury commissioners must be held to have intended the natural result which flowed from their conduct.

Id. at 56.

The impact of *Rabinowitz* was recognized by the Senate Committee on the Judiciary as

The passage of the Federal Act, therefore, was primarily a response to the inability of the prevailing jury selection process to achieve the goal of a representative jury. The Act requires that voter registration lists be used as the primary source of names for jury selection in federal courts. A similar provision applicable to state courts is included in the Uniform Jury Selection and Service Act, adopted by the Conference of Commissioners on Uniform State Laws in 1970.⁶ This article will examine the rationale and effectiveness of the use of voter registration lists as a means of achieving the goal of a representative jury, the problems in the implementation of the Federal and Uniform Acts, and a possible alternative to the use of the voter registration lists as the primary source of names for jury selection.

II. VOTER REGISTRATION LISTS IN THE JURY SELECTION AND SERVICE ACT OF 1968: SUPPLEMENTATION WHERE NECESSARY

A. *Provisions and Rationale for the Use of Voter Registration Lists*

The Federal Act provides that:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community. . . . It is further the policy of the United States that all citizens shall have the opportunity to be considered for service. . . .⁷

the basic factor in convincing the legislators that it was necessary to replace the key man selection system:

The actuality of unintentional discrimination was documented only recently in the case of *Rabinowitz v. United States*. . . . In that case, the operation of the key man system in one set of circumstances was condemned even though it was stipulated that the officials responsible for selection did not consciously engage in discriminatory practices. . . .

. . . .
Since the key man system in one form or another is employed in more than half of the Federal districts, evidence that it undermines the goals of jury selection is enough to sound the call for reform. But taken together with the diversity of practices among the jurisdictions, and the uncertainty of district judges concerning their role in the jury selection process, the case for reform is virtually unassailable. (Footnotes omitted).

S. REP. 11-12.

See also Senate Hearings 44-45 (remarks of former Attorney General Ramsey Clark).

⁶ Uniform Jury Selection and Service Act [hereinafter referred to in the text and cited as Uniform Act]. The text of the Act is set forth in McKusick, *Uniform Jury Selection and Service Act*, 8 HARV. J. LEGIS. 280, 292-309 (1971); and in NATIONAL CONFERENCE ON COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 158 (1970).

⁷ 28 U.S.C. § 1861 (1970).

Thus the Act in effect codifies the federal judicial policy and equal protection requirement of a jury selected from a source reflecting a representative cross section of the community and extends the opportunity to serve on a federal jury to all eligible citizens. The Act further prohibits any discrimination in the selection process.⁸

In order to implement its policy, the Act provides that “[e]ach United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors. . . .”⁹ The source of names from which the master jury list in each district is to be selected is initially either the voter registration lists or lists of actual voters, and the plan must specify which of these is the initial source.¹⁰ The Act requires that the original source of names be supplemented by “some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title.”¹¹ Significantly, then, the original source of names from the voter registration lists or lists of actual voters need only be supplemented “where necessary.” Although the Act does not indicate when such supplementation is necessary, both the Senate and House Reports on the bill suggest that supplementation would be required only when the voter registration lists deviated substantially from an accurate cross section of the community.¹² In developing their plans for jury selection, the courts are to determine whether the percentage deviation between the actual population distribution of the community and the population distribution contained in the voter registration lists is substantial.¹³

Once the initial source of names is established, the Act requires

⁸ *Id.* § 1862.

⁹ *Id.* § 1863(a).

¹⁰ *Id.* § 1863(b)(2) provides in part:

(b) Among other things, such plan shall—

. . . .

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division.

¹¹ *Id.*

¹² The Senate Judiciary Committee stated:

The voting list requirement, together with the provision for supplementation or substitution, is therefore the primary technique for implementing the cross sectional goal of this legislation. The bill uses the term “fair cross section of the community” in order to permit minor deviations from a fully accurate cross section. The voting list need not perfectly mirror the percentage structure of the community. But any substantial percentage deviations must be corrected by the use of supplemental sources. Your committee would leave the definition of “substantial” to the process of judicial decision.

S. REP. 17. See also H. REP. NO. 1076, 90th Cong., 2nd Sess. 5 (1968) [hereinafter cited as H. REP.].

¹³ S. REP. 17; H. REP. 5.

the district court to establish a procedure whereby names are selected at random from the master list¹⁴ and placed in a master jury wheel.¹⁵ After the clerk has taken names out of the jury wheel and mailed juror qualification forms to prospective jurors,¹⁶ a district judge, either upon his own initiative or upon recommendation by a clerk, may determine whether or not a prospective juror is qualified for jury service, but this decision must be based solely on the information contained in the returned questionnaires¹⁷ and the objective criteria specified in the Act.¹⁸ The qualifications for jury service were a central source of debate during the subcommittee hearings; many of those who testified argued that the screening process should allow for more subjectivity, others that even the objective criteria established were not necessary.¹⁹ In any event, the selection process continues beyond

¹⁴ 28 U.S.C. § 1863(b)(3) (1970).

¹⁵ *Id.* § 1863(b)(4).

¹⁶ *Id.* § 1864.

¹⁷ *Id.* § 1865(a).

¹⁸ *Id.* § 1865(b) provides that:

(b) In making such determination the chief judge of the district court . . . shall deem any person qualified to serve on grand and petit juries in the district court unless he —

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of physical infirmity, to render satisfactorily jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

¹⁹ In an exchange with former Attorney General Clark, Senator Sam Ervin advocated the use of subjective criteria for the selection of jurors. This exchange evidences a basic conflict between a truly cross sectional jury and a "blue ribbon jury":

Senator Ervin. It seems to me, and I invite your comments on it, that under the movement which is so well exemplified by the recommendations of the Knox committee, there are two characteristics of the juries. First is that they be drawn from all groups and segments of society, and the second is that those so drawn be the best in terms of intelligence, integrity, morality, and commonsense to be found in all groups. Aren't those pretty good criteria for the selection of jurors?

Attorney General Clark. We agree entirely with the first criterion, and endeavored to incorporate that in our bill.

The second, while perhaps not reflective of a perfect democracy, might be a nice utopian ideal. I am not sure how you choose or who shall choose intelligence, commonsense, and probity. I think that what we really need is to involve all of our people in the judicial process.

Senate Hearings 48. For further exposition of Senator Ervin's views, see Ervin, *Jury Reform Needs More Thought*, 53 A.B.A.J. 132 (1967).

For an attack on the objective criteria as being too broad, see *Senate Hearings* 334-35 (statement of Lawrence Speiser, then Director, Washington Office, American Civil Liberties Union).

the initial selection of a source of names, and the ideal of a fair cross section can also be jeopardized at these later stages.

The legislative history of the Federal Act and statements made by many commentators indicate that the voter registration list is considered to be the broadest and most readily available source of names from which jurors can be selected.²⁰ However, a significant percentage of Americans do not register to vote²¹ and are thereby deprived of consideration as potential jurors. The traditional justification for this limitation on jury representation is that those who have failed to register have "eliminated themselves"²² and that only those sufficiently interested in the democratic process to register should have the opportunity to serve on a federal jury. The voter registration lists thus contain a "built-in screening element" which eliminates "those individuals too uninterested in civic affairs or not qualified to register or to vote."²³ Apparently a prospective juror must have already demonstrated a sense of participation in the democratic process before he deserves the opportunity to be considered for jury service.

The assertion that those who have failed to register are not sufficiently interested in civic affairs to be included in the source list of names overlooks the potential that jury service may have in developing a favorable image of the democratic process.²⁴ Although the jury system exists in part to insure "active citizen participation in government,"²⁵ exclusive reliance on voter registration lists as a source of names for prospective jurors eliminates much of the potential that jury service may have in creating a sense of participation in the democratic process.²⁶ In view of

²⁰ The Report of the Senate Committee on the Judiciary states: "The bill specifies that voter lists be used as the basic source of juror names. These lists provide the widest community cross section of any list readily available." S. Rep. 16. See also note 30 and accompanying text *infra*.

²¹ Attorney General Clark, when asked what percentage of Americans eligible to vote actually voted, replied: "It varies from State to State. I think States range as high as 70 percent, and as low as 40 or perhaps a little lower, but I think the national average would be something nearer 50 percent, a little higher." *Senate Hearings* 43.

The Bureau of the Census reported that 69.2 percent of the eligible voting population was registered to vote in the 1968 presidential election and that 80.8 percent of those registered actually voted. STATISTICAL ABSTRACT OF THE UNITED STATES 368 (1970).

²² *Senate Hearings* 43.

²³ Judicial Conference, *supra* note 2, at 362.

²⁴ Dale W. Broeder, who was associated with the University of Chicago Jury Project, revealed the impact that jury service had on one Negro juror: "When I got my summons . . . I got a sense of really belonging to the American community. . . . It was a very proud moment when I opened my letter and found that I had been . . . selected to serve on a Federal jury." *Senate Hearings* 63.

²⁵ *Id.* at 67.

²⁶ Exclusive reliance on the voter registration lists is particularly discriminatory against the young, the poor and the undereducated. In the case of the youngest voters: "It takes time for people to register to vote and then get on venire lists and it is my thought that many of our young people do not register until the presidential election year following their 21st birthday." *Id.*

certain studies which indicate that jury service has a definite impact on a citizen's attitude toward this process²⁷ and that those who have served on a jury look more favorably upon jury service itself,²⁸ the selection process which chooses those jurors should include as broad a base of people as possible.²⁹

A further rationale for the use of voter registration lists is that no other source of names is either adequate or feasible:

We looked at post office addresses, at Civil Service Commission lists, at social security lists, and we considered telephone books, and a city directory sort of list, and we couldn't find any list that would be across the country nearly as good as the voter list.³⁰

The statistical testimony before the Senate Subcommittee on Improvement in Judicial Machinery suggested that while the voter registration lists were not totally free from bias, the cost of devising an unbiased system would be prohibitive.³¹ However, com-

Witnesses before the Senate subcommittee also maintained that the poor and undereducated are inadequately represented in the polls. *Id.* at 67 and 336.

The Fifth Circuit Court of Appeals, in reviewing district court plans for jury selection in its circuit, decided to use the voter registration lists rather than the list of actual voters. A variance between registration and voting was noted, but the same reasons could be applied to the variance between eligible voters and registration:

The variance in participation is due to the fact (1) that people are impelled to vote when the issues or candidates in an election are of significant concern to them personally, (2) that people are simply not prompted to vote when they think that an election does not concern them, and (3) that people are repelled from voting when, in their judgment, none of the candidates takes a position which is in accord with their views.

Gewin, *supra* note 2, at 336 (footnote omitted).

²⁷ See note 24 *supra*.

²⁸ The Chicago Jury Project discovered that of those people who had never served on a jury, 36 percent would like to serve, 48 percent would not like to serve, and 16 percent were undecided. Of those who had served on a jury within a year of the study, 94 percent said they would like to serve again. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 751-52 (1959).

It should be noted, however, that 48 percent of those who suffered economic hardship by being called upon to serve but who did not actually sit on a jury said they would not like to serve again. *Id.*

²⁹ Broeder suggests that whenever possible the voter registration list should be supplemented with names from village directories in order to encourage citizen participation in government. *Senate Hearings* 67.

³⁰ *Id.* at 43.

³¹ Professor Edwin S. Mills, Professor of Economic Theory at Johns Hopkins University, gave the following testimony:

Although directories and voting lists would yield much less biased jury lists than the key man system, they would still not be completely free of bias. There is undoubtedly a greater tendency, for example, for people in well paid occupations to have telephones than for people in very poorly paid occupations. To obtain less biased jury lists than could be obtained from directories and voting lists would, however, be expensive. To obtain absolutely unbiased lists would be prohibitively expensive. . . . My own judgment is that very nearly unbiased lists could be obtained almost costlessly from directories and voting lists, and that any less biased source could cost more than it is worth.

Id. at 208.

pilation of names from the voter registration lists is not without its difficulties and costs. For example, in 1967 only five of the one hundred counties in Kansas maintained voter registration lists, and the only other sources available were polling books which did not provide addresses;³² in New Jersey the compilation process would have required the copying of names from 6,000 lists with 500 names contained on each list;³³ and in the middle district of Georgia only one county maintained addresses of the persons included on the voter registration lists.³⁴ Thus, the mere process of information gathering under the Federal Act requires a great deal of time, personnel, and money.³⁵

A further difficulty beyond the initial gathering and compilation of voter registration lists is the method of selecting names from those lists to place in the master jury wheel. The Federal Act requires that the district court plan "specify detailed procedures" which "shall be designed to ensure the random selection of a fair cross section of the persons residing in the district or division wherein the court convenes."³⁶ The Act goes no further in specifying the manner of random selection to be used, although the Senate committee report suggests that "most districts probably will have to rely on some method of manual selection analogous to picking, say, every 37th name on the lists."³⁷ However, a true cross section might not result from merely picking every 37th name,³⁸ and a statistician's expertise should be utilized in the

³² *Id.* at 357.

³³ *Id.* at 362. Michael Keller of New Jersey testified that "even with only 21 counties" it was sometimes difficult to obtain voter registration lists. He was also unsure what method could be used to copy the lists, but did suggest that "if the lists are available, it is feasible, although it is not simple." *Id.*

³⁴ *Id.* at 364-65. Georgia faced a further difficulty since the voting age in Georgia was 18 while the age for jury service was 21. This required a careful check of the lists to eliminate those under 21. *Id.*

Recently Congress has considered a proposal to lower the age of jurors from twenty-one to eighteen in light of the 26th amendment to the United States Constitution allowing eighteen year olds to vote in federal elections. One of the rationales for lowering the age for jury service is the difficulty involved in eliminating from the voter registration lists names of voters between the ages of 18 and 20. *Hearings on S. 1975 Before the Subcom. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 92nd Cong., 1st Sess., 2 (1971).*

³⁵ *Senate Hearings* 366. One witness presented a cost estimate of \$80,000 for computerizing the process in his district. *Id.*

³⁶ 28 U.S.C. § 1863(b)(3) (1970).

³⁷ S. REP. 28. For a detailed discussion of the problems involved in random selection from the voter registration lists see Comment, *The Federal Jury Selection Act of 1968: A Critique*, 2 COLUM. SURVEY OF HUMAN RIGHTS L. 52, 72-82 (1970).

³⁸ Professor Mills testified before the Senate Subcommittee on Improvements in Judicial Machinery:

Even if one has a complete list of those eligible for jury service, one has to be careful how one selects jurors. If one selects the top name on each page, or every 10th name or every 25th name, it would not, necessarily, be a cross section.

initial stage of devising a plan for random selection.³⁹ The availability and reasonable cost of the advice of statisticians at this stage could eliminate many of the problems left unsolved by the Federal Act.⁴⁰

B. Supplementation of the Voter Registration List in the Fifth Circuit

Perhaps the most troublesome aspect of the Jury Selection and Service Act of 1968 is its failure to enumerate the circumstances in which voter registration lists should be supplemented with other sources of names. The exclusive use of voter registration lists has survived judicial review in the Fifth Circuit, where the court of appeals ruled that there must be a showing that exclusive use of voter registration lists has resulted in the "systematic exclusion" of a "cognizable group or class of qualified citizens."⁴¹

³⁹ *Id.* Mr. Harry Kalven, a statistician and co-author with Hans Zeisel, Jr. of *The American Jury*, pointed out that while the Jury Selection and Service Act of 1968 empowers the judicial process to review the effectiveness of a random selection plan,

[s]ampling is a very well known kind of technique, and what is being asked for is that kind of professional touch be added to the legislative apparatus in conceptualizing what you are doing. You are sampling, and since you are you might as well realize there is an existing profession that knows how to do that, and make some use in a consulting capacity, that they can do that and not pretend anybody can do it as well as anybody else, because they can't.

Senate Hearings 136.

⁴⁰ The following testimony was offered to the Senate Subcommittee on Improvements in Judicial Machinery:

Mr. Zeisel. . . . You see, there is no city in the United States where there is not a competent professor of statistics, and there is no reason why a judge shouldn't, when the system is first put into operation, have a statistician as a consultant. . . .

Mr. Kalven. Maybe I ought to make clear how cheaply a statistician will work. What is contemplated is sort of 1 day's advice once from a statistician when you set up the system. It may be periodical when you want to check how a system is working.

Id. at 135-36.

⁴¹ *Rabinowitz v. United States*, 366 F.2d 34, 57, n. 57 (5th Cir. 1966). The court emphasized that it did not intend to limit jury commissioners to any particular source of prospective jurors, and then quoted from *United States v. Greenberg*, 200 F.Supp. 382, 395 (S.D.N.Y. 1961):

The test is not whether voter registration lists are used, exclusively or otherwise, as a source of qualified jurors. The test is whether or not the use of such lists [or other sources] results in an array which is a representative cross-section of the community or from which a cognizable group or class of qualified citizens is systematically excluded. . . .

The Supreme Court has also expressed reluctance to dictate any particular source of names for the jury selection process. In upholding the use of tax lists as the source for jury selection in one jurisdiction, the Court stated in *Brown v. Allen*, 344 U.S. 443, 474 (1953):

Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.

Other federal courts have held that those not registered to vote are not a "cognizable group."⁴² The basic issue then is whether use of voter registration lists will result in a master jury list which does not reflect a substantial percentage deviation from a truly accurate cross section of the community.⁴³

In accordance with the provisions of the Federal Act,⁴⁴ the Fifth Circuit appointed a circuit-wide committee⁴⁵ "to begin immediately to research and analyze the problems involved in implementing the Act. . . ."⁴⁶ The committee initially determined that the use of the voter registration lists was preferable to lists of actual voters⁴⁷ and that the provision for supplementation where necessary was included in the Act primarily because of "conditions existing in the South."⁴⁸ The committee therefore ap-

⁴² For example, the First Circuit Court of Appeals has stated:

For a variety of reasons we reject the argument that eligible persons who do not register to vote constitute a "political" group in the community. In the first place the group does not include only the politically inert. It includes also the politically alert who may perhaps have lived for a year or more in the district but not long enough in their ward to be eligible to register to vote. In the second place, the group has no distinct or definable outlines, for in addition to persons who have just moved into a ward, it includes not only the completely apathetic but also those who might register to vote only when interested in a particular election. It includes persons of varying shades of political interest.

Gorin v. United States, 313 F.2d 641 (1st Cir. 1963). In this case the court rejected the claim that non-registered voters represent an apolitical or politically dormant group and held that a claimant must prove that court officials systematically and intentionally excluded from the voter registration lists an economic, social, religious, racial, political or geographical group. In the voter registration context the court suggested that systematic exclusion must be shown in the registration process itself before an attack against the use of voter registration lists could be successfully maintained. *Id.*

⁴³ See note 12 *supra*.

⁴⁴ 28 U.S.C. § 1863(a) (1970) provides that the plan for random jury selection of each district court

shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate.

⁴⁵ The committee's decision as to whether supplementation of the voter registration lists was necessary was made pursuant to extensive study and analysis. In addition to guidelines supplied by the Judicial Conference of the United States and available commentary, the committee sought guidance from other sources such as the Administrative Office of the United States Courts, the Department of Justice, the United States Commission on Civil Rights, the Southern Regional Council, population and statistical experts, and a number of outstanding lawyers and jurists. Gewin, *supra* note 2, at 364.

⁴⁶ *Id.* at 363.

⁴⁷ See note 26 *supra*.

⁴⁸ Gewin, *supra* note 2, at 367. Indeed, it was pointed out by Sheldon H. Elsen, member of the Committee on Federal Legislation of the Association of the Bar of the City of New York, that one of the purposes of the proposed legislation before the Senate subcommittee was to correct any deficiencies in voter registration in the South:

Of course, voting lists do raise the problem of the lack of Negro registration in the South. In S. 989 . . . this problem is handled in part by provisions that the persons registered by Federal examiners under the Voting Rights Act of 1965 shall be deemed to be included in the voter registration list. S.

proached the problem of supplementation "with the presumption that other source lists would be necessary in some areas"⁴⁹ and concentrated primarily on the factor of racial exclusion "in determining whether to supplement the registration lists."⁵⁰ Although it did not consider other groups which might be excluded by exclusive use of voter registration lists, such as the young, the poor, and the undereducated, the committee's manipulation of the variance between the percentage of eligible non-White voters in the community and the percentage of non-White voters contained in a random drawing of names on voter registration lists is probably indicative of how similar committees would handle variances in other representative groups of the population.

After noting the improvement in voter registration of Negroes throughout the South,⁵¹ the committee sought the aid of Professor Henry B. Moore, Director of the Center for Business and Economic research at the University of Alabama. Professor Moore, through an in-depth study of selected counties in Alabama, determined that failure to purge the 1968 voter registration lists⁵² of names of persons who had died or left the community resulted in a list containing a disproportionate number of registered White voters.⁵³ In most counties the voter registration lists in 1968 contained more than 100 percent of the number of eligible White voters actually living in the district according to the 1960 census figures. However, in those counties which had maintained voter lists with reasonable accuracy, an average of only 73.3 percent of the number of eligible White voters actually living in the district according to 1960 census figures were registered in 1968. Rather than attempting the difficult process of purging voter registration lists of inaccuracies, Professor Moore elected to adjust the number of White voters contained in a random drawing of names from the inflated lists. However, the percentage of non-Whites resulting

989 . . . contains provisions for sources other than voting lists if necessary to eliminate discrimination. . . .

Senate Hearings 231.

⁴⁹ Gewin, *supra* note 2, at 368.

⁵⁰ *Id.*

⁵¹ See Gewin, *supra* note 2, at 372, tab. I (Voter Registration By Race Before And After Passage of The Voting Rights Act of 1965).

⁵² Initially the committee had the problem of selecting the most accurate figures available, which in many instances were 1960 census figures. In those instances where voter registration figures were also available, the committee found that the figures were not separated into statistical classifications of religion, sex, national origin, or economic status. Moreover, the figures generally did not reflect shifts in population caused by death or by voters moving out of the community. Although the difficulty in compiling accurate lists is substantial, the crucial consideration is how the committee dealt with the figures once it was decided that the available figures were as reliable as possible. Gewin, *supra* note 2, at 368-69.

⁵³ *Id.* at 373-74.

from the random drawing was not adjusted, because Professor Moore assumed that the relative recency of Negro registration in most instances rendered the voter registration lists accurate.⁵⁴ The adjusted random drawing, then, was intended to approximate the racial composition of the total age population in the county. Unfortunately, the analysis was further complicated by the lack of recent census information and the failure to maintain accurate voter registration records.

Although a comparison of the eligible voting age population of 1960 with the unadjusted random drawings showed that the percentage of non-Whites actually drawn was more than 10 percent less than the percentage of non-Whites in the total voting age population in 1960 in most of the counties studied, after the random drawings had been adjusted the average percentage deviation throughout the counties was found to be only 6 percent.⁵⁵ The committee had previously decided that a determination of what constitutes a substantial percentage deviation requiring supplementation of voter registration lists would be left to the judiciary,⁵⁶ however, they had already determined that the disparity discovered from the lists presently available was less than 10 percent.⁵⁷ The committee believed that a disparity of this magnitude appearing on the actual list compiled for the master jury wheel would not be substantial since there was no requirement in the Federal Act that each list of names placed in the master jury wheel must be a "perfect mirror" of the population.⁵⁸ Moreover, the committee felt that even if the underrepresentation of a particular group could be identified, there was no easy solution to how the voter registration lists could be supplemented:

The committee soon discovered that positing an instance of easy supplementation is largely an exercise in autistic theory, for the fact is that there is no facile way to supplement registration lists. Once it is determined that a class of persons

⁵⁴ *Id.* at 373.

⁵⁵ *Id.* at 382, tab. IV (Analysis of Voting Age Population and Voter Registration By Race In The 13 Counties of the Southern District of Alabama).

⁵⁶ See note 12 *supra*.

⁵⁷ The committee considered the statistical data in terms of the recommendation made by William L. Taylor, Staff Director, U.S. Commission on Civil Rights, that voter registration lists should be supplemented

whenever, in States or political subdivisions in which literacy tests and devices have been suspended under the Voting Rights Act of 1965, the proportion of Negroes on the last selected jury list is lower by 10% or more than the proportion of voting age Negroes in the district or division from which the names for the master jury wheel are chosen.

Senate Hearings 243. See also Gewin, *supra* note 2, at 379.

⁵⁸ Gewin, *supra* note 2, at 379, 383.

is underrepresented in the basic source list—*e.g.*, Negroes, women or laborers—then an adequate supplementary list must be obtained. The list must be one containing the names of persons not on the registration list. Substantial duplication would render a list administratively cumbersome and ineffective since a random selection from it might produce virtually no jurors not on the basic source list.⁵⁹

Therefore the difficulty of supplementation and the relatively minor disparities determined by the statistical analysis provided the justification for finding supplementation unnecessary. The committee's final recommendation to the judicial council was that before supplementation should be considered, "there must be greater certainly [*sic*] as to where and to what extent disparity exists."⁶⁰

If the administrative difficulties encountered by the Fifth Circuit in actually deciding whether to supplement the voter registration lists is representative, reviewing panels may be extremely reluctant to find that any existing percentage deviation is substantial enough to put the process of supplementation into operation. Absent further legislative guidance, there is no indication that supplementation will ever be found necessary by the courts.⁶¹

III. THE UNIFORM JURY SELECTION AND SERVICE ACT: MANDATORY SUPPLEMENTATION

A. Provisions and Rationale

Modeled after the Federal Jury Selection and Service Act of

⁵⁹ *Id.* at 383.

⁶⁰ *Id.* at 384.

⁶¹ It is useful to note in relation to the problem of evaluation of jury selection systems by the judicial process that successful challenges to jury selection systems in federal courts have involved gross percentage deviations. For example, in *Rabinowitz v. United States*, 366 F.2d 34, 38-39 (5th Cir. 1966), the eligible Negro voting population of the Macon Division of the Middle District of Georgia was 34.5 percent of the total population, while only 5.8 percent of the names included in the master jury list were Negroes. In *Carter v. Jury Commission*, 396 U.S. 320, 327 (1970), while Negroes represented 75 percent of the population, the largest number ever to appear on the jury lists was 7 percent. But in *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970), the court was able to justify such discrepancies as five jurors between the ages of twenty-one and twenty-four when a true cross section would have yielded sixty-five, *id.* at 569 n. 13, and 7 percent of jurors with an education of one to eight years of school completed when the true cross section would have yielded 36.4 percent, *id.* at 571 n. 16. The court stated in support of its decision: "The Constitution's mandate for a non-discriminatory jury selection system is not frustrated simply by the existence of certain inadvertant disparities arising from an otherwise fair system." *Id.* at 574.

It appears that when analysis of the jury selection system is left to the courts a percentage deviation will quite likely be considered either insubstantial or inadvertant.

1968,⁶² the Uniform Jury Selection and Service Act⁶³ states the same policies of random selection from a fair cross section of the community.⁶⁴ Like the Federal Act, the Uniform Act provides that once the master list is compiled, the names are to be taken from the master list at random and placed in a master jury wheel.⁶⁵ The qualifications for prospective jurors are also derived largely from the Federal Act.⁶⁶

The Uniform Act differs from the Federal Act in one critical respect. Although both designate either voter registration lists or lists of actual voters as the initial source of names, the Uniform Act provides that supplementation of the initial source of names is mandatory. Section 5(a) of the Uniform Act states:

The jury commission for each (county) (district) shall compile and maintain a master list consisting of all (voter registration lists) (lists of actual voters) for the (county) (district) supplemented with names from other lists of persons resident therein, such as lists of utility customers, property (and income) taxpayers, motor vehicle registrations, and drivers' licenses, which the (Supreme Court) (Attorney General) from time to time designates. The (Supreme Court) (Attorney General) shall initially designate the other lists within (90) days following the effective date of this Act and exercise the authority to designate from time to time in order to foster the policy and protect the rights secured by this Act. . . . In compiling the master list the jury commission shall avoid duplication of names.⁶⁷

The comment to section 5 of the Uniform Act suggests several reasons why exclusive use of voter registration lists is not desirable. First, the comment states that exclusive use of voter registration lists might have a chilling effect on the exercise of the voting franchise itself.⁶⁸ This raises an interesting paradox in light

⁶² McKusick, *supra* note 6, at 280. Mr. Vincent L. McKusick, member of the bar, Portland, Maine, was the chairman of the subcommittee which drafted the Uniform Act.

⁶³ The following states have adopted the Uniform Act: Idaho, Idaho Sess. Laws ch. 169 (1971); North Dakota, N. D. CENT. CODE ANN. §§ 27-09.1-01 to 22 (Supp. 1971); and Colorado, Colorado Sess. Laws ch. 215 (1971).

⁶⁴ Uniform Acts § 1 provides:

It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this Act to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose.

⁶⁵ *Id.* §§ 5 and 6.

⁶⁶ *Id.* § 8.

⁶⁷ *Id.* § 5(a).

⁶⁸ Uniform Act § 5. Comment. The President's Commission on Registration and Voting Participation noted that one of the reasons that people fail to register is that the voter registration lists are used for nonvoting purposes:

of the favorable impact that jury service may have on the prospective juror's view of the civic responsibility involved in serving on a jury.⁶⁹ Although jury service may change a person's image of jury duty and the democratic process, exclusive use of the voter registration lists may both discourage a person from registering in the first place and insure that such person is never afforded the opportunity to serve on the jury. The paradox may be of minimal validity without empirical studies indicating how many people fail to register in an effort to avoid jury duty and how likely it is that such a person's attitude would be changed by the experience of jury duty, but it does indicate that the correlation between jury service and voter registration needs further study.

The comment to section 5 also points out that "voter lists typically constitute far from complete lists of the citizens qualified for jury service."⁷⁰ The drafters of the Uniform Act, therefore, rejected the rationale expressed in the legislative history of the Federal Act that those individuals who have failed to register to vote should be eliminated from consideration for jury service.⁷¹ The drafters viewed the policy expressed in the Federal Act "that all citizens shall have the opportunity to be considered for service on grand and petit juries"⁷² as describing an opportunity for jury service which is not necessarily conditioned upon the act of registering to vote.

B. Implementation of Mandatory Selection

The contrasting experiences of state courts in Idaho and North Dakota, states which have only recently begun to implement mandatory selection, illustrate the varying degrees of effectiveness and practicality that mandatory selection may have in different communities. The adoption of the Uniform Act by Idaho required the Supreme Court of Idaho to propose supplementary lists within ninety days of the effective date of the statute.⁷³ On April 29, 1971, the Supreme Court of Idaho issued the following order:

It has been indicated to the Commission that some persons do not register to vote because the voter registers in their counties are used for tax assessment, jury selection, and other nonvoting purposes. While the Commission is fully aware of the importance of these other civic responsibilities, we believe that registration lists should not be used for these purposes.

REPORT OF THE PRESIDENT'S COMMISSION ON REGISTRATION AND VOTING PARTICIPATION 38 (1963).

⁶⁹ See notes 24-29 and accompanying text *supra*.

⁷⁰ Uniform Act § 5, Comment.

⁷¹ See text accompanying notes 22 and 23 *supra*.

⁷² 28 U.S.C. § 1861 (1970).

⁷³ Idaho Sess. Laws ch. 169, § 5(1) (1971).

No later than November 1, 1971 the jury commission for each county shall compile and maintain a master list consisting of: all voter registration lists for the county consisting of individuals who are of legal voting age. Such master list shall be supplemented by the following when available:

Lists of driver's license holders over the voting age, and in compliance with the other provisions of Sec. 8(2) of S.B. 1140;

Lists of public utility customers, subject to S.B. 1140 Sec. 8(2). . . .⁷⁴

The lists chosen by the Supreme Court of Idaho and many of the lists suggested in the Uniform Act are vulnerable to the criticism that they reflect an economic bias.⁷⁵ Nevertheless, since one of the main purposes of the mandatory supplementation process is to avoid exclusive reliance on voter registration lists and thereby prevent a chilling effect on the exercise of voting franchise,⁷⁶ perhaps the use of such supplemental lists as driver's license holders and public utility customers will help to realize that objective.

The supreme court's order creates further difficulties, however. Judge Alfred C. Hagan of the Fourth Judicial District of the State of Idaho believes that the greatest problem with the order is that it will lead to the duplication of names,⁷⁷ and that the only practical solution to this problem is computerization.⁷⁸ Furthermore, Judge Hagan, in his role as a member of the Special Committee which drafted the Uniform Jury Selection and Service Act, thinks that duplication of names would not be so great a problem if the intent of the Act as he perceived it had been followed:

⁷⁴ Letter from Judge Alfred C. Hagan to the *University of Michigan Journal of Law Reform*, Sept. 22, 1971, on file with the *University of Michigan Journal of Law Reform*. Judge Hagan is a District Judge, Fourth Judicial District of the State of Idaho, and was a member of the Special Committee which drafted the Uniform Jury Selection and Service Act.

⁷⁵ See note 31 *supra*.

⁷⁶ See note 68 and accompanying text *supra*.

⁷⁷ Judge Hagan states:

The foremost problem is that of duplication of names. As of yet, we have not figured out a practical, economical system to avoid the duplications. . . . When I say the requirement of particularly public utility customers as an addition to the voter registration list is unfortunate, I make this conclusion strictly [*sic*] because of the problem of duplication.

Letter from Judge Alfred C. Hagan to the *University of Michigan Journal of Law Reform*, *supra* note 74.

One of the main reasons that the committee of the Fifth Circuit resisted the conclusion that supplementation was necessary was that it desired to avoid the difficulties of supplementation, particularly that of duplication of names. See notes 59-61 and accompanying text *supra*.

⁷⁸ Judge Hagan points out the problem of the cost of computerization: "I personally feel computerization is the only answer, but at this point the cost appears to be prohibitive.

As a member of the Special Committee which drafted the Uniform Jury Selection Act, I believe it was the intent of the committee, in providing for the supplemental lists, to be concerned about such lists as tribal roles, [sic] lists of migrant workers from employment records and other such lists to obtain individuals who in the main would not be members of the voter registration list. The eradication of duplication in lists of this type would be much easier to accomplish. . . .⁷⁹

Judge Hagan's concerns delineate the tension between various aims of mandatory selection. On the one hand, to prevent the chilling effect that exclusive use of the voter registration lists may have on the exercise of the voting franchise, other lists must be used so that the potential voter will not feel that by registering to vote he will automatically be considered for jury duty. In many cases such lists will be largely composed of names of people who have registered to vote, thus creating the problem of duplication of names. On the other hand, the Act seeks to give an opportunity to all qualified citizens to serve on a jury; and while the lists Judge Hagan suggests may avoid substantial duplication of names, the reason duplication is avoided is because those lists are primarily composed of people who do not usually register to vote. The remainder of the population may still be reluctant to register unless it thinks that other sources of names are being used. While lists such as tribal rolls may add certain peripheral groups to the source of names, they do not ensure broader coverage within the general population of unregistered voters. Apparently, then, in order to effectuate the goals of mandatory selection both the types of list presented in the Supreme Court of Idaho's order and those suggested by Judge Hagan should be utilized. There must be

However, we are doing further research into this and have not made the determination at this point." Letter from Judge Alfred C. Hagan to the *University of Michigan Journal of Law Reform*, *supra* note 74. But Gerald B. Kuban, the Senior Personnel and Management analyst of the Judicial Department of the State of Colorado, reports some initial success with the use of computers to avoid duplication of names. In November, 1971, Colorado began computerization of jury selection in fourteen out of sixty-three counties. In Denver County the voter registration list was supplemented with names selected at random from the Polk City Directory. Mr. Kuban described the method used as follows:

Since we are computerized, a program was written to compare the computer tape of the voter registration list and the tape of the Polk directory. We started with 200,000 names as the voter list and 300,000 names in the Polk directory. After running each tape against the other, 150,000 duplicate names were eliminated.

Letter from Mr. Gerald B. Kuban to the *University of Michigan Journal of Law Reform*, November 17, 1971, on file with the *University of Michigan Journal of Law Reform*. Mr. Kuban expressed the hope that as many additional supplemental lists as possible would be used for jury selection, noting that such an effort "entails extensive programming under a computer system in order to eliminate duplicated names." *Id.*

⁷⁹ Letter from Judge Alfred C. Hagan to the *University of Michigan Journal of Law Reform*, *supra* note 74.

enough variety of sources of names so that the prospective voter does not believe that the act of registration places him on the only list from which jurors are selected, and the list should also contain sources of names of persons who are unlikely to register in any event. The problem of duplication of names is an administrative difficulty which must be faced if the Act is to be effective. But until the costs of computerization are fully explored, the assumption that those costs would be prohibitive should not be entertained.

In contrast, the experience under the Uniform Act in North Dakota suggests that the problems described by Judge Hagan may not always be as difficult to solve as the Idaho experience would seem to indicate. Judge Eugene A. Burdick, who, in addition to being a district judge in North Dakota, is Chairman of the National Conference of Commissioners on Uniform State Laws, believes that mandatory supplementation is working quite well in his district. Judge Burdick points out that initially only the list of actual voters was available in North Dakota, but by order of the Supreme Court of North Dakota the names of holders of drivers' licenses were added.⁸⁰ Judge Burdick indicated that this source of names "provided an astonishing number of names not found on the lists of actual voters."⁸¹ Not only does he think that the problem of duplication of names is not severe, but he also believes that the use of these two sources of names manages to include a very broad cross section of the community:

On balance I think the two sources provide excellent coverage. Many of the older citizens vote but do not drive, and many of the younger citizens drive but do not vote. The combination will pick up most of the available jurors.⁸²

The contrast between the jury selection procedures developed in Idaho and North Dakota illustrates the impact that differences in various communities and the nature of available lists in those communities may have on the effectiveness of mandatory selection. It might develop that in a wealthier community where only the list of actual voters is used or where voter registration is comparatively low, the use of such lists as those of utility customers, property and income tax payers, and drivers' licenses⁸³ will

⁸⁰ Letter from Judge Eugene A. Burdick to the *University of Michigan Journal of Law Reform*, Oct. 5, 1971, on file with the *University of Michigan Journal of Law Reform*. Judge Burdick reports that the list of holders of motor vehicle operators licenses is available through computer print-out. *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See text accompanying note 67 *supra*.

provide a substantial number of additional names not contained in the voter lists. In such circumstances the economic bias of the lists suggested by the Act may not be severe, and the additional coverage provided may be considerable. On the other hand, in areas where the groups likely to be excluded are from the lower economic strata, the use of the lists suggested by the Act may not provide sufficient coverage, and resort to such lists as tribal rolls and employment records may be necessary. Because identification of all potentially available lists which, when utilized, would make mandatory supplementation effective in a particular community is extremely difficult, the guidelines for mandatory selection in the Uniform Act should not be read restrictively. Although the choice of lists contained in the Act are only suggestions, the Supreme Courts of both Idaho and North Dakota chose from among the lists enumerated in the Act with varying success. The flexibility of mandatory supplementation should be emphasized in order to allow the proper authority in each community an opportunity to require the use of lists which are calculated to reflect the characteristics of that community.

IV. A.C.L.U. PROPOSAL: LIST OF NAMES SELECTION BY RANDOM SAMPLING

In 1967 Lawrence Speiser, then Director of the Washington D.C. Office of the American Civil Liberties Union, presented a plan for federal jury selection to the Senate subcommittee which was considering the various bills eventually developed into the Federal Act.⁸⁴ Mr. Speiser proposed that the source of names for jury service should be determined by the same techniques of statistical sampling used for public opinion surveys:

We believe that selection of names for jury service should be done according to techniques of statistical sampling which are expressly designed to produce a fair cross section of the community. None of the bills does this. It is surprising that in a day when sampling techniques are used for everything from opinion surveys to television ratings to beer taste tests that we should ignore the considerable body of knowledge which has been developed in this field as an aid to the administration of justice. The omission is particularly striking given the constitutional mandate that the jury be a "cross section," the very word having statistical or mathematical connotations.⁸⁵ (Footnote omitted.)

⁸⁴ *Senate Hearings* 334-37.

⁸⁵ *Senate Hearings* 336. Speiser further noted that many of these persons who are

The rationale underlying Speiser's proposal is not unlike that expressed in both the Federal Act and the Uniform Act: both purportedly seek to give every qualified citizen an opportunity to be considered for jury service and both seek a method of selection of names which will produce a fair cross section of the community.

In Speiser's view "each judicial district should be at liberty to devise its own plan in consultation with experts familiar with the locality."⁸⁶ Unlike either the Federal Act or the Uniform Act, he does not propose that voter lists be used as an initial source of names. Rather, he suggests that the district court, in cooperation with various experts, should devise its own method of jury selection, using whatever sources are necessary to develop a random sample which is representative of the community. He notes the need for flexibility in view of the variations between districts:

We must recognize that there are substantial variations between the various judicial districts, as to size, population and occupational structure of the district population. We, therefore, endorse in principle the Judicial Conference position that each district court prescribe the mechanics of jury selection by rule. We believe that each district should, with the aid of such experts as it sees fit to employ, be permitted to draw up a plan for jury selection to be approved by the judicial council of the circuit.⁸⁷

Speiser maintains that the mechanics involved in implementing his proposal are already well developed, and he analogizes the implementation of random selection plans and distribution of jury questionnaires to the existing practice of random sample surveys:

Moreover, the work involved in compiling the jury questionnaires, or carrying out a random selection plan, is identical to that involved in many random sample surveys; research centers and universities which conduct such surveys regularly employ part-time temporary workers for this purpose with notable success.⁸⁸

Thus Speiser's proposal implies that statistical expertise should

excluded by the exclusive use of voter registration lists are the youngest voters, the transients, the undereducated and the poor. He expressed the belief stated by other witnesses before the subcommittee that jury service itself has a potential to bring people into the democratic process: "Not only should we not encourage a system which perpetuates this *de facto* discrimination, but we should use the jury system as a means of ending it. Jury service brings jurors into a consciousness of citizenship." *Id.* See also notes 24, 26 and 29 *supra*.

⁸⁶ *Senate Hearings* 336.

⁸⁷ *Id.*

⁸⁸ *Id.*

be injected into the selection process at the outset rather than being utilized to develop a method of random selection from a previously compiled list of registered voters⁸⁹ or to evaluate whether the master list as finally selected substantially deviates from a fully accurate cross section of the community.⁹⁰ He suggests that random sample surveys necessarily involve a determination of what is the accurate cross section of the community and that the method of random sampling which has been developed by research centers and universities will provide this information.

Speiser's proposal raises the questions of whether the techniques of random sampling developed by research centers could be feasibly used to develop a list representing a cross section of the adult population of the community and whether the costs of such techniques are outweighed by the advantages of having a list which more closely represents a cross section of the community than does random selection from the voter registration list and supplemental lists.⁹¹ While there may be difficulties with random sampling techniques, studies of individual cities have been successfully undertaken using a geographically defined population which is "perhaps the most common basis for sample surveys."⁹² In order to compile a cross section of the adult population of a particular community the procedure of area sampling could be used to reduce the community to blocked areas from which homes would be selected at random. From those homes a sample of adults would be selected.⁹³ The costs involved in such a procedure would include the expense of compiling geographical information in order to construct the area samples and the field work required to enumerate those persons in the sample homes

⁸⁹ See text accompanying notes 37 and 38 *supra*.

⁹⁰ Note that the experience of the Fifth Circuit Court of Appeals required a great deal of statistical expertise merely to determine whether the list of registered voters would yield a master list which substantially deviated from the distribution in the eligible voting age population. See notes 52-57 and accompanying text *supra*.

⁹¹ As pointed out in Campbell & Katona, *The Sample Survey: A Technique for Social-Science Research*, in RESEARCH METHODS IN THE BEHAVIORAL SCIENCES 16 (L. Festinger & D. Katz eds. 1953): "The survey technique is used only when the desired information cannot be obtained more easily and less expensively from other sources."

⁹² *Id.* at 19.

⁹³ The wide use of area sampling in social studies is attributed to the convenience of identifying each member of the population with a single dwelling unit:

Area sampling is an important kind of listing procedure because it is used widely in social studies. . . . Its widespread use in social surveys is due chiefly to the relative ease of identifying each member of a human population with one, and only one, dwelling unit. In turn, these dwelling units are identified with area segments, also uniquely. Thus, a selection of the area segments yields a sample of dwellings, and these in turn a sample of people.

Kish, *Selection of the Sample*, in RESEARCH METHODS IN THE BEHAVIORAL SCIENCES 187 (L. Festinger & D. Katz eds. 1953). For a discussion of how the division of the area into blocks and the selection of sample blocks is accomplished, see *id.* at 225-35.

who are adults. Thus the procedures to implement Speiser's proposals are available, albeit somewhat costly and complex.

Assuming the availability of sampling techniques, Speiser's proposal does have certain advantages over the methods of juror selection mandated in the two acts. The courts would be spared the ministerial burden of deciding which lists to select, whether to supplement such lists, and how to eliminate duplication of names when several source lists are utilized. The statistical expertise on which courts have relied to determine whether a list compiled by random selection from voter registration lists is a fair cross section of the community would be channeled into compiling a list which is by design a fair cross section. Moreover, whatever chilling effect the use of voter registration lists for purposes of jury selection may have on the exercise of the franchise would be eliminated.

Speiser's proposal places the burden of compiling a master jury list on an already developed expertise. While his proposals appear to eliminate many of the ministerial difficulties encountered by the other jury selection acts, it is not clear that the necessary level of expertise is available in every community to devise an appropriate plan which the local court could adopt. The use of voter registration lists may be subject to criticism, but they are available throughout much of the country. If in a particular community random sampling techniques have not already been developed, the cost of using available lists might be significantly less than the cost of devising a random sampling plan. On the other hand, if a well-developed random sampling plan does exist and the court is satisfied that the random sample is a representative cross section of the community, the acts should allow the court to adopt that plan as its jury selection system. A workable solution might be to allow the court sufficient discretion to use whatever available resources appear most likely to develop a representative jury pool.

The difficulty with the Federal Act is that it allows the district courts to develop individual plans only after it has chosen the voter registration lists or lists of actual voters as the initial source of names. The Act prevents the district court from using other initial sources which may be more likely to produce a representative jury pool and not require the expenditure of a great deal of additional administrative effort. Similarly the Uniform Act establishes voter lists as the initial source of names but requires mandatory supplementation. However, a restrictive reading of the enumerated supplemental lists may undermine the flexibility of

the Uniform Act. To date, the enumerated lists have been the only ones selected. Under either jury selection act a proposal such as Speiser's could never be utilized even if a carefully developed random sampling plan already existed in the community. Both acts suffer from an understandable preference for the practical convenience of a uniform initial source of names, whereas the universe of names from which a random sample is selected must include all members of the community, and the incorporation of names from other sources would only bias the sample.

At the very least, therefore, each local court should be allowed to choose an initial source of names which in its judgment is most likely to produce a representative cross section of the community. The initial source should not be arbitrary; rather, it should be the best available source of names in that particular community.

One final factor that must be considered in adopting a jury selection plan is the extent of public confidence in the selection process. As one commentator has stated:

As far as public confidence in the judicial system is concerned, assurance of a jury drawn from a cross section of the community is a most desirable value, aside from the case law which indicates such juries are constitutionally required.⁹⁴

Part of Speiser's proposal includes provisions for giving the public an opportunity to scrutinize the selection process chosen.⁹⁵ Since the basic objection to the "key man" system was that it placed too much discretion in the individual jury commissioners without providing any means for controlling how the actual selection process was devised,⁹⁶ local review of the selection plan chosen might help increase public confidence in the jury system itself. It does not necessarily follow, however, that in order to control the jury selection process the individual courts must begin with an arbitrary source of names, that is, voter registration lists, from which juries are to be selected. The courts should have more discretion in choosing whichever list or combination of lists is most likely to yield a representative jury pool rather than necessarily selecting the voter registration lists merely because those lists are in general more readily available. If the jury selection plan chosen by the local court is subject to judicial review by higher courts and is also subject to public scrutiny, public con-

⁹⁴ Corlew, *Mississippi Jury Selection: A Proposed Statute*, 40 Miss. L.J., 393, 396 (1969).

⁹⁵ *Senate Hearings* 337.

⁹⁶ See note 4 *supra*.

fidence in the jury selection process chosen could be assured. As long as discretion in choosing a jury selection system is subject to review, there is no compelling reason why a local court must be limited to a uniformly established initial source of names.

V. CONCLUSION

Although both the Federal Act and the Uniform Act go a long way in assuring that a jury panel will be selected from a list composed of a fair cross section of the community, the use of voter registration lists does exclude a certain percentage of the community qualified to serve on a jury. If jury service is indeed a potential method of encouraging participation in the democratic process, the argument that only those who have registered to vote should be considered for jury service loses much of its force. The various members of our society who for one reason or another have either chosen not to register or are unable to register should have an additional opportunity to participate in civic affairs. The Federal Act in its present form makes supplementation virtually impossible. The mandatory selection of the Uniform Act if read expansively could conceivably provide broad coverage. At the very least, therefore, the Federal Act should be amended to require mandatory supplementation rather than supplementation where necessary. Both the use of voter registration lists with supplementation when necessary and voter registration lists with mandatory supplementation give rise to administrative difficulties with no easy solution. Further consideration should therefore be given to proposals like those of Mr. Speiser which are designed to compile a list of names which from the outset comprise a representative cross section of the community, contain no arbitrary or unavoidable built-in screening devices, and allow the local court in its discretion to use the best sources available.

—*Fred A. Summer*