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The Jury System in Louisiana

Criminal Law

Ralph Slovenko*

1. IN GENERAL

There are two types of juries: the grand jury, the jury of accusation; and the petit jury, the jury of conviction.¹ The grand jury is primarily an agency to determine whether or not the evidence is sufficient to warrant prosecutive action. The petit jury determines the guilt or innocence of the accused and renders a verdict accordingly.²

The jury system is one of the great "sacred cows" of the common law. The grand and petit jury, one of the ancient English institutions, came to be regarded, in the struggle of the people for their civil rights and liberties, as a barrier against persecution in the name of the crown.³ The grand jury was an assembly of a number of neighbors for the purpose of starting the prosecution of crimes with which the neighborhood was

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1. See generally LA. R.S. 15:172-215 (1950).

2. This English common law method of prosecution was carried into our constitutions. The Federal Constitution provides for the concurrence of these two juries in order to convict a person. The Fifth Amendment provides that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. Article 3, Section 2, provides that the trial of all crimes, except in cases of impeachment, shall be by jury; and the Sixth Amendment states that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

The Fifth Amendment as to the federal government and the Fourteenth Amendment as to the state governments, provide that no person shall be deprived of life, liberty, or property, without "due process of law." Punishment for crime is always deprivation of life, liberty, or property. However, "due process" has been held not to include the necessity that the accusation be made by a grand jury, *Ocampo v. United States*, 234 U.S. 91 (1914), or that the trial be by jury, *Maxwell v. Dow*, 176 U.S. 581 (1900). As stated by Justice Cardozo: "Consistent with that amendment trial by jury may be abolished." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). See also *In re Ross*, 38 La. Ann. 523 (1886). Hence, the right to the grand or petit jury is protected only by the specific provisions in the federal and state constitutions and statutes. U.S. CONST. Amend. VI; LA. CONST. art. I, § 9.

3. See Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play*, 55 COLUM. L. REV. 1103, 1105 (1955). As to the development of the grand jury as an institution here and in England, see *Hale v. Henkel*, 201 U.S. 43 (1906); 4 BL. COMM. 301 *et seq.*; 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 130 (1895); 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 312-23 (1903); Glaser, *The Political and Historical Development of the Grand Jury*, 8 LAW SOC. J. 192 (1938); Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 295 (1931).

familiar by observation or reputation. The jury of accusation at common law was called the grand jury because it was a big twenty-three,⁴ while the trial jury was a petty twelve.⁵ In the beginning the trial judge placed the question of the truth of the charge to the accusing jury, or to part of it, or to it with added members, which body was then not to make an accusation but to speak the truth, that is to say, to render a verdict, concerning the accusation already made. After a time, the mixture of the grand jury and the trial jury was not permitted. The accused was allowed to object to a trial juror who sat upon the grand jury which considered the cause, and to have him dismissed. This practice produced a completely separate trial jury, which, with its number ultimately settled at twelve, was the common law petty or petit jury.⁶

2. GRAND JURY

Power of Grand Jury

The grand jury from its beginning had inquisitorial power and at one time even some trial power. At times the grand jury served as a protection against arbitrary government, but fortunately we Americans have had few occasions for such protection.⁷ This age-old institution, despite criticisms, has been retained in our constitution and laws, in the belief that it is a beneficent element in the official machinery of justice. The grand jury is presently an essential part of the judicial power, for one accused of a capital crime (a felony in federal courts) cannot be prosecuted except upon a true bill returned by a grand jury.

The court controls the grand jury to the extent that it organizes and determines the legality of its proceedings. The members of the grand jury are subject to the court's supervision and control for any violation of their duties.⁸ Beyond this super-

4. The number of grand jurors was variable at common law, but could not exceed twenty-three nor be less than twelve. To distinguish this accusatory body from the small, or "petit" juries that functioned in the individual cases, they were known as the large, or in Norman French, the "grand" jury.

5. The word "petty," as here used, should be taken to mean small in nature or diminutive, and not trifling or insignificant.

6. See PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 122 (4th ed. 1948); SNYDER, *AN INTRODUCTION TO CRIMINAL JUSTICE* 67 (1953).

7. See Franklin, *Infamy and Constitutional Civil Liberties*, 14 *LAWYERS GUILD REV.* 1 (1954).

8. State *ea rel.* DeArmas v. Platt, 193 La. 928, 192 So. 659 (1939).

visory power, however, the court cannot limit the grand jury in its legitimate investigation of alleged violations of the law. The term "legitimate investigation" remains to be defined. In federal criminal procedure the grand jury's powers are not defined by statute, and it has remained for the courts to determine the extent of the grand jury's power to investigate crime.⁹ The Code of Criminal Procedure of the American Law Institute recommends that the grand jury be allowed to inquire into every public offense triable within its jurisdiction for which a charge has not already been filed.¹⁰ In contrast, the redactors of the 1928 Louisiana Code, in considering the scope of grand jury investigations, followed a policy of not giving the grand jury general inquisitorial powers. Article 209 of the 1928 Code states that the grand jury is to investigate non-capital offenses triable within the parish only when called to their attention by the district attorney or the court. Furthermore, the grand jury was no longer to act as a censory body of public morals. The grand jury was given power only to return a true bill or a no-true bill, or, if it chose, to take no action at all.¹¹ Its power to make reports or recommendations was limited to certain designated institutions.¹²

The limitation adopted in 1928 on the general inquisitorial power of the grand jury has been modified. The legislature has integrated into the 1950 Revised Statutes an old 1870 provision which provides that any member of the grand jury is required, under penalty of law, to bring to the attention of his fellow members any violation of the criminal law which may have come to his personal knowledge, or of which he may have been informed.¹³ In effect, the integration of the 1870 provision was simply an adoption of the jurisprudence. Applying the 1870 provision, which was not expressly superseded by the 1928 Code, and the pre-codal jurisprudence relating thereto, the Louisiana Supreme Court ruled that the grand jury could return an indictment regardless of how the information on which it acted

9. See *Application of Texas Co.*, 27 F. Supp. 847 (E.D. Ill. 1939); Dressen & Cohen, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687 (1932); Kennedy & Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251 (1955); Note, 30 TUL. L. REV. 323 (1956).

10. ALI CODE OF CRIM. PROC. § 132 provides that the grand jury "shall inquire into every offense triable within the county which are presented to them by the prosecuting attorney or otherwise come to their knowledge."

11. LA. R.S. 15:210 (1950).

12. *Id.* 15:210-211. See *State ex rel. DeArmas v. Platt*, 193 La. 928, 192 So. 659 (1939).

13. LA. R.S. 15:209.1 (1950).

came to its attention.¹⁴ A holding that the grand jury is legally considered to have knowledge of a crime when informed by a grand juror or any individual citizen,¹⁵ coupled with the fact that prescription commences from the time the grand jury has knowledge of the offense,¹⁶ justifies the view that the grand jury may originate investigations and file charges against alleged offenders of the law on its own motion.¹⁷

A possible limitation on the grand jury's investigative power is the witness' privilege against self-incrimination.¹⁸ Moreover,

14. *State v. Richey*, 195 La. 319, 196 So. 545 (1940). See *State v. Vial*, 153 La. 883, 96 So. 796 (1923). See also *State v. Dallao*, 187 La. 392, 420, 175 So. 4, 14 (1937).

15. Apparently any person has the right to bring information of a crime before the grand jury. See *State v. Johnson*, 116 La. 856, 41 So. 117 (1906); *State v. Stewart*, 45 La. Ann. 1104, 14 So. 117 (1893). See also *The Times-Picayune*, April 21, 1956, p. 1, col. 1 (private citizen cannot act as legal adviser). Direct communication with the grand jury by private complainants is prohibited in most states, and even where permitted, it is sometimes discouraged by the threat of a contempt citation for wasting the jury's time. See *People v. Parker*, 374 Ill. 524, 30 N.E.2d 11 (1940); *Hitzelberger v. State*, 173 Md. 435, 196 Atl. 288 (1938); *State v. Love*, 23 Tenn. 255 (1843).

16. See LA. R.S. 15:8 (1950).

17. Judge George P. Platt of the criminal district court, in swearing in the grand jury for Orleans Parish on March 5, 1956, charged the new panel in the following manner: "You are to investigate such matters as may be called to your attention by the court or submitted by the district attorney, or that may come to your knowledge in the course of your investigation of matters brought to you or from your own observations. . . . As a general rule, I advise you to decline to examine complaints unless some satisfactory reason be given or appears for it not being placed before the court by affidavit or information by the district attorney." *New Orleans States*, March 5, 1956, p. 1, col. 7.

18. LA. CONST. art. I, § 11, provides: "No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution." An indictment will be invalidated upon a showing that the defendant was called before the grand jury to give evidence and testified without being first advised of his privilege against self incrimination. In *State v. Harrell*, 228 La. 434, 82 So.2d 701 (1955), the defendant, while in custody on a charge of murder, was taken before the grand jury for interrogation about the crime, without his request to be heard. He was not advised of his privilege against self incrimination and he was without the advice of counsel. He stated that he had shot the deceased in self defense. A motion to quash the indictment was made on the ground that the defendant's privilege against self incrimination had been violated. The state admitted that, had the defendant been ordered to testify about the homicide over his express desire not to give evidence, the indictment would without doubt be a nullity, but it argued that the rule is different where an accused volunteers the self-incriminating testimony. The state further contended that, since the accused predicated his entire defense at the trial upon a plea of self defense, he could not have been prejudiced in any way by his appearance before the grand jury. The Supreme Court, reversing the conviction, held that an interrogation which fails to advise the defendant of his privilege against self incrimination is tantamount to obtaining his testimony through compulsion, in violation of his constitutional rights, and an indictment which is grounded, in whole or in part, on evidence secured in violation of a constitutional right, is an absolute nullity. See also *State v. Dominguez*, 228 La. 284, 82 So.2d 12 (1955), which held that the privilege against self incrimination, notwithstanding a grant of immunity, exonerates from disclosure whenever there is a probability of incrimination in another jurisdiction.

the public prosecutor's broad power to *nolle prosequi* the grand jury's indictments also serves as a possible limitation on its inquisitorial power.¹⁹ Because the grand jury cannot compel the district attorney to prosecute the case (the most it can do is urge him to act), the grand jury as a matter of practice limits its investigations to those cases presented to it by the prosecutor and the court.

Evidence to Justify an Indictment

The grand jury is justified in returning an indictment when the evidence, if unexplained or uncontradicted, would in its judgment warrant a conviction by the trial jury.²⁰ To determine whether there has been a violation of the law, the grand jury has the right to subpoena and to have persons and documents called before it.²¹ However, since the function of the grand jury is to decide whether proceedings shall be taken and is not to pass on disputed facts, the grand jury can, if it wishes, hear and consider only the evidence for the prosecution in determining whether there is probable cause to believe the accused to be guilty. The grand jury is not bound to hear evidence in behalf of the accused. Indeed, as stated above, an indictment may be based on knowledge of facts of the grand jury members only, and without having any witnesses summoned. However, as a matter of principle, the grand jury ought to weigh all relevant evidence submitted to it and not to rest satisfied with remote possibilities.²²

The requirement that an indictment be supported by sufficient evidence is designed to protect the accused from the burden and expense of an unnecessary public trial and its accompanying unfavorable publicity. The Code declares that in the investigation of crime the grand jury can receive none but legal evidence, but the court has held that the provision is directory, rather than mandatory, in nature and affords no basis for a review of the evidence on which the indictment was based.²³

19. Court assent is not required before the prosecutor can enter a *nolle prosequi*. See LA. R.S. 15:329 (1950).

20. The quantum of evidence on which grand jurors must rest their conclusions in returning indictments is not within the control of the courts. State v. Lewis, 38 La. Ann. 680 (1886).

21. LA. R.S. 15:214 (1950).

22. *Ibid. Accord*, ALI CODE OF CRIM. PROC. § 139.

23. LA. R.S. 15:213 (1950). In State v. Simpson, 216 La. 212, 43 So.2d 585 (1949), the defendant sought to challenge the nature and legality of the evidence upon which the grand jury had returned an indictment. Initially defense counsel filed a bill of particulars seeking full information as to the evidence that went before the grand jury, including a specific question as to whether the defendant's

The decision is justified in theory and practice. Although trial court evidence standards would implement the grand jury's function of protecting the accused citizen, the rules of the trial court are not necessarily appropriate to a grand jury proceeding. The purpose of the grand jury's investigation is not to pass on guilt or innocence, but to determine whether there is probable cause to believe that the accused is guilty of the offense charged. Probative and relevant evidence, even though technically incompetent, can furnish a rational ground for assuming the possibility that the accused is guilty. By excluding illegal evidence which is relevant and probative, the rules may actually hinder the grand jury's function. The hearsay rule is illustrative. Hearsay is not inherently irrelevant or non-probative, as is evidenced by the many exceptions to the rule. Lack of cross-examination is the primary basis for the exclusion of hearsay in the trial court; cross-examination, however, is not available as part of the grand jury procedure to test any evidence.²⁴

The indictment procedure makes the evidence rules of the trial court inappropriate to the grand jury proceedings. Since

controversial confession was placed before the grand jury. The bill of particulars was refused. Later, defense counsel's motion to quash the indictment was overruled by the trial judge. Affirming the ruling, the Supreme Court held that Article 213 is directory in nature, and cannot be used as the basis of a technical review of the evidence which was produced before the grand jury. The grand jury proceeding merely ascertains whether there is a sufficient prima facie case to justify charging a crime and is quite different from the actual trial of the case, where the rules of evidence are in force. See also *State v. Dallao*, 187 La. 392, 175 So. 4 (1937) (indictment based solely on private knowledge of grand jurors); *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Criminal Law and Procedure*, 11 LOUISIANA LAW REVIEW 233, 243 (1951).

24. In 1852 Mr. Justice Nelson on circuit said in *United States v. Reed*, 27 Fed. Cas. 728, 738: "No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof."

In *Costello v. United States*, 350 U.S. 359, 361 (1956), all the evidence before the grand jury was in the nature of hearsay. Upholding the indictment, the United States Supreme Court said: "The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. . . . If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." See Notes, 62 HARV. L. REV. 111, 114-15 (1948); 104 U. PA. L. REV. 429 (1955); 65 YALE L.J. 390 (1956).

the accused does not have the right to testify or to present evidence at the grand jury proceeding, it follows that he cannot complain that the indictment was based on insufficient evidence or on no evidence at all.²⁵ Even should the court inquire into the weight and sufficiency of the evidence adduced before the grand jury, the defendant is confronted with the obstacles of discovery. Since the grand jury sessions are secret, and since the jurors are incompetent as witnesses to impeach the indictment, there is no one as a practical matter to support the objection that illegal evidence was received.²⁶ The accused does not have the right to be present at the grand jury proceeding. At the hearing, the only persons normally present, besides the grand jurors themselves, are the particular witness who is being heard and the prosecuting attorney, who, as legal adviser, has free access to the sessions of the grand jury.²⁷ In addition, the district attorney can permit a stenographer to take minutes of the proceedings, and the grand jury can avail itself of an interpreter to translate the testimony of a witness.²⁸ Three of these four individuals, the district attorney, the stenographer, and the translator, are, like the jurors themselves, sworn to the secrecy of the proceedings,²⁹ and the stenographic minutes of

25. See *State v. Britton*, 131 La. 877, 60 So. 379 (1912). FED. R. CRIM. P. 6(d) provides that the defendant is not entitled to be present when witnesses appear before a federal grand jury.

26. See *State v. Britton*, 131 La. 877, 60 So. 379 (1912).

27. The district attorney and his advisers are the legal advisers of the grand jury, and may be present at, and assist the jurors in, their examination of cases, provided the district attorney does not take part in their deliberations as to their conclusions and findings. See LA. R.S. 15:215 (1950); *State ex rel. DeArmas v. Platt*, 193 La. 928, 192 So. 659 (1940); *State v. Aleck*, 41 La. Ann. 83, 5 So. 639 (1889).

28. *Ibid.*

29. LA. R.S. 15:204, 15:215 (1950). See *State v. Hopkins*, 115 La. 786, 40 So. 166 (1906). See also *State v. Perry*, 149 La. 1065, 90 So. 406 (1921); *State v. Britton*, 131 La. 877, 60 So. 379 (1912). However, when a witness upon the trial testifies differently from what he did before the grand jury, the grand jurors, or the district attorney, stenographer, or interpreter may inform the judge, who may cause the witness to be prosecuted for perjury. See *State v. Wood*, 53 N.H. 484 (1873). ALI CODE OF CRIM. PROC. § 145 provides: "No grand juror, prosecuting attorney, stenographer or interpreter shall disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that of the witness given before the court, or to disclose the testimony given before the grand jury by any person upon a charge against such person for perjury in giving his testimony or upon trial thereof, or when permitted by the court in the furtherance of justice." Moreover, no secrecy is imposed upon a witness before a grand jury either as to the fact that he has testified or as to the testimony given by him. See *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947). Although evidence before the grand jury to sustain an indictment should be legal and competent, an indictment is not vitiated

the proceedings are not accessible to the defendant or other interested parties.³⁰ Under these circumstances, the only method available to the accused to discover what transpired and who testified is to inquire of the witnesses at the trial.³¹ There is no requirement, however, for the endorsement of the names of witnesses appearing before the grand jury to be made on the indictment.

Secrecy of Proceedings

A policy of secrecy exists in regard to grand jury proceedings. Various purposes are served by secret proceedings.³² The grand jury may investigate and find nothing worthy of indictment; secrecy serves to protect the good name of the person under scrutiny. A disclosure that a person is under investigation will certainly besmirch his reputation. This purpose of secrecy, however, really applies only when the grand jury is the first body to act in the case. The reason most often announced for the policy of secrecy is that the defendant has no right to the secrets of the prosecution's case in advance. Secrecy is imposed so that an unscrupulous defendant will not be allowed to go on a "fishing expedition" of the evidence available to the prosecution and thereby be put in a position to build up a perjured defense.

There are other reasons which justify secret proceedings: to avoid the danger of the escape of the accused before his arrest when the case is initiated by jury action; to insure against judicial control of the grand jury; to secure to a witness the utmost freedom of disclosure of alleged crimes; and to promote that freedom of deliberation, expression of opinion and of action among the grand jurors which would be impaired if the part taken by each might be disclosed to the accused or to

because the grand jury examined incompetent witnesses, or considered improper evidence, or required an ordinary witness to give improper evidence, e.g., to testify against himself. Indeed, it is impracticable to receive testimony that a grand jury has acted on insufficient or improper evidence, since the jurors themselves may inform one another, or come to their conclusions in other ways. See *State v. Britton*, 131 La. 877, 60 So. 379 (1912); *State v. Lewis*, 38 La. Ann. 680 (1886). See also *Washington v. State*, 63 Ala. 189 (1879).

30. LA. R.S. 15:215 (1950). See *State v. Dallao*, 187 La. 392, 175 So. 4 (1937); PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 120 (1953).

31. Cf. *State v. Harrell*, 228 La. 434, 82 So.2d 701 (1955) (violation of privilege against self incrimination), discussed note 18 *supra*.

32. See *Commonwealth v. Mead*, 12 Gray 167 (Mass. 1858); *In re Kittle*, 180 Fed. 946, 947 (S.D.N.Y. 1910); Note, 16 *FORD. L. REV.* 131 (1947).

others.³³ In accordance with this policy, the oath administered to grand jurors, established by common law usage, ancient and modern, and prescribed by Article 204, contains this clause: "that he [each of the grand jurors] will keep secret his own counsel, that of his fellows and that of the state."

Effect of No-True Bill

The finding of a no-true bill presents no right to interpose a plea of former acquittal or *res judicata* at a subsequent grand jury hearing or at the trial of the case on the later true bill or on an information.³⁴ A grand jury investigation is an *ex parte* proceeding. The proceeding is not a trial for the determination of guilt or innocence. The grand jury has essentially only one function to perform: to report to the court that it has reasonable cause to believe that probable grounds exist or do not exist for the violation of the law. Indeed the trial judge has the duty to charge the petit jury sitting at the trial that a true bill returned by the grand jury carries no evidence and creates no presumption of guilt; the judge must charge the jury that the defendant

33. See *Kastel v. United States*, 23 F.2d 156, 158 (2d Cir. 1927). The veil of secrecy surrounding grand jury proceedings was lifted in *United States v. Proctor & Gamble Co.*, 19 F.R.D. 122 (D.C.N.J. 1956). After grand jury investigations concerning possible violation of the anti-trust laws, the matter was dropped and no indictment was returned, but the United States then brought a civil action under the Sherman Act. The defendants moved to compel the government to produce and permit the inspection and copying of the grand jury transcripts on the ground that the government had used the facts contained in the transcripts to gain an unfair advantage over the defendants who had been unable to use such facts in preparing for trial. The judge summarized the reasons for the rule of secrecy as follows: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." The court then said that the first two reasons clearly did not apply since the grand jury had been discharged without returning an indictment and that the fifth reason was not applicable since it was the corporations themselves who had moved for production of the transcripts. The court rejected the third ground on the theory that such possibility was not so great a danger as the danger of surprise. As to the fourth reason, the court said that after the grand jury had been discharged the temporary guaranty of secrecy ended and remarked that a contrary rule would create an opportunity for abuse by a corrupt witness who could testify falsely without fear of his lies being revealed to public scrutiny and reaction. Grand jury minutes were also revealed for use in a subsequent civil action in *United States v. Grunstein & Sons Co.*, 137 F. Supp. 197 (D.N.J. 1955), 42 VA. L. REV. 581 (1956).

34. *State v. Ross*, 14 La. Ann. 364 (1859) (information can be filed notwithstanding return of no-true bill).

is presumed to be innocent, and that the presumption will control unless guilt is proved beyond a reasonable doubt. A true bill cannot be used as evidence to establish the guilt of the accused; similarly, a no-true bill has no effect on a subsequent accusation. However, being public, the return of a no-true bill serves in a way to exonerate the accused.

Criticism of Grand Jury

The desirability of a grand jury indictment has been questioned for many years. As early as 1825, Jeremy Bentham, in his "Rationale of Judicial Evidence," insisted that the grand jury, as an institution, had then been unnecessary and of no value for fully a quarter of a century. There has been a definite tendency to abolish the grand jury. The grand jury was eliminated in England in 1933, as a useless relic; and in a number of American states, grand juries have similarly been abolished.³⁵ Even in the states which retain the grand jury, it is generally bypassed by the use of the prosecutor's information. The American Law Institute has recommended that the requirement of an indictment by a grand jury for any offense be eliminated. The same conclusion was reached by the New York Crime Commission. Bentham's contention that the grand jury has been performing no useful function since the beginning of modern prosecution has been the keystone of the argument against the grand jury system.

In the era of royal despotism, the grand jury was looked upon as an institution to protect the people against the deprivation of their liberties by restricting and preventing unbridled royal prosecutions carried on through the instrumentality of subservient royal judges. It is now said that, in spite of or in ignorance of the rise of totalitarianism in the twentieth century, the grand jury is no longer needed as a check against the state.³⁶ It is suggested that the trial courts and trial juries, together with other community institutions, are quite capable of protecting the rights of the people. Those who would improve the administra-

35. See Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L. & CRIMINOLOGY 3 (1938); Younger, *The Grand Jury Under Attack*, 46 *id.* 214 (1955). For criticisms of the grand jury as serving no useful purpose, see Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 295, 329 (1931). *But see* Dession, *From Indictment to Information — Implications of the Shift*, 42 YALE L.J. 163 (1932); White, *In Defense of the Grand Jury*, 25 PA. B.A.Q. 260 (1954).

36. See CLEMENTS, COMMENTS, CASES AND TEXT ON CRIMINAL LAW AND PROCEDURE 734 (1952); DIENSTEIN, ARE YOU GUILTY? 100 (1954); Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L. & CRIMINOLOGY 26 (1955).

tion of justice allege the need for improvement in the jury system to be as vital as that which inspired the procedural changes embodied in the civil and criminal codes of recent years.

It is charged that the grand jury often does little more than rubber-stamp the opinion of the district attorney, its legal adviser. In actual practice, the prosecutor usually draws up the indictment. The grand jury is almost exclusively dependent upon him for both the law and the facts and its conclusions are customarily his.³⁷ Because of the district attorney's extensive power to prosecute or not to prosecute,³⁸ the jurors cannot make effective inroads on his accusatorial discretion. Furthermore, it is undeniable that grand juries encumber and delay the administration of the criminal law, that grand juries involve large expenditures of funds,³⁹ and that grand juries are sometimes pressured by dominant groups.⁴⁰

Such criticism of the grand jury, however, does not necessarily mean that the grand jury is not or cannot be an important democratic institution. Among other things, the grand jury is or can be an effective voice of the people as a general investigating body for inquiring into the acts of public officials, whether it be general lawlessness, or a faithless discharge of official duties.⁴¹ The grand jury, rather than be abolished, can be effectively employed to police the conduct of public officials.⁴²

37. See POUND & FRANKFURTER, *CRIMINAL JUSTICE IN CLEVELAND* 212 (1922). The district attorney, however, is prohibited from taking part in the deliberations of the grand jury as to their conclusions and findings. *State v. Aleck*, 41 La. Ann. 83, 5 So. 639 (1889).

38. For a discussion of the prosecutor's accusatorial discretion, see Note, 103 U. PA. L. REV. 1057 (1955).

39. There is great expense also in requiring witnesses to attend two preliminary hearings, one before the judge in a preliminary examination and one before the grand jury. This requirement of repeated attendance of witnesses discourages witnesses and not infrequently leads to no prosecution where one ought to go forward. It is possible, however, as we have seen, for the grand jury to be the first body to act in a particular case, thus by-passing preliminary examination. A warrant will then issue for the defendant's arrest.

40. See Hall, *Analysis of Criticisms of the Grand Jury*, 22 J. CRIM. L. & CRIMINOLOGY 692 (1932); Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 119 (1931). See also HALL & GLUECK, *CRIMINAL LAW AND ENFORCEMENT* 651 (1951).

41. See *The Times-Picayune*, March 23, 1956, p. 1, col. 4, concerning the indictment of a state representative for public bribery.

42. See Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379 (1924). The American Law Institute has recommended that the grand jury be retained as an occasional instrument for such purposes, but that the requirement of it as a basis of prosecution, even for the more serious crimes, be abolished. Section 113 of the ALI Code of Criminal Procedure provides that "all offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment of information." Under Section 114: "No grand jury shall be summoned to attend at any court except upon the order of a judge thereof when in

Grand juries appear better suited than legislative or executive committees or private bodies for such a task. The combination of subpoena power and secrecy permits testimony to be taken with minimum embarrassment and with minimum risk of reprisals to the subpoenaed witnesses. The jurors, non-professional, ordinarily are not dually engaged in both investigating the misconduct of public officials and in promoting their own careers.

The grand jury in Louisiana is authorized to conduct periodic investigations into the public institutions of the area in its jurisdiction. The grand jury is to inspect every prison, place of detention, asylum, and hospital within the parish and to report its findings to the district judge.⁴³ The grand jury is to determine how well these institutions are being run and to look into conditions that may reflect upon the enforcement of the law or the management of the institutions.

3. THE PETIT JURY

Function

For historical reasons, trial by jury in criminal cases has been regarded as a protection to the individual citizen against oppressive laws or oppressive enforcement of law. The petit jury, or the convicting jury as it may be called, was thought so important a safeguard to the rights of the individual that the Constitutions of the United States⁴⁴ and Louisiana⁴⁵ specifically provide that "in all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury."

America, colonized by Englishmen who suffered under seventeenth century legislation and law enforcement under the Stuarts, thought of the jury as a bulwark against royal tyranny. Again, on the eve of the American Revolution, the local jury in the colonies was considered as a safeguard against enforcement of repugnant legislation by royal governors. From the beginning, then, Americans have thought of the jury in terms of the seventeenth century contests between the courts and the crown and

his opinion public interest so demands, except that a grand jury shall be summoned at least once a year in each county." See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 178, 184 (1947).

43. LA. R.S. 15:211 (1950).

44. U.S. CONST. amend. VI.

45. LA. CONST. art. I, § 9. "Due process of law" of the Fourteenth Amendment has been held not to include the necessity of a trial by jury. See Snyder v. Massachusetts, 291 U.S. 97 (1934), discussed note 2 *supra*.

in terms of the eighteenth century contests between the colonies and royal authority. The petit jury, along with the grand jury, has been looked upon as a pillar of democratic government.

The present primary function of the trial jury in the process of administering justice in criminal prosecutions is the ascertainment of the facts. The jury hears the allegations and then hears the facts presented to substantiate or disprove them. On the basis of this presentation, and the rulings of law as set forth by the judge, the jury decides, supposedly without hostility or sympathy, whether or not the accused committed the act charged in the manner charged.

Criticism of Petit Jury

Historically considered as a protection against arbitrary prosecution, the jury was not thought of as an effective tribunal for the ascertainment of facts in criminal prosecutions. In England the jury was not employed originally in the chancery court or at all in the ecclesiastical courts (indeed, until the last century their witnesses were examined out of court). Today, complaints are frequently voiced as to the inefficiency of the jury system as a fact-finding body.⁴⁶

A circumstance acting against the efficiency of jury trial is the inordinate demand upon the time and energy of the citizen in proper performance of civic duties in the big towns of the twentieth century. To many citizens of the present-day community, jury service, rather than a privilege and an honor, is something to be avoided. Furthermore, the selection of an impartial jury panel in important criminal cases has come to be a difficult task as a result of the advance trial of the case in the press.⁴⁷ The practice of challenging jurors takes days in some parts of the United States. A person who has formed a definite

46. See McCarter, *The Jury System: A Twentieth Century View*, 4 KAN. L. REV. 425 (1956). The historian Trevelyan reports that even earlier "the English jury system, while it protected our liberties, by no means always increased the fairness of trials." ENGLAND UNDER THE STUARTS 22 (1949).

Lewis Carroll, in his nonsensical work, *The Hunting of the Snark* 42 (1923), quipped:

"The Jury had each formed a different view

"(Long before the indictment was read),

"And they all spoke at once, so that none of them knew

"One word that the others had said."

47. In England today, newspapers may not editorialize in any fashion upon pending cases, and in certain types of suits even reporting the evidence presented at the trial is restricted by statute and rigorous English "custom." See *Rex v. Hutchinson*, 155 L.T.R. 455 (K.B. 1936), 23 VA. L. REV. 337.

opinion previous to the trial can be disqualified from jury service, but in our present age of mass communication, it is seldom that an intelligent person has not formed an opinion regarding the guilt or innocence of an accused in his community. Consequently, this feudal conscription of laymen results in having jury service fall to persons who do not have the capacity or initiative to acquire general and current information. The presence of the jury, which has largely influenced the development of the law of evidence, is now said to be one of the principal obstacles to its reform. Moreover, the weaknesses of the untrained jurors are exploited. An attorney who has a weak case knows that he has a better chance before a jury than before a judge presiding without a jury. Criminal lawyers are often hired to defend clients not on their talent in the art of conducting a trial to ascertain the truth, but for their histrionic ability to befuddle and excite the jury. The professional judge (or a professional jury) is said to be able to do the work better or, at least, equally well.

The problem is so well brought out by Sir William Holdsworth in his work "The History of English Law" that a somewhat lengthy quotation is justified: "The defects of the jury system are obvious. They are twelve ordinary men --- 'a group just large enough to destroy even the appearance of individual responsibility.' They give no reasons for their verdict. The verdict itself is not subject to any appeal; and it is apt, in times of political excitement, to reflect the popular prejudice of the day. Experience shows that they are capable of intimidation. It is said that they are always biased when a pretty woman or a railway company happen to be litigants. Though a good special jury is admitted to be a very competent tribunal, the common jury may be composed of persons who have neither the desire nor the capacity to weigh the evidence, or to arrive at a conclusion upon the facts in issue."

However, Sir Holdsworth immediately adds: "But in spite of these obvious defects, distinguished judges, who have spent years working with juries have combined to praise the jury system In fact the jury system works well from the point of view of the litigant, the judge, the jury itself, and the law. The litigant gets a body of persons who bring average common sense to bear upon the facts of the case Judges have from the earliest times appreciated the relief from responsibility

which the jury system affords them. Not only does the collaboration of the jury relieve the judge from the responsibility of deciding simply upon his own opinion, it also helps him to take, as the advisor and director of the jury, a more truly judicial attitude. . . . The effects of the jury system upon the law are no less remarkable and no less beneficial. It tends to make the law intelligible by keeping it in touch with the common facts of life. The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense Judges must explain the law to the jury. They must separate the rule of law from the question of fact. This produces both prevision in the statement of the rule, and a clear outside judgment on the facts."⁴⁸

The advocates of the jury system maintain that it assures a fairer trial to the accused than is the case when one man — the judge — dictates his fate. Common sense suffices to perform jury duty; jurors need not be, and should not be, specialists at trying cases, as they are in some countries. Before a conviction can be properly brought in, all evidence should be so clear and incontrovertible that the average citizen, possessed of his reason, can determine the guilt or innocence of the accused.

We accept the position that the institution of trial by jury is vital and fundamental to a democracy. It is incompatible with republican government to permit the judge to determine the fact as well as the law. Furthermore, the institution of the jury serves to develop the spirit of citizenship. In Latin America, for example, there were populations of diverse racial origin, divided into castes, and separated by distrust, antipathy, and ill feeling. To eradicate these differences arising from wealth, social position, or traditional prerogatives, the jury system was

48. 1 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 347-50 (3d ed. 1923). Glanville Williams, however, terms "purely fanciful" the argument that the requirement of reducing all law to jury instructions keeps it free from subtlety and jargon. Williams suggests abolition of the jury in favor of a three-man court, as used in Germany. See WILLIAMS, *THE PROOF OF GUILT* (1955).

Edward Livingston thought that the Louisiana code should precisely declare that in all criminal prosecutions the trial by jury is a privilege which cannot be renounced. He wrote: "Were it left entirely at the option of the accused, a desire to propitiate the favor of the judge, ignorance of his true interest, or the confusion incident to his situation, might induce him to waive the advantage of a trial by his country, and thus, by degrees, accustom the people to a spectacle they ought never to behold; a single man determining the fact, applying the law, and disposing at his will, of the life, liberty, and reputation of a citizen." LIVINGSTON, *REPORT MADE TO THE GENERAL ASSEMBLY OF THE STATE OF LOUISIANA ON THE PLAN OF A PENAL CODE* 21 (1822).

indispensable.⁴⁹ By getting all these groups to participate together in a jury, there develops a common feeling of trust and faith among all members of the body politic. In other terms, all members of society, regardless of race or color, would experience the common bond of citizenship and mete out justice equitably upon each other. The average citizen, by serving on juries, becomes more public-spirited and indoctrinated in the advantages and responsibilities of democratic government. Thus, citizens in the real sense of the word are formed.

4. GENERAL QUALIFICATIONS OF JURORS

In Louisiana the presence of an unqualified person on the grand or petit jury invalidates everything which follows his selection. At the trial, for example, the defendant can show that a grand juror was disqualified in order to invalidate the indictment. Since the concurrence of only nine of twelve jurors is required for an indictment in Louisiana, it might be asked why an indictment should be quashed if only one member of the grand jury is disqualified. Ten or eleven members may have concurred in the indictment. Although the disqualified juror is the tenth, eleventh, or twelfth member, thereby leaving the required concurrence of nine, the bill was presented when an unauthorized person sat with the grand jury. A disqualified juror is considered to be a stranger in the jury room who could have influenced the others.⁵⁰

In federal criminal procedure twelve jurors of the grand jury, which consists of not less than sixteen nor more than twenty-three members, must concur in order to find a true bill. In federal procedure a showing that one or more members of the grand jury were not legally qualified is not ground for the dismissal of the indictment if it appears from the record that the finding of the indictment was concurred in by twelve or more members, after deducting the number not legally qualified.⁵¹ It is assumed

49. See RODRIGUEZ, *THE LIVINGSTON CODES IN THE GUATEMALAN CRISIS OF 1837-1838*, 13 (Middle American Research Institute, Tulane University, 1955).

50. The presence in the grand jury room of unauthorized persons while the jury is investigating a case invalidates an indictment. See *State v. Bower*, 191 Iowa 713, 183 N.W. 322 (1921). However, it can perhaps be argued that a disqualified juror is not a "mere stranger" in the grand jury room.

As to the conduct of grand jurors, see *In re Summerhayes*, 70 Fed. 769 (1895); *In re Ellis*, 8 Fed. Cas. 548 (1821); *Pennsylvania v. Keffer*, Add. 290 (Pa. 1795) (a grand juror was intoxicated).

51. See FED. R. CRIM. P. 6(b)(2). Unanimity is required in the federal petit jury verdict. *Id.* 31(a).

that the disqualified juror voted in favor of the bill but not that he influenced others in their vote. The federal procedure was adopted so as to circumvent attacks upon the jury, but it has not been adopted in Louisiana. In Louisiana one disqualified juror upsets the trial.

Article 172 sets forth the qualifications which an individual must have in order to serve as a grand or petit juror in any criminal proceeding. They are known as the "general qualifications" of a grand or petit juror because they do not refer to an individual's qualifications to take part in a particular case, but rather to his qualifications to take part in any criminal case, irrespective of the crime or the criminal. A special qualification can disqualify a petit juror, although he is generally qualified, from serving in the particular case being tried.

The following is a cursory discussion of the general qualifications required by Article 172 for a grand or petit juror.

Age

A juror cannot be less than twenty-one years of age, even though he be emancipated.⁵² There is no maximum age limit, but if over sixty-five years of age, he may be excused from jury service.⁵³ This is a personal exemption, however, and not a disqualification.

Citizenship and Residence

Article 172 requires a juror to be a citizen of the state and, in addition, a bona fide resident of the parish where the court is to be held. Such residence must have been for one year next preceding the service. Anyone who is a citizen of the United States, by birth or naturalization, is also a citizen of the state wherein he resides.⁵⁴ State citizenship flows from residency in the state. Thus, a citizen of the United States who comes to Louisiana from another state and intends to reside permanently in Louisiana immediately becomes a citizen of this state. After he has satisfied the second requirement of residence for one year, he would be eligible for jury service in that parish. A temporary resident, however, is not competent to serve as a juror, but if a person in fact resides in Louisiana, a temporary

52. LA. R.S. 15:172 (1950).

53. *Id.* 15:174(4).

54. U.S. CONST. amend. XIV; *Gassies v. Ballou*, 31 U.S. (6 Pet.) 761 (1832); *State v. Iseringhausen*, 204 La. 593, 16 So.2d 65 (1943).

absence from the parish, as on a business or vacation trip, will not alter the fact of residence.

A person need not qualify as a voter to be competent as a juror.⁵⁵ Moreover, the constitutional provision that no one is eligible to hold any "office" unless he is an elector⁵⁶ does not apply to jury service.⁵⁷ It is only necessary that the potential juror intend to establish his domicile in Louisiana, and in addition reside in the parish for one year, in order to be qualified in point of citizenship and residence.

Educational Requirements

Article 172 requires that the juror be able to read and write the English language. The law does not require a finished scholar, but does contemplate that his knowledge of reading and writing shall be such as to enable him to serve competently as a juror.⁵⁸ It is quite possible, however, for a person, even without a physical infirmity, to meet the two requirements of reading and writing without being able to speak or understand the language, which are even more important for jury service.

A jury selected by the degree of intelligence as revealed by a questionnaire would apparently be invalid under the constitutional provision providing for trial by jury.⁵⁹ The jury should not be made the representative of the most intelligent or most successful nor of the least intelligent or least successful. The jury is a democratic institution, representative of all qualified classes of people. However, since the states may abolish trial by jury, without violating the Federal Constitution, it may follow that the states may by any qualification, not arbitrary, abolish the cross-sectional element as well.⁶⁰ As an institution the special jury, in which the jurors are selected with a view to obtain-

55. LA. CONST. art. VIII, § 1. By constitutional amendment in 1956, the residence requirement in the state for voting was reduced from two years to one year.

56. *Id.* art. VIII, § 13.

57. *State v. James*, 165 La. 822, 116 So. 199 (1928).

58. The trial judge is without right to curtail unduly counsel's examination of the prospective jurors. See *State v. Brazile*, 229 La. 600, 86 So.2d 208 (1956). In *State v. McClendon*, 118 La. 792, 43 So. 417 (1907), it appeared that the juror was once able to read but had lost his capacity. Query: What about a man who is well educated but paralyzed in both arms? In the *McClendon* case, in which the illiterate juror was the only disqualified member of the grand jury, the indictment was declared invalid.

59. U.S. CONST. amend. VI; LA. CONST. art. I § 9.

60. See *Fay v. New York*, 332 U.S. 261 (1947) (New York's "Blue Ribbon" jury held constitutional); *State v. Gutierrez*, 15 La. Ann. 190 (1860).

ing those with expert qualifications in a given field, has been held to conform to procedural due process.⁶¹

Article 172 requires that a juror not be under interdiction. This refers to formal interdiction under the Civil Code, but a person who is mentally deranged and who might not be interdicted because he may not have sufficient property to warrant interdiction, would certainly be disqualified.

Charge or Conviction of Crime

Article 172 disqualifies from jury service a person who is charged with any offense or who has been convicted at any time of any felony. The rule may have had its basis in the Roman law theory of *capitis diminutio* which operated to deprive a convicted person of his civil, public, and political rights. The disqualification may also stem from the view that a person is psychologically affected by a charge or conviction of crime to such an extent that he cannot make a fair juror.

Charged with an offense. In the case of *State v. Calhoun*,⁶² which occurred prior to the Code of 1928, a juror had been charged with a violation of a municipal sanitary ordinance. The statute then in effect disqualified a juror who was "charged with any crime or offense," which is similar to Article 172 of the Code. The court held that a charge of a misdemeanor does not render a person ineligible, since the statute setting forth the qualifications for a juror related only to crimes cognizable to a grand jury and that a city ordinance was not so cognizable.⁶³ It is to be noted, however, that under Article 2 of the Code of 1928, subsequently adopted, all prosecutions are cognizable to the grand jury. Moreover, even prior to the Code of 1928, the court in *State v. Butler*⁶⁴ threw doubt on the earlier jurisprudence when it disqualified a juror who was under indictment in federal court for a misdemeanor. The court in *State v. Smith*⁶⁵ in 1934 held that it was not error to excuse a juror who was under charges of a misdemeanor. This, however, is not a square holding that it is error to retain such a juror. The rule is probably that disqualification for jury service results from a pending charge for any offense, either a felony or a misdemeanor, including a charge by the federal government and probably one by another state.

61. See *Buchalter v. New York*, 319 U.S. 427 (1943); *Brown v. New Jersey*, 175 U.S. 172 (1899).

62. 117 La. 82, 41 So. 360 (1906).

63. *Accord*: *State v. Bush*, 117 La. 463, 41 So. 793 (1906).

64. 149 La. 1036, 90 So. 395 (1922).

65. 179 La. 614, 154 So. 625 (1934).

In *State v. Gunter*⁶⁶ one of the jurors, some thirty-one years before, had been charged with a felony. His conviction had been set aside, but the case had never been retried. Instead it had been placed on the "dead docket." The court held that since the charge had not been dismissed when he served as a juror, he was disqualified from jury service since he was still under a charge. A charge is still pending until *nolle prosequied* by the district attorney or ordered dismissed by the court.

Conviction of a felony. The past record of an individual in determining his qualification as a juror is almost as important as his present status before the law. As we have seen, an individual, to qualify as a juror, must not be presently under a charge of a felony or a misdemeanor. The individual must also never have been convicted of a felony.⁶⁷ Conviction of a misdemeanor, however, will not disqualify.⁶⁸ Why should there be a distinction, it should be asked, between a past conviction for a felony or a present charge of a misdemeanor and a past conviction for a misdemeanor? Perhaps the basis for the distinction is that memory of a conviction for a felony and the vivid prospect of a conviction under a pending charge of a felony or misdemeanor will influence the decision of an individual, whereas a past conviction for a misdemeanor probably will not.

Physical Infirmary

Article 172 provides that the district judge may decide upon the competency of jurors in particular cases where from physical infirmity the person may be, in the opinion of the judge, incompetent to sit upon the trial. A juror cannot perform his duties properly if he cannot see, hear, or speak.

Relationship

Article 172 states that "relationship, or other causes" will disqualify a person from jury service. The common law had the rule that relationship to the ninth degree would disqualify a juror; the degree of relationship in Louisiana has not been fixed, but it does not extend as far as the early common law rule.

66. 188 La. 314, 177 So. 60 (1939).

67. A pardon wipes out a conviction and hence removes the disqualification.

68. *State v. Stephens*, 191 La. 111, 184 So. 559 (1938). Felonies are those offenses where death or imprisonment at hard labor can be imposed; misdemeanors are all other offenses.

Article 172 does not specify the degree of disqualifying relationship. Relationship between a juror and the defendant, or to the victim, would certainly be included in the prohibition. Relationship of a juror to counsel of either side would probably not be permitted because an advocate has an interest in the result of the case. The juror's relationship to the judge may be permissible as he is only an arbiter in the case. The relationship between witnesses and the juror may fall within the ban of a challenge for cause. The exact prohibited relationship and degrees were perhaps purposely omitted from Article 172 so as to take care of the various situations which may arise by leaving the matter in the discretion of the judge.

The prohibited relationship is more than a blood relationship. The phrase in Article 172 of "relationship, or other causes" is sufficiently broad to disqualify a close friend or foe of a juror. The question, in view of the constitutional guarantee of a trial by an impartial jury,⁶⁹ should always be: "Can the juror be fair and impartial to both the defendant and the state?"

In *Dennis v. United States*,⁷⁰ trial counsel for the defendant, who was General Secretary of the Communist Party in the United States, inquired during voir dire examination as to the employment of each prospective juror, and challenged all government employees for cause. Counsel argued that because of the "Loyalty Order"⁷¹ and other security investigations taking place in Washington, government employees would be afraid to risk the possible consequences of an acquittal and were, therefore, biased as a matter of law. The trial judge, denying the challenge, relied on a statute which expressly qualified government employees for jury service.⁷² The act makes no exception for distinctive circumstances. The United States Supreme Court stated that the Congress has a wide discretion in defining the impartial jury required by the Sixth Amendment and, therefore, could provide that government employment of a juror does not constitute implied bias when the government is a party to the action. Since actual bias is still cause for challenge, the court held that the impartial jury required by the Constitution is preserved. The theory is that no such relation exists between gov-

69. U.S. CONST. amend. VI; LA. CONST. art. I, § 9.

70. 339 U.S. 162 (1950).

71. 12 Fed. Reg. 1935 (1947).

72. 49 STAT. 682 (1935): "All other persons, otherwise qualified according to law whether employed in the service of the government of the United States or of the District of Columbia . . . shall be qualified to serve as jurors."

ernment prosecution and government employment as would create any special interest on the part of the employee jurors. However, the court earlier indicated that special circumstances might create an exception which would attribute bias to the employees as a class.⁷³ The *Dennis* case, involving the trial of a Communist during a period of national hysteria, throws doubt on whether bias can ever be implied, no matter what the special circumstances of the case. To insist, as does the majority, that trial of a Republican for contempt is no different in its effect upon those close to the government than trial of a Communist is to insist on the equality of unequals. Similarly, an action under the Narcotics Act could not be fairly compared with an action for contempt of the Un-American Activities Committee.⁷⁴ As Justice Frankfurter stated in the dissent, "It was a wise man who said that there is no greater inequality than the equal treatment of unequals."

In summary, a grand or petit juror, to be qualified, must be a citizen of the state, a bona fide resident for one year next preceding the service, in the parish where the court is to be held, not less than twenty-one years of age, able to read and write the English language, not under interdiction, not under charges of any offense, not convicted at any time of any felony, no physical infirmities, and no relationship, or other causes. Article 172 also has an omnibus clause: "In addition to the foregoing qualifications, jurors shall be persons of well known good character and standing in the community."

Exemption from Jury Service

Article 174 allows certain exemptions from jury service, such as members of the legislature, the high executive officers of the state and their employees, members of the judiciary and the bar, physicians and surgeons, school teachers, members of the fire department, persons over sixty-five years of age or physically incapacitated persons, telegraph and telephone operators, railroad station agents, and chief engineers of electric and water works systems. These persons are not disqualified, but may claim exemption from jury service. The exemptions are personal

73. See *United States v. Wood*, 299 U.S. 123 (1936); *Frazier v. United States*, 335 U.S. 497 (1948).

74. The mere fact that a grand juror had filed an affidavit against the defendant does not disqualify him to sit on the grand jury which subsequently indicts the defendant. See *State v. Vial*, 153 La. 883, 96 So. 796 (1923). This is based on the theory that grand jurors are supposed to report to the grand jury all of-

and if the person himself does not exercise the exemption, he may legally serve on the jury.

Time for Urging Objections

An attack upon the qualification of a particular grand or petit juror must be made by a motion to quash filed *in limine*.⁷⁵ If not, the objection is waived. However, a disqualification of a juror can be urged for the first time even after verdict if it is shown that the disqualification was not known until that time.⁷⁶ In *State v. Futch*⁷⁷ defense counsel's objection, a motion for a new trial based on an alleged newly-discovered fact that a petit juror was unable to read and write, was held to come too late, on the ground that the disqualification of a juror for such a cause must be urged before the swearing in of the juror. It is only when the juror has answered falsely on voir dire examination as to the particular qualification that the matter can be subsequently urged as a basis for setting aside the verdict.⁷⁸ Defense counsel, relying upon the deputy clerk's usual procedure of testing all prospective jurors as to their qualifications when he swore them in for the voir dire examination, had not examined the juror as to his literacy. The Supreme Court held that the clerk of court's procedure does not relieve counsel of ascertaining by a voir dire examination the qualifications of those tendered for jury service, and the failure of counsel to interrogate each juror concerning his qualifications constitutes a waiver of such disqualifications.⁷⁹ Counsel himself must interrogate the juror concerning his qualifications.

An attack on the regularity of the drawing or selecting of the jury, which is to be distinguished from an attack on the quali-

fenses with which they are familiar, and, secondly, grand juries can indict with no evidence at all, simply calling upon their own knowledge of facts. Bias as a matter of law is not implied.

75. LA. R.S. 15:355 (1950).

76. *State v. Chevis*, 48 La. Ann. 575, 19 So. 557 (1896); *State v. Giffin*, 38 La. Ann. 502 (1886). In a personal injury case, *Church v. Capital Freight Lines*, 296 P.2d 563 (Cal. App. 1956), eleven days after the verdict, the wife of one of the jurors petitioned to have him declared mentally ill and such declaration was made two days later. The plaintiffs claimed that the mental incompetency of the juror deprived them of their right to a trial before a jury of twelve competent persons. The court agreed that such a condition would entitle the plaintiffs to a new trial but on the merits found that the evidence supported the trial judge's determination that the juror had been qualified to serve at the trial.

77. 216 La. 857, 44 So.2d 892 (1950). See *The Work of the Louisiana Supreme Court for the 1949-1950 Term — Criminal Law and Procedure*, 11 LOUISIANA LAW REVIEW 244 (1951).

78. *State v. Oliver*, 193 La. 1084, 192 So. 725 (1939).

79. See *State v. Bryan*, 175 La. 422, 143 So. 362 (1932).

fication of any particular juror, must be made within three judicial days from the end of the term of the jury, or before the trial if the trial begins before the expiration of the term plus three days.⁸⁰ Article 253, which allows any motion to quash to be made up to the time of trial, has been construed to apply only to defects in the indictment itself, and not to the manner of selecting or drawing the jury since a specific codal article covers the latter subject.⁸¹

A jury is presumed to be legally constituted and to be composed of competent and qualified jurors. Hence, anyone urging the contrary has the burden of overcoming the presumption.⁸² Moreover, a minor irregularity without fraud in the manner of selecting the jury panel will not operate to disqualify the entire venire, unless it would cause irreparable injury.⁸³ Generally speaking an irregularity in the drawing of a jury panel will not be sufficient reason to set aside the venire.

5. METHODS OF SECURING JURIES

Technical Procedure

The manner of selecting jurors in the country parishes and

80. LA. R.S. 15:202 (1950). See *State v. Saba*, 191 La. 1009, 187 So. 7 (1939). Article 202 provides that the objection must be urged "before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering the trial of the case if it be begun sooner." A literal application of the article would in many situations render the filing of an objection impossible. See *The Work of the Louisiana Supreme Court for the 1954-1955 Term — Criminal Law and Procedure*, 16 LOUISIANA LAW REVIEW 334, 345 (1956); Comment, 15 LOUISIANA LAW REVIEW 749 (1955). The court however has construed the words "before the expiration of the third judicial day of the term" to mean "before the expiration of the third judicial day after the term." See *State v. Wilson*, 204 La. 24, 14 So.2d 873 (1843); *State v. Labat*, 226 La. 201, 75 So.2d 333 (1954). Without such an interpretation, an accused who had not committed a crime, or had not been indicted, until after the third day of the term, would be precluded from objecting. See *State v. Vance*, 31 La. Ann. 398 (1879). Article 202, as interpreted in the *Wilson* case, is applicable to objections to petit jury venires as well as to grand jury venires. *State v. Chianelli*, 226 La. 552, 76 So.2d 727 (1954). As a result, the defendant has a right to file objections to the petit jury venires as well as to grand jury venires. *State v. Chianelli*, 226 La. 552, 76 So.2d 727 (1954). As a result, the defendant has a right to file objections to the petit jury venire at any time before the trial, because the trial is never held "after the end of" the jury term. See *The Work of the Louisiana Supreme Court for the 1954-1955 Term — Criminal Law and Procedure*, 16 LOUISIANA LAW REVIEW 334, 347 (1956).

81. LA. R.S. 15:201 (1950). See Comment, 18 TUL. L. REV. 462 (1944).

82. *State v. White*, 193 La. 775, 192 So. 345 (1939).

83. LA. R.S. 15:203 (1950) provides that no venire shall be set aside because of any defect or irregularity in the manner of selecting the jury, or in the proceedings of the jury commission, "unless some fraud had been practiced or some great wrong committed that would work irreparable injury." See *State v. Knight*, 227 La. 739, 80 So.2d 391 (1955). Thus, it would not be a fatal defect if less than three hundred names in the country parishes or seven hundred and fifty names in Orleans Parish appear on the general venire list. See note 14 *supra* and note 88 *infra*. The irregularity must constitute a fraud or great wrong.

in Orleans Parish differs to such a degree that each will be considered separately.⁸⁴

Country Parishes

The local district judge in the country parishes selects five commissioners who, together with the clerk of court, compose the jury commission. The five commissioners receive no salary and are removable at the pleasure of the district judge.⁸⁵ Three members of the five-member commission, together with the clerk of court, form a sufficient quorum to perform the duties of the jury commission, provided the other members are notified of the meeting.⁸⁶

Upon the written order of the district judge to draw a jury panel,⁸⁷ the commissioners meet at the office of the clerk of the district court and in the presence of at least two witnesses select the names of three hundred persons qualified to serve as jurors.⁸⁸ Prior to the selection of the three hundred persons the commission can subpoena prospective jurors for a test of their qualifications.⁸⁹ From this list of three hundred names, known as the general venire list, the commission selects twenty persons who will serve from four to eight months as grand jurors. The twenty are selected by name, and not by lot.⁹⁰ Their names are written on slips of paper and placed in an envelope and sealed as the "List of Grand Jurors."

The names of the remaining two hundred and eighty persons, which are written on slips of paper, are placed in a "General Venire Box,"⁹¹ from which the commissioners draw by lot the names of thirty persons to serve as petit jurors for the first week of the next ensuing session of the court, and if, in the judgment of the commission or district judge, a jury for a subsequent week

84. The word "country" is used to designate all parishes outside of Orleans Parish. The jurors who attend and serve are entitled to compensation for each day's attendance at court, and for mileage necessarily traveled in going to and returning from the court house. See LA. R.S. 13:3049 (1950); OP. LA. ATTY. GEN. 1948-1950, p. 238.

85. LA. R.S. 15:175 (1950).

86. *Id.* 15:176. See *State v. Milton*, 188 La. 423, 177 So. 260 (1937).

87. LA. R.S. 15:177 (1950).

88. *Id.* 15:179. There must be no systematic exclusion of any group in the selection of the three hundred names.

89. *Id.* 15:173. Article 172 sets forth the qualifications required of a juror.

90. The commissioners are supposed to choose the best twenty men. There is here a possibility of "stacking" the grand jury and also the possibility of systematic exclusion of a particular group.

91. *Id.* 15:179.

of the session may be required, the commissioners draw in the same manner an additional thirty names.⁹² The thirty slips first drawn are placed in an envelope which is sealed and endorsed as the "List of Jurors No. 1," and the thirty additional names, when drawn, are likewise enclosed and sealed, with the endorsement "List of Jurors No. 2." These sealed envelopes, with the one containing the list of grand jurors, are placed in a "Jury Box," which is sealed and delivered to the custody of the clerk of court for use at the next session of court.⁹³

The clerk of court makes a *procès verbal* of the meeting, recording all the names in the order they are drawn and showing the week for which they are to serve. After the meeting the clerk delivers a list of the names drawn to the sheriff, who without delay serves notice on all the named persons to attend upon the session of court and to serve for the week for which they are drawn. The clerk also publishes the list of grand and petit jurors in the official journal of the parish, if there be one, or in any public newspaper of the parish. If an official journal or other newspaper is not published in the parish, the clerk posts the lists on the courthouse door.⁹⁴ By this publication, counsel obtains identification of the prospective jurors.

At least once in every six months the jury commission examines the original venire list in the presence of two witnesses and strikes from the list the names of those who have served, or who have died, or become disqualified, and supplements the original list with enough persons to keep the number at the original three hundred.⁹⁵

Drawing of grand jury. Impanelment of a grand jury involves swearing them in as provided by Article 204 and instructing them as to their powers and rights as provided by Article 205. The judge usually impanels the grand jury on the first day of the term of court.⁹⁶ The grand jury can be impaneled and sworn before the beginning of the next session of court only in districts composed of more than one parish.⁹⁷

The judge selects a foreman from the list of grand jurors. The choice of foreman is entirely discretionary with the judge.

92. *Id.* 15:181.

93. *Id.* 15:182.

94. *Id.* 15:183. See also *id.* 15:332.1.

95. *Id.* 15:188.

96. *Id.* 15:184.

97. *Id.* 15:190.

Out of the nineteen names remaining in the envelope, the sheriff, under the direction of the court, draws by lot eleven more, who, with the foreman, constitute the twelve-member grand jury.⁹⁸ The eight remaining names in the envelope are replaced in the jury box, to be drawn from by lot in case any vacancy shall occur thereafter in the membership of the grand jury panel. If the eight names of the original list are exhausted, additional names to complete the grand jury panel are selected by the commission from the remains of the original three hundred names of the general venire list.

A grand jury is impaneled in each parish twice in each year.⁹⁹ It cannot be impaneled for more than eight nor less than four months.¹⁰⁰ The grand jury, or any of its members, cannot be discharged prior to the termination of their term except for legal cause. The discharged grand jury, or any of the discharged members, can make application to have the discharge reviewed directly by the Supreme Court.¹⁰¹

Drawing of petit jury. The thirty petit jurors, or sixty if two lists were drawn, are summoned to appear in court on the day the term commences. If it appears to the judge that the thirty or sixty names will be exhausted before a jury is drawn, or if the names are actually exhausted, the necessary number of jurors are drawn from a "tales jury box." The jury commission, at the order of the court, selects one hundred persons qualified as jurors and places their names in a box known as the tales jury box, which is sealed and delivered "to the district clerk of the parish."¹⁰² Publication of the tales jury is not necessary, but a copy of the list is furnished to the state and to the defense before the commencement of the trial.¹⁰³

It is to be noted that when the regular venire is exhausted, or apparently will be exhausted, the court uses the "tales box" to fill the vacancies, rather than the general venire box which is resorted to when the grand jury panel is exhausted.¹⁰⁴ The

98. *Id.* 15:184.

99. LA. CONST. art. VII, § 42. In Cameron Parish, however, only one grand jury is impanelled each year.

100. LA. R.S. 15:189 (1950). See also LA. CONST. art. VII, § 42. The time limitation on the service of the grand jury tends to prevent the jurors from becoming partners of the prosecutor. See STEWART, FEDERAL RULES OF CRIMINAL PROCEDURE 46 (1945).

101. LA. R.S. 15:189 (1950).

102. *Id.* 15:186.

103. *Ibid.*

104. *Id.* 15:184.

justification for resort to a "tales box" is not clear since the general venire box may contain as many as 250 names and not less than 220 names, resulting from the original list of 300 names minus a grand jury list of twenty names and minus one or two petit jury lists of thirty names each. Inasmuch as a petit juror may ordinarily serve only one week, if he does not serve during that week,¹⁰⁵ and the commissioners draw the panels for subsequent weeks out of the general venire list,¹⁰⁶ perhaps the commissioners are to resort to the tales box to fill a panel only when the general venire list is running short. However, the judge can always order more names added to the general venire list according to the usual procedure outlined by Article 179.¹⁰⁷ At any rate, when new or tales jurors are drawn, the slips of names of tales jurors drawn who do not serve are not replaced in the "tales jury box" but are destroyed. Rather than obtain tales jurors from the "tales jury box," the judge, provided he has the consent of both the district attorney and defense counsel, can summon talesmen from among the bystanders or persons in proximity of the courthouse, or within the parish.¹⁰⁸

Orleans Parish

The jury commissioners for Orleans Parish are chosen from the registered voters of Orleans Parish by the Governor.¹⁰⁹ The commissioners are not under the control of the judges of the criminal district court, as in the country parishes. The Governor selects five commissioners who serve at his pleasure and who receive a salary of \$4,200 per annum.¹¹⁰ Three of the commissioners form a quorum, and when there is no quorum, the Governor can appoint a person with full power of a commissioner to fill the temporary vacancy.¹¹¹

The jury commissioners qualify all persons before their selection as jurors, but the judges of the district courts still have the right to decide finally upon their competency.¹¹² The commissioners select at large, impartially, from the citizens of Orleans Parish having the qualifications requisite to register as voters

105. *Id.* 15:187.

106. *Id.* 15:185.

107. *Ibid.*

108. *Id.* 15:186.

109. *Id.* 15:191.

110. *Ibid.*

111. *Ibid.*

112. *Id.* 15:192. Article 193 provides the oath which the commissioners administer to all persons appearing before them.

the names of not less than 750 persons to serve as jurors.¹¹³ These persons need not be registered to vote, but must meet the qualifications of a voter,¹¹⁴ and, in addition, of course, must meet the general qualifications to serve as a grand or petit juror as established by Article 172. The list of these names is kept as a permanent record, and the names on the list are copied on slips which are placed in a jury wheel from which a drawing is made.¹¹⁵

Drawing of grand jury. As stated earlier, a grand jury of twelve is impaneled in each parish twice in each year.¹¹⁶ The grand jury in Orleans Parish serves a term of six months and cannot be discharged before the end of the term except for legal cause.¹¹⁷ Between February 15-20 and August 15-20 of each year, the commissioners draw from the jury wheel the names of not less than seventy-five persons and they are submitted to the judge whose turn it is to impanel the incoming grand jury. Each judge of the criminal district court in Orleans Parish in rotation selects the grand jury. The judge chooses in his discretion, which is limited by the prohibition against the systematic exclusion of a class, twelve persons from the list of seventy-five or more names to constitute the grand jury.¹¹⁸ The judge who appoints the grand jurors has control and instruction over the grand jury during its term of six months, to the exclusion of all other judges of the criminal district court, and the grand jury makes its findings and returns in open court to the appointing judge.¹¹⁹ All vacancies occurring in the membership of the grand jury are filled by the impaneling judge, who either orders the jury commission to draw not less than twelve names from the jury wheel, from which he selects the persons necessary to fill the vacancies, or selects from the panel of petit jurors serving in his section to fill the vacancies.¹²⁰

Drawing of petit jury. Between the 15th and 20th of each month, the commissioners and sheriff draw from the jury wheel

113. *Id.* 15:194. Act 151 of 1944 reduced the number of names from 1,000 to 750. In Orleans Parish the commissioners have regular process servers to serve and attach jurors. *Id.* 15:198.

114. Under LA. CONST. art. VIII, § 1, as amended in 1956, a person to be qualified as a voter must be a resident of the state for one year and of the parish for one year.

115. LA. R.S. 15:194 (1950).

116. See LA. CONST. art. VII, § 42.

117. LA. R.S. 15:200 (1950).

118. *Id.* 15:196.

119. *Ibid.*

120. *Id.* 15:197.

not less than 100 names, when jurors are to be summoned for service in only two sections of the criminal district court, and not less than fifty additional names for each section of court ordering a drawing for a special jury term.¹²¹ The persons whose names are drawn constitute the petit jury venire for the next session of court. The names are drawn by lot from the list after which they are then individually examined and qualified.

If the regular panel of jurors for the term is exhausted, or apparently will be exhausted, the judge orders the criminal sheriff or deputy to draw tales jurors. The drawing of tales jurors in Orleans Parish is different from the procedure in the country parishes in that the names in Orleans Parish are drawn from the regular jury wheel rather than from a special tales box.¹²² Although a regular jury panel can never be drawn unless there are at least 750 names in the wheel, tales jurors can be drawn when there are as few as 500 names in the wheel.¹²³ Before ordering tales jurors drawn from the jury wheel, the court may borrow petit jurors who are not serving in other sections of the court.¹²⁴ Unlike the country parishes, tales jurors in Orleans Parish are never selected from bystanders.¹²⁵

Systematic Exclusion of Classes

The most noted objection to the makeup or membership of a jury is that the jury was selected in such a manner as systematically to exclude members of a given race, thereby, it is claimed, depriving the accused and members of his race of due process of law and of the equal protection of the laws, as provided by the Fourteenth Amendment to the United States Constitution and the statute enacted by Congress in 1875, supplementing that amendment.¹²⁶ Although a state may abolish trial

121. *Id.* 15:195.

122. *Id.* 15:199.

123. *Id.* 15:194.

124. *Id.* 15:201.

125. *Id.* 15:199.

126. 18 STAT. 336, 18 U.S.C. 243 (1948), making it a federal crime for an improper selection of a state juror, provides: "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5000."

The constitutionality of the section was upheld in *Ex parte Virginia*, 100 U.S. 399, 347 (1879): "The 14th Amendment was ordained" to secure equal rights to all persons. To render its purpose effectual, Congress is vested with power "to

by jury without violating the Fourteenth Amendment, if it grants trial by jury, it must do so in a non-discriminatory manner. The right to a trial by an impartial jury, as provided for in the State Constitution,¹²⁷ prevents the exclusion of a particular class from jury service. Accordingly, Article 172 of the Louisiana Code of Criminal Procedure declares that no distinction shall be made in the selection of a grand or petit jury on account of race, color, or previous condition of servitude. The intentional, arbitrary, and systematic exclusion by the state of any portion of the population from jury service, grand or petit, on account of race, color, creed, or national origin, would be at variance with the fundamental law. The principal problem in each case is to determine what actually constitutes an exclusion.

As to procedural aspects, one who wishes to avail himself of the defense of discrimination in the selection of jurors on the grand or petit juries must raise the constitutional question in the trial court, and if overruled must appeal to the highest state court. The defendant must raise the constitutional question in the state court in order to have the adverse decision reviewed by a federal court.¹²⁸ In any attack upon the selection of the jury, the defendant has the burden of proof.¹²⁹

Race, color, or national origin. The United States Supreme Court ruled in *Pierre v. Louisiana*¹³⁰ that there is a denial of equal protection of the laws when a state, in the selection of jurors, discriminates against Negroes solely because of their race or color. The Supreme Court has never said, however, that a defendant, as a matter of right, is entitled to have the jury composed in part of members of his race. The defendant is not entitled, for example, to have sitting on the jury a percentage based on the proportion of his race to the population in the community. All that is possible must be done not to discriminate,

enforce its provisions by appropriate legislation. Such legislation must act, not upon the abstract thing denominated a state, but upon the persons who are its agents in the denial of the rights which were intended to be secured."

The person who selects the jurors for the state derives his authority from the state, but he is bound in the discharge of that duty to obey the Federal Constitution and the laws passed in pursuance thereof.

127. LA. CONST. art. I, § 9.

128. *In re Wood*, 140 U.S. 278 (1891). See notes 80, 81 *supra*, for the proper time to challenge the panel. As a possible alternate procedure, a defendant who is denied in a state court any law providing for the equal civil rights of United States citizens may have the case removed to a federal district court. See 62 STAT. 938, 28 U.S.C. § 1443 (1952). See also 62 STAT. 696, 18 U.S.C. § 242 (1952).

129. See *State v. Pierre*, 198 La. 619, 3 So.2d 895 (1941); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Carter v. Texas*, 177 U.S. 442 (1900).

130. 306 U.S. 354 (1939).

but success or failure to select a member of the defendant's race is immaterial if the system of selection is fair. The only right of the accused is that there be no "systematic exclusion" in the selection of jurors.¹³¹

The systematic exclusion of a race from the grand or petit jury is sufficient reason to quash an indictment.¹³² Inquiry is invited as to whether a verdict of a jury should be reversed on the ground of systematic exclusion of a class when the accused is not a member of that class. If it is the system itself of selecting juries which can be attacked, regardless of the actual fairness of the trial, a defendant who is a member of the white race would be able to object to the systematic exclusion of Negroes from jury service. Under this theory, irreparable injury to the defendant would not be an essential for a reversal of a conviction. Similarly, under the principle that race or class is not to be a factor in the selection of jury panels, any attempt at proportional representation or "systematic inclusion" of a race or class on jury panels according to population would be as invalid as total exclusion.¹³³ On the other hand, if the fairness of the jury, rather than the system of exclusion in selecting juries, is to determine the constitutionality of the procedure,¹³⁴ then the exclusion of Negroes in the trial of a member of the white race, or the exclusion of whites from the trial of a Negro, will not constitute a denial of equal protection since the exclusions were not harmful to the accused. For, if there were any discrimination, it would be in the defendant's favor. The Louisiana Supreme Court has held that the verdict of a jury will not be reversed on the ground of systematic exclusion of a class or race unless the accused is a member of that class.¹³⁵

131. *Pierre v. Louisiana*, 306 U.S. 354 (1939). See also *Hill v. Texas*, 316 U.S. 400 (1942); *Virginia v. Rives*, 100 U.S. 313 (1879); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Criminal Law and Procedure*, 11 LOUISIANA LAW REVIEW 241 (1951); *Gibson, Racial Discrimination on Grand Juries*, 3 BAYLOR L. REV. 29 (1950); *Comment*, 29 TEXAS L. REV. 817 (1951).

132. *State v. Nichols*, 216 La. 622, 44 So.2d 318 (1950).

133. See *Cassell v. Texas*, 339 U.S. 282 (1950); *Ballard v. United States*, 329 U.S. 187 (1946); *Note*, 51 MICH. L. REV. 925 (1953).

134. It may be said that exclusion of Negroes harms a Negro defendant by giving him a lesser chance than has the white man for a favorable jury, on the assumption that racial animosity exists.

135. *State v. Lea*, 228 La. 724, 84 So.2d 169 (1956), cert. denied, 350 U.S. 1007 (1956). The Louisiana Supreme Court stated: "In our review of the decisions of this Court and the Supreme Court of the United States, we do not find any case wherein the verdict of a jury was reversed on the ground of systematic exclusion of a class or race except where the accused was a member of that class." 228 La. 724, 729, 84 So.2d 169, 171 (1956). See also *Haraway v. State*, 203 Ark. 912, 159 S.W.2d 733 (1942), cert. denied, 317 U.S. 648 (1942); *Commonwealth*

The court in *State v. Perkins*¹³⁶ was concerned with the system employed by Orleans Parish for the selection of jurors by which Negroes were placed on jury lists in just proportion to whites as recorded on the voters' registration roll. Over the dissent of Justice O'Niell, the majority of the court held that this method of selection of jurors is permissible since a preference given to those desirous of having a voice in government and willing to assume the responsibilities of citizenship is justified.

As stated earlier, the defendant has the burden of proving discrimination in the selection of the jury panel. A showing that a Negro has not served on a jury for a long period of time and that qualified Negroes are available to serve as jurors in the locality raises a presumption of discrimination in favor of the defendant. The presumption, unless rebutted by the state, is sufficient to warrant a finding of discrimination and a quashing of the entire jury panel.¹³⁷ In *Patton v. Mississippi*¹³⁸ the fact that no person of African descent served on a jury for over a period of thirty years in a locality where the adult population was thirty-five percent Negro established a presumption of systematic exclusion which could not be overcome by a showing that a relatively small number of Negroes met the requirement that jurors must be qualified electors. Moreover, when an occasional Negro is placed on a jury, the court will determine if it is a subterfuge to cover intended discrimination against Negroes with a thin veneer of constitutional compliance.¹³⁹

In *Hernandez v. Texas*¹⁴⁰ the United States Supreme Court was faced with the question of whether the rule of the *Patton* case should be extended to cover nationalities as well as races. The defendant, an American citizen of Mexican descent, stated that no person of Mexican extraction had served on a grand jury or petit jury for the past twenty-five years, although qualified persons of Mexican descent resided within the locality. The defendant was unable to prove actual discrimination but relied upon a prima facie showing of discrimination to prove his alle-

v. Wright, 79 Ky. 22 (1880); *State v. James*, 96 N.J.L. 132, 114 Atl. 553 (1921). Cf. *Griffin v. State*, 183 Ga. 775, 190 S.E. 2 (1937).

136. 211 La. 993, 31 So.2d 188 (1947). See also note 147 *infra*.

137. See *Patton v. Mississippi*, 332 U.S. 463 (1947); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Norris v. Alabama*, 294 U.S. 587 (1935); *Neal v. Delaware*, 103 U.S. 370 (1880). See Comment, 8 LOUISIANA LAW REVIEW 548 (1948) for analysis of proof problems.

138. 332 U.S. 463 (1947).

139. See *Smith v. Texas*, 311 U.S. 128 (1940).

140. 347 U.S. 475 (1954).

gation. The state maintained that the presumption arises only to members of different races, and that since persons of Mexican descent are primarily members of the white race no presumption of discrimination should be found. The United States Supreme Court, reversing the conviction of the state court, held that the state court erred in limiting the application of the equal protection clause of the Fourteenth Amendment to the white and Negro races and held that the state had failed to rebut the prima facie showing of discrimination.¹⁴¹

Religion. Although Article 172 of the Code does not expressly prohibit discrimination based on creed, the deliberate and systematic exclusion of members of a particular religious faith would be unconstitutional under the "systematic exclusion" test of the *Pierre v. Louisiana*¹⁴² case. So too, discrimination against members of the defendant's political party would be unconstitutional.¹⁴³

The Fourteenth Amendment, though adopted to prevent discrimination against a particular race, is not restricted in its application to members of that race. Its protection is available "when the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification."¹⁴⁴

Economic status. The intentional and systematic exclusion of certain occupational classes is repugnant to the concept of trial by jury. In *Thiel v. Southern Pacific Co.*,¹⁴⁵ daily wage earners such as iron craft workers, bricklayers, carpenters and machinists were intentionally excluded from the jury lists on the basis that these individuals might suffer financial hardship by serving on juries; and, as was shown at the trial, these wage earners were usually excused by the judge from jury duty upon their own request. Business men and their wives constituted the majority of the jury lists. The court held that, although no actual

141. *Ibid.*

142. See note 129 *supra*. In *Juarez v. State*, 102 Tex. Crim. App. 297, 277 S.W. 1091 (1925) the systematic exclusion of Roman Catholics from jury service was held to be a denial of the equal protection of the laws and violative of the Fourteenth Amendment. See also *People v. Hampton*, 4 Utah 258, 9 Pac. 508 (1886).

143. See *Kentucky v. Powers*, 139 Fed. 452 (E.D. Ky. 1905), rev'd on other grounds, 201 U.S. 1 (1906).

144. *Hernandez v. Texas*, 347 U.S. 475 (1954).

145. 328 U.S. 217 (1956), 21 TUL. L. REV. 116 (1946).

prejudice was shown, wage earners cannot be intentionally excluded in whole or in part from the jury panel. The essential element is not that the selected jury be composed of a cross-section of the community, but that the manner of selection of the panel be non-discriminatory. One segment of the population cannot be arbitrarily excluded from the jury list.¹⁴⁶

In *Brown v. Allen*¹⁴⁷ the defendant, a Negro, claimed systematic discrimination against Negroes serving on grand and petit juries resulting from the use of property and poll tax lists as sources from which to draw jury panels. The United States Supreme Court held that the use of property and poll tax lists as sources of jury panels does not establish unconstitutional discrimination against Negroes serving on juries and does not require reversal of a conviction which is obtained under that system. The defendant argued that, because of economic and educational discrimination in the community, the proportion of Negroes who were voters and property owners would, as in this case, be less than the percentage of Negroes in the population and that this fact made the system of selection invalid. The majority opinion recognized this fact but held it insufficient to invalidate the system. The court assumed that the poll and property tax lists used as the source of jury panels were non-discriminatory as to race and that the taxes were reasonable. Indeed, a jury selection system which has an objective basis lessens the opportunity for discrimination than when the choice of the jury panel depends on the personal selection and opinion of the jury commissioners.

Sex. The systematic and intentional exclusion of men or women from grand or petit jury panels warrants a dismissal of

146. The *Thiel* case was a civil action brought in a federal court under the Federal Employers Liability Act; *a fortiori* the procedure would be improper in a criminal case. The exclusion of daily wage earners from the jury panel in the *Thiel* case was held to be reversible error, not on constitutional grounds, but on the ground of improper administration of the jury system in federal courts. The policy is not necessarily embodied in the concept of due process and thereby applicable to the states.

The evidence was insufficient in *State v. Krieger*, 212 La. 527, 33 So.2d 58 (1947) to show that white manual workers were systematically excluded from jury service. See Comment, 8 LOUISIANA LAW REVIEW 548, 552 (1948).

See *Fay v. New York*, 332 U.S. 261 (1947), where New York's "Blue Ribbon" jury based on intelligence was held constitutional. The term "blue ribbon" is attached to panels selected by a process which tends to qualify jurors of high business standing and educational experience. As to whether government employees should be excluded from the jury panel by reason of employment, see discussion of *Dennis v. United States*, note 70 supra.

147. 73 S.Ct. 397 (1953).

the indictment. In *Ballard v. United States*, which involved the prosecution of a woman for violation of a federal criminal statute, the Supreme Court said that a federal jury panel from which women are intentionally and systematically excluded is not properly constituted.¹⁴⁸ The systematic exclusion of women, like the exclusion of a racial group or an economic or social class, deprives the jury system of the broad base which it should have.

In Louisiana a woman must file with the clerk of the district court a written declaration of her desire to be subject to jury service before she can be called for jury duty.¹⁴⁹ The system, in effect, abridges the right of women to serve on juries, in that it requires them to do something that is not required of men in order to be eligible for jury service. The Louisiana Supreme Court, however, rejecting the argument, has held that the requirement of filing a request for jury service is not discriminatory against women, but is favorable to them, because it gives to each of them the option of choosing whether she shall be subject to jury service.¹⁵⁰ The requirement imposed upon women of filing a request for jury duty is reasonably permissible, as the

148. 329 U.S. 187 (1946). In *Fay v. New York*, 332 U.S. 261, 290 (1947), the defendants claimed a violation of the due process clause of the Fourteenth Amendment by reason of the exclusion of women from the jury panels. Justice Jackson, as organ of the court, in stating that the question of women jury service was not a constitutional one, said: "We may insist on their inclusion on federal juries where by state law they are eligible, but woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood." See Comment, 28 B.U.L. Rev. 55 (1948).

149. LA. CONST. art. VII, § 41; LA. R.S. 15:172.1 (1950).

150. *State v. Dreher*, 166 La. 924, 118 So. 85 (1928). The court in *State v. Bray*, 153 La. 103, 95 So. 417 (1923) held that the procedure in Louisiana which permits women to sit on juries only when they have made application for jury service does not violate the Nineteenth Amendment of the Federal Constitution since that amendment is concerned with the right of women to vote. See Notes, 20 MICH. L. REV. 669 (1922), 70 U. PA. L. REV. 30 (1921).

For nearly a half-century after the Fourteenth Amendment was adopted, it was universal practice in the United States to allow only men to sit on juries. The first state to permit women jurors was Washington, and it did not do so until 1911. In 1942 only 28 states permitted women to serve on juries and they were still disqualified in the other 20. Moreover, in 15 of the 28 states which permitted women to serve, they might claim exemption or must expressly waive exemption because of their sex. In some states it became a rule of policy that women need not be included on the jury lists where courthouses do not contain appropriate facilities for them. See *People v. Parman*, 14 Cal.2d 17, 92 P.2d 387 (1939); R.I. Laws 1938, c. 506, § 39. Federal courts select for jury duty only those people who qualify as jurors under the law of the state in which the federal district court is situated. 28 U.S.C. § 1861 (1954).

It may be objected that the Louisiana requirement—that women must file a request for jury service in order to be called—abridges the right of the accused to have women on the jury. The answer to this objection is that the accused has the right to reject, and not to select jurors.

exercise of the right to serve as jurors is not burdened with any arbitrary restriction imposed upon women because of sex or as a class, but is solely for the purpose of avoiding compulsory service of women upon juries, contrary perhaps to their wishes to exercise such a privilege of citizenship. The law is in the nature of a general exemption from jury service of women as a class, requiring an individual exercise of the option to serve, and is as legitimate as the procedure embodied in Article 174 which allows certain persons, such as physicians, lawyers and teachers, to claim exemption from jury service.¹⁵¹ Indeed, it may be argued that, if the nature of the exclusion of a group is not likely to impair the fairness of the jury, the Fourteenth Amendment would not prevent the state from excluding, rather than merely exempting from jury service, certain classes, such as doctors, dentists, engineers and firemen, for the good of the community.¹⁵² The right of a defendant, it has often been said, is not a right to select, but to reject, jurors.¹⁵³

Geography. In *State v. Poe*¹⁵⁴ a motion to quash the venire was urged on the ground that no members from the ward in which the defendant lived were drawn on the jury panel, whereas all twelve members of the panel were drawn from the ward of the residence of the prosecutrix. The court held that the objection does not state a legal cause for quashing the venire in the absence of fraud "or some great wrong committed that would work irreparable injury."¹⁵⁵ It seems questionable whether selection of a jury panel from a particular ward does justice to the defendant's right to trial by an impartial jury.

6. SELECTION OF PETIT JURY PANEL

Tendering of Venire

Article 343 defines the distinction between the venire and the panel. The venire is the body of persons selected to serve as jurors during a certain designated term. It is the group chosen from the general jury box, made up by the jury commissioners, to appear for a particular term of court. The panel is the five or twelve persons who are actually selected from the venire, and impaneled and sworn to try a particular case.¹⁵⁶ A twelve-man

151. See page 676 *supra*.

152. See *Rawlins v. Georgia*, 201 U.S. 638 (1906).

153. See *State v. Dreher*, 166 La. 924, 188 So. 85, 93 (1928).

154. 214 La. 606, 38 So.2d 359 (1948).

155. See L.A. R.S. 15:203 (1950).

156. See generally L.A. R.S. 15:343-361 (1950).

jury is impaneled in cases in which a capital penalty may be imposed or in which hard labor must be imposed upon a conviction; a five-man jury is impaneled in cases in which hard labor can be imposed; the judge alone tries cases in which hard labor cannot be imposed.¹⁵⁷

Article 344 provides that the defendant has the right to have all jurors in the regular venire tendered to him for acceptance or rejection at the trial of his case.¹⁵⁸ It would be error to submit only a part of the venire to the defendant. However, the right granted the defendant by Article 344 to have all jurors in the regular venire tendered for acceptance or rejection is flanked by Article 345 which gives the judge the right, in his discretion, to excuse for cause jurors of the regular venire. In excusing jurors, however, the intentional, arbitrary and systematic exclusion by the judge of any portion of the population from the petit jury panel, on account of race, color, creed or national origin, would be at variance with the Constitution and the Code.¹⁵⁹

It was contended in *State v. Gould*¹⁶⁰ that the right granted to the judge to excuse jurors is limited to the causes of disqualification provided by law and which were overlooked by the commissioners. The judge in this case had excused 37 out of 75 jurors on the venire, without any apparent reason for doing so. Counsel complained that this wholesale excusing was wrong, and that the law merely granted the judge the right to excuse jurors who did not have the proper qualifications. Counsel contended: "We do not believe that this clause confers upon the trial judge the right to select a jury. It simply gives him a right to pass on the qualifications of a juror. In other words, if the commissioners should assign to the court seventy-five persons for

157. See *id.* 15:337-342; LA. CONST. art. VII, §§ 41-42. The five-man jury only is waivable. For a discussion of waiver of jury trial, see Perkins, *Proposed Jury Changes in Criminal Cases*, 16 IOWA L. REV. 20, 223 (1930). See also Note, 5 FORDHAM L. REV. 504 (1936), on the waiver of the constitutional number of jurors.

Rule 23 of the Federal Rules of Criminal Procedure provides: "(a) *Trial by jury.* Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government. (b) *Jury of less than twelve.* Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12."

ALI CODE OF CRIM. PROC. § 266 provides: "In all cases except where a sentence of death may be imposed trial by a jury may be waived by the defendant. Such waiver shall be made in open court and entered of record."

158. For a discussion of the time to file objections to the drawing or selecting of juries, see Comment, 18 TUL. L. REV. 462 (1944).

159. See LA. R.S. 15:172 (1950).

160. 155 La. 639, 99 So. 490 (1924).

jury duty and it should occur that some of these persons, thus assigned, were not citizens, or had been convicted of a crime punishable by hard labor, and had not been pardoned, and this had escaped the scrutiny of the jury commissioners, the judge would have the right to exclude an individual of that kind."¹⁶¹

The Louisiana Supreme Court rejected this view and held that the trial judge may excuse jurors from service for any reason that to him may be proper and satisfactory. Furthermore, the exercise of this discretion will not be interfered with on appeal unless it clearly appears that the right has been abused or that the defendant has been prejudiced thereby. The defendant's right is that of eliminating incompetent jurors, not of selecting jurors of his choice. The court indicated that if the trial judge excuses a large percentage of the venire without application for excuse by the jurors themselves and without taking into consideration the question of their qualifications and competency, a different view might be taken. That question was not before the court. The holding of the court is a practical one. In many instances, because of sickness in the family, business, or other cause, a hardship would be imposed upon a juror in requiring him to serve.

Article 346 provides that the prosecution or the defense may demand attachment for all jurors of the regular venire who are absent. However, if enough jurors are present to make up the panel, the attachments cannot be demanded of right. This then is another exception to the provision of Article 344 that the defendant has the right to demand that all jurors in the regular venire be tendered for acceptance or rejection.

Upon the exhaustion of the regular venire without completing the panel, the judge, if the prosecution or the defense so request, must order the sheriff to call the absent jurors, before it is permissible to tender any talesman.¹⁶² Tales jurors, however, may be summoned at such time as the judge may deem expedient, but they cannot be tendered until the regular venire has been exhausted.¹⁶³ An order made by the judge in the course of the trial, in anticipation of the exhaustion of the regular jury panel, directing the sheriff to summon tales jurors, and hold them to serve, if necessary, for the purpose of saving time and

161. *Id.* at 644, 99 So. at 491.

162. L.A. R.S. 15:347 (1950).

163. *Id.* 15:348. The method of choosing tales jurors, however, is not left to the judge but is fixed by law. *Id.* 15:186.

avoiding delay, is not illegal, and will not invalidate an impaneled jury, provided the talesmen are tendered only after the exhaustion of the regular panel.¹⁶⁴ An irregularity in summoning talesmen is waived when they are accepted and sworn without objection.¹⁶⁵

Examination of Prospective Jurors

The examination of a juror to test his qualifications for jury service is called the voir dire examination, literally, to see and to speak to the juror. The purpose of the voir dire examination is to secure fair and qualified persons to try the issue between the state and the accused.

Article 349 states that the examination is to be conducted in a manner as now provided by existing laws. The statutory law on the subject, however, is brief.

General and special causes for challenge. Causes for challenge are general or special: general, when the jurors lack some qualification required by Article 172 to serve in any case; special, when the juror, though generally qualified, is disqualified from serving in the particular case on trial, by reason of some defect prescribed by Article 351 or 352.¹⁶⁶

(i) *General causes for challenge.* As soon as court is convened, the judge, according to custom, announces publicly from the bench the general qualifications prescribed for jury service, and asks that, if any one drawn for jury duty lacks any of the qualifications, he should come forward and make known his disqualifications. Then, the judge turns the jurors over to the prosecuting and defense attorneys.

164 State v. Moncia, 39 La. Ann. 868, 2 So. 814 (1887).

165. State v. Watkins, 106 La. 380, 31 So. 10 (1901).

166. LA. R.S. 15:350 (1950). The comment of the court in *People v. Cosmo*, 205 N.Y. 91, 96, 98 N.E. 408, 409 (1912) is interesting: "In the feudal days they [the jury] were required to be freemen, and from this circumstance it may be surmised that some, if not all, were owners of property. With the development of civilization and the gradual establishment of property rights there came a period when the ownership of property was probably regarded as something of an index to the intelligence, character and standing of men in their communities, and as a convenient basis for the arbitrary fixing of a class from which the ultimate selection of jurors was to be made. In England this qualification seems to have been at first confined to such capital cases as treason, misprision of treason and murder and we know that later it was extended by statute so that when the common law took root in American soil we engrafted upon the jury system the property qualification which to some extent, and in one form or another, has survived to this day."

Article 172 provides that the general qualifications required for service as a petit juror, as for a grand juror, are: That he be a citizen of this state, not less than twenty-one years of age, a bona fide resident of the parish in and for which the court is held for one year next preceding such service, able to read and write the English language, not under interdiction or charged with any offense, or convicted at any time of any felony, provided that there shall be no distinction made on account of race, color, or previous condition of servitude; and provided further, that the district judge shall have discretion to decide upon the competency of jurors in particular cases where from physical infirmity or from relationship, or other causes, the person may be, in the opinion of the judge, incompetent to sit upon the trial of any particular case. In addition to the foregoing qualifications, Article 172 provides that jurors shall be persons of well known good character and standing in the community.

In *State v. Bryan*¹⁶⁷ a bill was reserved to the overruling of a motion to discharge the jury on the ground that one of the jurors could not read or write the English language. Counsel did not ask the juror whether he could read and write on his voir dire examination, but assumed that all jurors were qualified. The disqualification was discovered on the fifth day of trial. A considerable part of the evidence that went to the jury was documentary evidence. The Supreme Court held that the judge's statement on the opening day of the criminal term of the required qualifications of jurors and his requested avowal of disqualifications does not dispense with counsel's ascertainment of the juror's qualifications on the voir dire examination. The Supreme Court ruled that the bill of exception was not well founded because of the failure to ask the juror about the qualification before swearing in of the jury (or before the taking of evidence).

Proper procedure, consequently, is to examine each juror with great particularity. A standard list of questions should be prepared. Then, if the juror tells an untruth on his voir dire, his incompetency can later be set up for having answered falsely on his examination.¹⁶⁸

167. 175 La. 422, 143 So. 362 (1932).

168. The trial lawyer would probably benefit at nominal expense by securing a court reporter to make a record of the examination so that in the eventuality of prejudicial misconduct by the opponent during examination or upon learning even after verdict that a juror untruthfully answered an inquiry which counsel relied

(ii) *Special causes for challenge.* Articles 351 and 352 list the special or particular causes for challenge.

Article 351 deals fundamentally with challenges for partiality. The article provides three special causes for challenging a juror, either by the defendant or by the state: (1) fixed opinion, (2) relationship of the juror to persons involved, and (3) service on grand jury or former petit jury in connection with the case.¹⁶⁹ A discussion of each of these special causes for challenge follows.

(1) *Fixed opinion.* The first of the special causes provided in Article 351 for which a prospective juror may be challenged is "that he is not impartial, the cause of his bias being immaterial; but an opinion as to guilt or innocence of the accused, which is not fixed, or has not been deliberately formed, or that would yield to evidence, or that could be changed, does not disqualify the juror."

The cause of partiality is immaterial. A juror is disqualified even though he says he is biased for some nonsensical reason. His disqualification for partiality can arise from race prejudice, religious prejudice, or simply because he is hostile or friendly to the defendant. In all these cases of partiality the juror must be excused.¹⁷⁰

It is to be noted that the state, as well as the accused, can challenge a juror for partiality: A juror who is friendly towards the defendant is disqualified from jury service, just as he would be if he were hostile to the defendant. The state, as well as the defendant, is entitled to a fair trial.

on in accepting him, the trial attorney would be prepared. See APPLEMAN, SUCCESSFUL JURY TRIALS 119 (1952).

Query: Is the testimony of the other jurors as to what a juror said during the deliberations in the jury room admissible to show that he was biased and prejudiced at the time of his voir dire examination? See *Clark v. United States*, 289 U.S. 1 (1933), 17 MARQ. L. REV. 300 (it should be observed that the court is guilty of circular reasoning). See LA. R.S. 15:470 (1950).

169. Article 351 lists these special causes for challenging a juror: (1) That he is not impartial, the cause of his bias being immaterial; but an opinion as to guilt or innocence of the accused, which is not fixed, or has not been deliberately formed, or that would yield to evidence, or that could be changed, does not disqualify the juror; (2) that the relations, whether by blood, marriage, employment, friendship or enmity, between the juror and the accused, or between the juror and the person injured, are such that it must be reasonably believed that they would influence the juror in coming to a verdict; (3) that the juror served on the grand jury which found the indictment, or on a petit jury which once tried the defendant for the same offense, or on the coroner's jury that investigated the homicide charged against the accused.

170. *State v. Guin*, 212 La. 475, 32 So.2d 895 (1947). See Stout, *The Examination of Prospective Jurors in Capital Cases*, 29 TEX. L. REV. 34 (1950).

In our present-day compressed society the prospective juror is very likely to have heard about the case prior to his selection on the panel. The prospective juror, particularly if he is on the panel for a case of public interest, has been subjected to the bombardment of the press, radio, and acquaintances. Scarcely anyone can be found among those fitted for jury service who has not read or heard about the case, and who has not some impression or some opinion in respect to its merits. He has his prejudices which he may or may not acknowledge. He has experienced the climate of opinion of his community.

It is clear, therefore, that some concession is necessary to this modern situation. Article 351 provides that an opinion as to guilt or innocence of the accused, which "is not fixed, or has not been deliberately formed, or that would yield to evidence, or that could be changed, does not disqualify the juror." Furthermore, a prospective juror's competence or incompetence is not determined from isolated answers given during the course of his examination. It is judged from the entire examination.¹⁷¹

In *State v. Birbiglia*,¹⁷² a murder case which attracted much publicity, each of the proposed jurors admitted that he had formed an opinion from the newspaper accounts of the homicide. Each of them said that his opinion was so fixed that it would require strong evidence to remove, but each of them also said that he could and would, if taken on the jury, put aside his opinion, and, presuming the defendant to be innocent, be governed entirely by the evidence in the case, and that he would not convict unless the state proved the guilt of the defendant beyond a reasonable doubt. The court concluded that the jurors were qualified.

It is to be noted that the jurors were accepted even though they said that their opinion was so fixed that strong evidence would be required to overcome it. Although each juror admitted that he would be governed by the evidence in the case, who as a matter of fact has the burden of proof? And what about the presumption of innocence? The case is extreme, yet it does show the difficulty of obtaining an impartial jury in modern times.¹⁷³

171. See *State v. Henry*, 200 La. 875, 9 So.2d 215 (1942).

172. 149 La. 4, 88 So. 533 (1920).

173. The defendants, Felix Birbiglia and Charles Zalenka, were actually hanged (on the same day that prizefighter Jack Dempsey knocked out Carpentier) for a most brutal murder of a young woman.

In *State v. Thornhill*¹⁷⁴ a juror admitted on his voir dire that he had a fixed opinion, but added that it would probably yield to the evidence. The trial judge then excused the juror for the reason that he had a fixed opinion. The Supreme Court held that the ruling was correct, as the juror did not state that his opinion would yield to the evidence in the case, or that it could be changed, but that it "would probably yield" to the evidence. The court held that only an opinion of innocence or guilt which can definitely be changed by the evidence will not disqualify a juror.

Again, in *State v. Henry*,¹⁷⁵ involving a murder which attracted great attention, the juror on his voir dire admitted that he had formed an opinion of the guilt or innocence of the accused, but said that he "thought" that it would yield to the evidence. The court stated: "The fact that a man has formed an opinion as to the guilt or innocence of an accused does not necessarily disqualify him from serving as a juror. If he states on his voir dire examination that his opinion would readily yield to the testimony adduced, that he could and would lay aside that opinion, he is competent. But where, as in the instant case, the juror makes it plain he has an opinion and that he is not sure that he can lay it aside, he is not competent."¹⁷⁶

On the retrial of the case,¹⁷⁷ two of the prospective jurors, who were highly educated men, admitted that they entertained opinions as to the guilt or innocence of the defendant, based on information they received by reading the newspaper accounts of the previous trial. Both of these men declared that their preconceived opinion would readily yield to the evidence adduced during the trial. The court again stated that a prospective juror who has formed an opinion is competent if, having no prejudice against the accused, he can lay aside that opinion.

Probably the best statement of the rule is in *State v. Hamilton*: "The jurisprudence of this state has consecrated the rule that proffered jurors are not incompetent or disqualified from serving as jurors in a criminal case because of impressions or opinions formed from reading of newspaper reports and from hearing the case discussed, where such impressions and opinions are not definitely fixed, but will readily yield to the evidence

174. 188 La. 762, 178 So. 343 (1937).

175. 197 La. 999, 3 So.2d 104 (1941).

176. *Id.* at 1019, 3 So.2d at 111.

177. *State v. Henry*, 200 La. 875, 9 So.2d 215 (1942).

adduced on the trial of the case, and where such jurors feel, and so testify to the satisfaction of the trial judge, that their minds are open and in such condition as that they can and will decide the case solely on the evidence produced on the trial of the case."¹⁷⁸

The statement is in effect a mere elaboration of Article 351 (1), which was subsequently enacted, that a juror is not disqualified by an opinion as to guilt or innocence "which is not fixed, or has not been deliberately formed, or that would yield to evidence, or that could be changed." Considerable discretion is vested in the trial judge in determining whether previous knowledge of the case will disqualify a juror, and whether the juror's positive testimony that he will decide the case entirely upon the evidence presented at the trial is sufficient to bring him within the proviso of Article 351.

The standard observed in Lord Mansfield's day and time, that the mind of a juror should be "white as paper," is impractical under modern conditions, and is no longer accepted as correct. The rule now generally observed, although the courts of several of the states have gone much further, is the one announced by Chief Justice Marshall on the trial of Aaron Burr. He said: "Were it possible to obtain a jury, without any pre-possession whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court, is that light impressions which may be fairly supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror, ought to test him by this rule."¹⁷⁹

This rule has long been adhered to in Louisiana.¹⁸⁰ In applying the rule, the question of whether a juror is disqualified by

178. 155 La. 1069, 1071, 99 So. 874 (1924).

179. See *State v. George*, 8 Rob. 535, 538 (La. 1844). In the early common law jurors were selected because they were familiar with the facts in the case, and not, as now, because of their ignorance of them.

180. See cases cited in *State v. Joiner*, 163 La. 609, 112 So. 503 (1927).

reason of a preconceived opinion is always one of degree, and the court must determine, from all the circumstances of the case and the mental characteristics of the juror, as disclosed on his voir dire, whether his state of mind is such and the opinion he entertains is such as will prevent him from rendering full and impartial justice in the case. It is important to determine whether the juror entertains a strong opinion or merely a weak impression.

(2) *Relationship of juror to parties and others involved.* The second of the special causes provided in Article 351 for which a juror may be challenged is "that the relations, whether by blood, marriage, employment, friendship or enmity, between the juror and the accused, or between the juror and the person injured, are such that it must be reasonably believed that they would influence the juror in coming to a verdict." The entire community is usually enraged by the commission of a crime, but unless the juror has a special relationship to the victim, it is supposed that his emotions and passions have not been so aroused as to deprive the accused of a fair trial. It is only the existence of one of the relationships listed in Article 351(2) which may justify the presumption that the juror is biased.

At common law a juror was subject to challenge if he was related to a party to the action within the ninth degree, by affinity or by consanguinity.¹⁸¹ However, rather than provide that a given degree of kinship to certain participants will disqualify a juror, as is the practice of many jurisdictions, the statute in Louisiana provides that any relationship between the juror and the accused, or between the juror and the victim, which would influence the juror in reaching his verdict is a basis for a challenge for special cause.¹⁸² Personal friendship or enmity is sufficient cause to incapacitate a juror from serving, even without a family relationship. On the other hand, distant relationship unaccompanied by prejudice is no cause for challenge.¹⁸³

A practical interpretation, similar to that given the right under Article 351(1) to challenge for a preconceived opinion, is

181. See McGee, *Selecting the Jury in Criminal Cases — Some Common Law Aspects*, 5 ALA. L. REV. 213, 218 (1952).

182. LA. R.S. 15:351(2). The court in *State v. Caron*, 118 La. 349, 42 So. 960 (1907) pointed out that at common law family relationship to the ninth degree was considered a good ground for challenge, but the court did not adopt the rule. See Note, 25 TUL. L. REV. 402 (1951).

183. *State v. Carricut*, 157 La. 140, 102 So. 98 (1924).

adopted for the right to challenge for cause because of relationship, friendship, or enmity. In *State v. Atwood*,¹⁸⁴ a murder case, a prospective juror on his voir dire testified that he was acquainted with both the deceased and the defendant, and that he was acquainted also with certain members of the deceased's family. However, he added that he was not biased or prejudiced against the accused, and that his various acquaintances would not influence him in his verdict in any way. Under these circumstances, the court held that there was no merit in a challenge for cause.

However, a juror whose relation to the defendant or the injured party is such that his partiality may be presumed is subject to challenge for cause, as, for example, a venireman who is the uncle of the defendant,¹⁸⁵ or who is related to prosecutrix in a trial for attempted rape.¹⁸⁶ The case of *State v. Dunn*,¹⁸⁷ which deals with various aspects of relationship as affecting the competency of a juror, should be considered. Here, several jurors were challenged for a variety of reasons; and, as the defendant exhausted his peremptory challenges in selecting the jury, bills of exception were reserved during the impaneling of the jury to the overruling of his challenges for cause. A juror against whom the challenge for cause was directed was a member of the Ku Klux Klan, of which the deceased was also a member, and attended the funeral of the deceased in the regalia of that organization. Two or three prospective jurors were members of the same church to which the deceased belonged, and of which he was an officer, and attended the same Bible class that the deceased attended. One of the veniremen made donations to a fund for the relief of the widow and children of the deceased. The jurors who were Klansmen answered on their voir dire that the fact that they were members of the Klan would not influence their verdict one way or another if they were accepted as jurors; that those who were members of the same church and Bible class, as was the deceased, answered that they would not be influenced by that fact in reaching a verdict; and those who made donations answered similarly.

It should be observed that, while what a juror says about his impartiality should be given consideration, it is not binding

184. 210 La. 537, 27 So.2d 324 (1946).

185. *State v. Rankins*, 211 La. 791, 30 So.2d 837 (1947).

186. *State v. Houck*, 199 La. 478, 6 So.2d 553 (1942).

187. 161 La. 532, 109 So. 56 (1926).

upon the trial judge, whose function it is to decide the question. The declaration of the prospective juror, that he can disregard all personal views and feelings and give the defendant a fair and impartial trial, must be tested like all other human testimony, according to the common knowledge, experience, and observation of mankind. It is the natural impulse of all men, with rare exceptions, when the question is put to them, to declare that they believe that they can disregard a preconceived opinion and render a fair and impartial verdict upon the evidence submitted to them. In general, they are sincere in their statement and belief. The declaration, however, should not only proceed from the lips of the venireman, but it should be made in connection with a state of facts showing that it is probably true.

The Supreme Court held that the trial judge did not err in refusing to sustain the challenges for cause. The proof, the court stated, showed that the rules, regulations, or ritual of the organizations do not call upon a member to convict a person charged with killing another member of that organization when the law and the evidence do not justify a conviction. Nor did the court think that the fact that a juror has contributed to a fund, raised by public subscription, for the relief of the widow and children of the deceased, is a ground to challenge the juror for cause. A contribution for the relief of the widow and children of the deceased is made upon the supposition that the widow and children are in necessitous circumstances, and the contribution cannot be considered as made for the prosecution of the case. However, there was some evidence (denied by counsel who assisted the state) that money collected had been used to hire a lawyer to aid the prosecution. The court indicated that if a juror had knowingly contributed to a fund for this purpose, he would be disqualified.

Another bill was reserved to the overruling of a challenge for cause, based on the ground that the juror's wife was a third cousin of the widow of the deceased. The court held that there was no error in overruling the challenge, as the connection was only by affinity and was remote, and the juror stated on his voir dire that he would not be influenced by the connection.¹⁸⁸

It appeared on the voir dire examination of another juror that his brother and the deceased married sisters, and the state,

188. *Accord*, *State v. Phillips*, 164 La. 597, 114 So. 171 (1927) (juror was second cousin of deceased).

upon that ground, challenged the juror for cause, which challenge was sustained by the trial judge. The Supreme Court held that there was no error in sustaining the challenge, but even if the juror were competent, the defendant has no legal ground to complain. The court reiterated the important doctrine that "the right of an accused in the impaneling of a jury is not to select jurors, but is only to reject them." The right of rejection but not of selection of jurors means that a party cannot complain when a challenge for cause of a perfectly competent juror is sustained.¹⁸⁹

Article 351(2) does not consider the relationship of a prospective juror with counsel, or with a witness, of either side. In *State v. Thornhill*¹⁹⁰ the trial court ruled that a juror who was the first cousin of an attorney assisting in the prosecution was competent. The Supreme Court stated that relationship to the district attorney, or an associate counsel for the state, is not a cause for which a juror may be challenged. "Besides," the court added, "the juror answered on his voir dire that the fact of his relationship would not influence him in arriving at a verdict."¹⁹¹

Moreover, the court holds that a juror who is related to a witness is qualified unless he is shown to be actually biased or prejudiced.¹⁹² In *State v. Joiner*¹⁹³ a prospective juror who was friendly with the main witness for the state was disqualified, but this was because he had formed a strong opinion on the case.

(3) *Service on grand jury or former petit jury.* The third of the special causes provided in Article 351 for which a juror may be challenged is "that the juror served on the grand jury which found the indictment, or on a petit jury which once tried the defendant for the same offense, or on the coroner's jury that investigated the homicide charged against the accused." The objection, however, is waived when the defendant, with knowledge of the prior service of the venireman, accepts him without objection.¹⁹⁴

189. *Accord*, *State v. Foster*, 164 La. 813, 114 So. 696 (1927); *State v. Carriut*, 157 La. 140, 102 So. 98 (1924).

190. 188 La. 762, 178 So. 343 (1937).

191. *Id.* at 770, 178 So. at 346.

192. *State v. Jones*, 195 La. 611, 197 So. 249 (1949) (son of coroner, a routine state witness, was held competent); *State v. Holbrook*, 153 La. 1025, 97 So. 17 (1923) (juror's aunt was possible witness). See also *State v. Houck*, 199 La. 478, 6 So.2d 553 (1942).

193. 163 La. 609, 112 So. 503 (1927).

194. See *State v. Jackson*, 37 La. Ann. 897 (1885). At early common law it was permissible for members of the grand jury to be included in the petit jury.

Even without the provision, a venireman who has had prior connection with the case could be disqualified for having formed a fixed opinion and for not being impartial. Article 351(3) leaves open the qualification of a venireman who has had courtroom acquaintance with an aspect of the case. For example, in *State v. Stroud*,¹⁹⁵ the defendant was jointly indicted with another for theft, but a severance was granted on the ground that their defenses were antagonistic. After the trial of the co-defendant had been completed and the jury had retired to deliberate on their verdict, the defendant was called for trial. His counsel objected to going to trial for the reason that the accused could not secure a fair and impartial trial by a jury impaneled from members of a venire who had been in the courtroom and had heard some, if not all, of the evidence produced on the first trial, which would be used on the trial of the defendant. The prospective jurors testified on their voir dire examination that they had heard a portion of the evidence and had formed an opinion which was not fixed and would yield to the evidence adduced on the trial of the defendant. The court held that the accused was afforded a trial by an impartial jury.

Suppose two indictments are brought against a single defendant and the above situation developed. Would a prospective juror, who had heard the first case, be qualified for jury service in the second trial? The court discusses this point and refers to *State v. Frazier*¹⁹⁶ where exactly this happened. The defendant here was tried for two offenses arising out of the same transaction; he had participated in a robbery and had later attempted to murder the person who assisted him in the crime. Upon completion of the trial of robbery and while the jury was deliberating on its verdict, the defendant was placed on trial for attempted murder. Defense counsel objected to his going to trial, contending that the accused could not secure a fair and impartial trial from a jury impaneled from members of a venire who had remained in the courtroom and had heard much of the evidence against the defendant in the robbery case. He contended that the members of the jury venire were "automatically and unintentionally" prejudiced by their presence in the courtroom during the first trial. The prospective jurors testified that the previous trial would not influence their verdict. The Supreme Court upheld the trial judge's ruling that the

195. 220 La. 806, 57 So.2d 691 (1952).

196. 209 La. 373, 24 So.2d 620 (1946).

veniremen were not automatically disqualified. Considerable discretion is vested in the trial judge in determining whether a previous acquaintance with the case will disqualify a juror.

(4) *Other special causes for challenge.* Article 352 also provides causes for challenge, but they are exercisable only on the part of the prosecution and not on the part of the defense. It is good cause for challenge on the part of the prosecution (1) that the juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is unconstitutional; or (2) that the juror tendered in a capital case has conscientious scruples against the infliction of capital punishment; or (3) that the juror would not convict upon circumstantial evidence. A person who is not exempt from jury duty by law soon learns that there are means by which he can avoid the service, if he so desires. All he needs to say is that he has formed a fixed opinion about the case, he is against capital punishment, or that he will not convict upon circumstantial evidence.

The statute does not contemplate that the prosecutor should question prospective jurors in capital cases as to the kind of verdict they would favor under a given state of facts or circumstances. It is optional with the jurors to qualify their verdict, and the state has no right to question them as to the character of verdict they would favor under a given state of facts. In *State v. Henry*¹⁹⁷ the district attorney, in questioning the jurors on voir dire as to their views on capital punishment under Article 352, asked the question in such a way that he practically made the whole panel commit themselves to capital punishment if he proved a given set of facts. Each of the jurors indicated in advance what his verdict would be under a certain state of facts. The procedure was held erroneous. The importance of the case is this: In examining a juror, under Article 352, the state may question him about his prejudices relative to a statute, or to capital punishment, or to circumstantial evidence, but he cannot ask a juror, "will you return a verdict of capital punishment if certain facts are proved?" or "will you convict if certain circumstances are proved?" Article 352 does not allow the state to cause jurors to commit themselves to any verdict. The jury's power to qualify its verdict is an unlimited power which cannot be impaired by seeking to bind the jurors in

197. 197 La. 999, 3 So.2d 104 (1941).

advance.¹⁹⁸ The prosecutor, as well as the defense lawyer, frequently tries to commit the jury in advance to its side of the case by the use of hypothetical assumptions of how the evidence will turn out in the case, and how in these contingencies the jurors will act. Hypothetical questions tie down the juror, and bind his judgment and vote in advance of the evidence and the judge's charge, and therefore are improper and should not be allowed.

In *State v. Guin*,¹⁹⁹ a murder prosecution of a sixteen-year-old boy, the district attorney questioned the prospective jurors on voir dire to determine whether or not they would try a defendant under seventeen for the crime of murder as they would an adult. A negative answer would indicate that the juror was antagonistic to the constitutional provision requiring a criminal trial of a juvenile between the ages of fifteen and seventeen in capital cases, and was incapable of rendering a fair and impartial verdict. Counsel for the defendant argued that the questions deprived the accused of the benefit of the juror's natural lenient attitude toward a juvenile. The Supreme Court, in rejecting the contention, pointed out that the age of the accused is not an element or a determining factor in the establishment of the crime of murder. The jury may take into consideration the age of an accused only after it has reached the conclusion that he has been proved guilty beyond a reasonable doubt, in determining whether he should be made to pay the extreme penalty for his crime or whether it should qualify its verdict. The questions propounded would have been improper had they sought in any way to limit the juror's power to qualify his verdict.

In *State v. Dunn*,²⁰⁰ a bill of exception was reserved by the defendant to the court's ruling which sustained a challenge of a juror for cause, made by the state, because the juror said on his voir dire that he would not inflict the death penalty in a case where the evidence was purely circumstantial. The defendant

198. See LA. R.S. 15:409 (1950). Counsel may ask a juror if he "could," but not whether he "would" render a certain type of verdict. See *The Work of the Louisiana Supreme Court for the 1954-1955 Term — Criminal Law and Procedure*, 16 LOUISIANA LAW REVIEW 334, 348 (1956). As a corollary of the statutory rule that the prosecution may challenge for cause a juror who has conscientious scruples against the infliction of capital punishment, it has been recognized that the defense has a proper challenge for cause where the juror has conscientious scruples against the rendition of a qualified verdict. See *State v. Henry*, 196 La. 217, 233, 198 So. 910, 915 (1940).

199. 212 La. 475, 32 So.2d 895 (1947).

200. 161 La. 532, 109 So. 56 (1926).

objected to the challenge for cause on the ground that the state had not declared that the case was one wherein the evidence was purely circumstantial, and until it is so declared it had no right to challenge for cause on that ground. During the course of the trial it developed that the state's case consisted purely of circumstantial evidence. But, aside from that, the Supreme Court held that even the erroneous sustaining of a challenge by the state affords no ground for setting aside the verdict, because the defendant has the right only to reject jurors, and not to select them.

Peremptory challenges. A peremptory challenge is one that excludes a juror from serving without the necessity of assigning a reason for the challenge. It is the right to have a juror excluded without cause, and the court is bound to allow it. Although a peremptory challenge can be made without giving any reason, it may be better practice to justify its use by a reason to avoid creating an unfavorable impression upon the jurors retained. Article 354 provides the number of peremptory challenges allowed each side.²⁰¹ Obviously, since the number of peremptory challenges are limited, counsel should first resort to a challenge for cause whenever possible.

In capital crimes, or crimes necessarily punishable with imprisonment at hard labor, the defendant and the prosecution are each entitled to twelve peremptory challenges. In all other cases, the defense and the state each have six peremptory challenges. Each defendant, in a mass trial case, is entitled to the number of peremptory challenges provided in Article 354, and the state is given the same number of challenges "for each defendant."²⁰²

Prior to the Code of 1928, the state had one-half of the number of peremptory challenges that were given to the accused. The state had six, the defense twelve. This provision originated in England during the time when over one hundred and sixty crimes, from petty larceny up to murder, were punishable by hanging. The severity of penalties for the small offenses re-

201. LA. CONST. art. I, § 10, provides that the accused "when tried by jury shall have the right to challenge jurors peremptorily, the number of challenges to be fixed by law."

202. LA. R.S. 15:354 (1950) was amended by Act 365 of 1938 to read "each defendant" instead of "the defendant." However, this was already the rule by interpretation. See *State v. Caron*, 118 La. 348, 42 So. 960 (1907). In some jurisdictions, if there is more than one defendant, they must jointly share a single defendant's peremptory challenges. See STEWART, FEDERAL RULES OF CRIMINAL PROCEDURE 199, 204 (1945); Note, 14 ST. JOHN'S L. REV. 142 (1939).

sulted in the development of these protections for the defendant. The court wanted to mitigate as far as possible the severity and harshness of penalties that were inflicted upon conviction. At present, since it is felt that there is no reason to handicap the state in such a manner, the state is allowed the same number of challenges as the defendant.

In the case of *State v. Elmore*²⁰³ (which occurred prior to the adoption of the Revised Statutes of 1950), counsel argued that Article 354, entitling the state to as many peremptory challenges of jurors as defendant, is substantive and not procedural law, and is therefore unconstitutional under the ruling in *State v. Rodosta*,²⁰⁴ where it was held that the Legislature could not, by adopting the Code of Criminal Procedure in a special manner, change the substantive law of the state because no such authority was conferred by the Constitution. The court held the section to be constitutional, as relating to a matter which is purely procedural, since it regulates the steps by which one who violates a criminal statute is punished, and does not declare what acts are crimes nor prescribe the punishment for committing them.²⁰⁵

Priority of challenging jurors. There is some division among the states on the question of priority of challenging. Generally the prosecution is required to challenge first. Practice varies as to whether all, or more than one, challenge must be made at a time. The question is resolved in most states by statute.

In *State v. Roberson*²⁰⁶ a bill was taken to the refusal of the trial judge to have a full panel of twelve jurors present in the jury box in front of the accused at all times while the jurors were being examined on their voir dire. Each juror was called individually and examined by the state, tendered to the defendant and either accepted or rejected by him. The defendant contended that all twelve simultaneously should have been tendered to him. The Louisiana Supreme Court stated: "[s]ince it is not mandatory on the court to select a jury according to any prescribed form, it follows that a jury may be selected in any way that permits the accused to examine each juror touching his

203. 179 La. 1057, 155 So. 896 (1934).

204. 173 La. 623, 138 So. 124 (1931).

205. *Accord*, *State v. Thornhill*, 188 La. 762, 178 So. 343 (1938).

206. 157 La. 974, 103 So. 283 (1925).

qualifications, and to exercise as to such juror his right to challenge for cause, or peremptorily, as the case may be."²⁰⁷

Hence, a lot of leeway exists in the method of examination, with one exception, to wit, Article 358. This article provides in part that the jurors must be tendered first to the prosecution, and, if accepted, then tendered to the defense; the article further provides that when a juror has been accepted by both sides, then neither side has an absolute right to challenge him peremptorily.

In *State v. Ferguson*²⁰⁸ the district attorney examined several jurors on their voir dire and tendered them to the defendant without acceptance or rejection. After their examination, the defendant tendered them back to the district attorney without acceptance or rejection. The defendant objected to the trial court's ruling that the district attorney has the right to cause the defendant to accept or reject first. The Supreme Court held that the procedure was reversible error.

The state is required to exercise its right of challenge first because the party who has the last choice has the advantage. The state may not want a juror but will pass him temporarily in the hope that the defendant will challenge him peremptorily, thus saving a challenge for the state and wasting one for the defendant. The trial judge in his per curiam, while admitting that he had committed error, stated that a new trial should not be granted because the defendant had not exhausted his peremptory challenges and hence was not prejudiced. The Supreme Court, however, stated that the method of challenging jurors in this case was a direct violation of a substantial right guaranteed the accused under the Constitution²⁰⁹ and constitutes reversible error, even though no prejudice is shown to the defendant.²¹⁰

The tendering of a juror to the defendant's counsel, by the district attorney, after he has examined the juror on his voir dire, is in itself tantamount to an acceptance of the juror by the district attorney, subject to the rights which are accorded to both sides under Articles 358 and 359.²¹¹

207. *Id.* at 986, 103 So. at 287.

208. 187 La. 869, 175 So. 603 (1937).

209. LA. CONST. art. I, § 10, guarantees the defendant a right to peremptory challenges but leaves the number thereof to be fixed by the legislature.

210. *Cf.* *State v. Breedlove*, 199 La. 965, 7 So.2d 221 (1941).

211. See *State v. Boone*, 194 La. 977, 195 So. 511 (1940). The following systems for examining veniremen are possibilities: (a) The court calls one venireman

Time for challenge. (i) Peremptorily. Article 358 provides that when a juror has been accepted by both sides, the court in its absolute discretion may allow either side to peremptorily challenge the jurors up to the time that the jury is impaneled. The rule that the tender of a juror by the prosecution to the defendant is an acceptance of that juror by the district attorney is cut across to the extent that the judge has the discretion under Article 358 to allow a challenge after the defendant has accepted the juror. In *State v. Thornhill*,²¹² after a jury of twelve had been selected and duly sworn, the state, over the objection of the defense, was permitted to use one of its peremptory challenges. The defendant contended that under Article 358 the trial judge, after a juror has been accepted by both sides, can allow a party to peremptorily challenge jurors only up to the time that the jury is impaneled, and not thereafter. In this case the defendant had not exhausted his peremptory challenges when the new juror was called, nor did he challenge him, and as a consequence, the Supreme Court affirmed the ruling on the ground that the defendant had suffered no injury.

at a time for examination and qualifies him generally. The state then makes its decision, and if the prospective juror is found satisfactory, he is submitted to the defendant for his approval. If satisfactory, the juror then goes into the box and the next venireman is called. (b) The court calls a group of two, three, or any number up to twelve and examines the whole group, submits them to the district attorney, and then to the defendant, and those who remain take their seats. See *State v. Lea*, 228 La. 724, 84 So.2d 169 (1955). (c) The court calls a group of twelve veniremen and allows the district attorney to examine them. If he challenges, say five, then the court calls five more and so forth until a twelve-man jury is acceptable to the district attorney. Then they are submitted to the defendant. If the defendant excuses five, then five more veniremen are submitted to the district attorney, and then turned over to the defendant, and so forth. Another method is for each side to be given a list of jurors in order in which they will be called. Each marks his challenges and then those not challenged by either side are called and examined as to challenge for cause. This procedure would not be permissible in Louisiana because of Article 358, requiring a tendering of jurors first to the prosecution, and, if accepted, then to the defense. See Adams, *Hints on Reforms in Louisiana Criminal Procedure*, 2 LOYOLA L.J. 7 (1920).

In the federal courts in Louisiana the trial judge examines the prospective jurors, and if the attorneys wish to ask any questions of the jurors, these questions are directed through the judge. In this manner the judge screens all questions to the jurors and may delete any which he feels are irrelevant, immaterial, or embarrassing in any manner. Usually the selection of a jury panel in a federal court will take only about fifteen minutes. The federal court in Louisiana prides itself on the high quality of jury panel which it has had in its cases. The federal authorities try to do everything in their power to convenience a juror. If for some reason an attorney receives a continuance, the United States Marshal will contact each juror and inform him that he is not required to come to court that day. Every juror who is called in the federal courts is paid seven dollars a day, whether he sits in a jury panel that day or not. The practice is to allow a five-year interval between jury service periods.

²¹² 188 La. 762, 178 So. 343 (1937), cited with approval in *State v. Rankins*, 211 La. 791, 30 So.2d 837, 839 (1947). See also Note, 4 TEXAS L. REV. 125 (1925).

The court stated:

"If it should appear in any case that, at the time the State peremptorily challenged a juror, the panel was complete, and the defendant had exhausted his peremptory challenges and was compelled, because of the State's challenge, to accept an obnoxious juror, we would not hesitate to set aside the conviction and sentence in such a case, as both prejudice and injury to the defendant would be clearly shown.

"But, in the instant case, it is not stated by defendant . . . that defendant's peremptory challenges had been exhausted, and that he was forced, by the peremptory challenges allowed the State, to accept an obnoxious juror.

"Nor does defendant pretend . . . that, by his ruling, the trial judge allowed the State more peremptory challenges than are allowed by law. Had he done so, it would have been reversible error, and a new trial would have to be granted to defendant. But the fact is that the district attorney exhausted his last peremptory challenge against the juror, . . . as shown by his statement: 'We have one other challenge and want to challenge [the juror].' The record fails to disclose that any additional peremptory challenge was allowed the State by the trial judge in this case."²¹³

(ii) *For cause.* Article 355 provides that the incompetency of a juror for cause can be challenged up to the time that he is sworn in, unless the juror answered falsely on his voir dire examination as to the particular qualification afterwards complained of. However, Article 359 states that a juror, although he may have been accepted by both the prosecution and the defense, may, up to the beginning of the taking of evidence, be challenged for cause by either side, or be excused by consent of both sides. The articles differ as to the ultimate time for a challenge for cause, as the swearing in of the jury and the taking of evidence do not occur simultaneously. The conflict is possibly resolved by Article 360 which provides that, after a juror has been accepted and sworn, and it is discovered that he is incompetent to serve, the judge may, in the exercise of his sound discretion, at any time before evidence has gone to the jury, order the juror to be set aside and the panel to be completed in the ordinary course. Hence, from a combined reading of Articles

213. 188 La. 762, 778, 178 So. 343, 348 (1937).

355, 359, and 360, counsel has an absolute right to challenge a juror for cause before he is sworn in, but, after swearing in and until the taking of evidence before the jury, it is within the discretion of the trial judge to allow a challenge for cause. However, if it is discovered after the taking of evidence that a juror falsified as to his qualifications, a mistrial will be called, unless alternate jurors were drawn.

Alternate jurors. After the trial of a criminal case has begun, it sometimes becomes necessary to discontinue the proceedings and start all over again because a juror is unable to continue for some impelling reason such as illness. It is particularly disappointing to have this happen after the case has been in progress for many days. The longer the trial the greater is the possibility of such an occurrence. In some jurisdictions the defendant can avoid the necessity of a fresh start by waiving his right to a full panel, but this procedure is not satisfactory because it places the control of the trial in his hands. As a result, the trend in many states is to authorize the selection of alternate jurors for cases likely to be protracted.

The statute in Louisiana provides that whenever, in the opinion of a judge of a district court about to try a defendant against whom an indictment or information has been filed, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn, the court may direct the selection of one or two alternate jurors.²¹⁴ The provision that the trial court may direct selection of one or two additional jurors, if he thinks that the trial may be protracted, is however not mandatory.²¹⁵

Alternate jurors are drawn from the same source, and in the same manner and have the same qualifications as the jurors already sworn, and are subject to the same examination and challenges. Each defendant is entitled to one peremptory challenge to each of the alternate jurors and the prosecution is entitled to one challenge to each of the alternate jurors for each defendant.

214. LA. R.S. 15:362 (1950), originally Act 6 of 1940, was placed in the Code of Criminal Procedure as Article 359.1.

215. *State v. Roberson*, 225 La. 74, 72 So.2d 265 (1954). Rule 24(c) of the Federal Rules of Criminal Procedure provides that the court may direct that not more than four jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.

The alternate jurors sit with the regular jury, with equal power and facilities for seeing and hearing the proceedings in the case, and take the same oath,²¹⁶ and must attend the trial at all times in company with the other jurors. If the regular jurors are kept in custody during the trial of the cause, the alternate jurors must also be kept in confinement with them.

The alternate jurors are discharged upon the final submission of the case to the jury. An amendment in 1944 enlarged the causes for excusing a juror and putting an alternate in his place.²¹⁷ Prior thereto, the only grounds for using an alternate was the death or illness of a regular juror. Since 1944, any cause, in the opinion of the court, which renders a juror unable or disqualified to perform his duty, or warrants his discharge as a juror, is grounds for excusing a regular juror and replacing him with an alternate. Moreover, unless alternates are drawn, an incompetent juror can be excused only before evidence is taken, and then the panel is completed in the ordinary course,²¹⁸ whereas, if alternates are drawn, an alternate can be substituted up until the final submission of the case.

Erroneous Ruling on Challenge for Cause

The rule that a party has a right to reject but not to select a jury should be examined in the light of Article 353. The language employed in the article is cumbersome and has caused difficulty. It provides:

“No defendant can complain of any ruling sustaining or refusing to sustain a challenge for cause, unless his peremptory challenges shall have been exhausted before the completion of the panel; moreover, the erroneous allowance of challenges for cause affords the defendant no ground of com-

216. The following oath is administered to the jurors: “You will well and truly try, and true deliverance make, between the State of Louisiana and the prisoner at the bar, whom you shall have in charge, and a true verdict give, according to the law and the evidence, so help you God.” LA. R.S. 15:361 (1950). This final oath of the jurors is separate and apart from the oath on voir dire as provided by Article 356. With reference to the time when jurors who have been accepted by the state and defense should be sworn, the Supreme Court said: “Since there is no statute in this state prescribing when the jurors, once accepted, shall be sworn to try the case, it follows that they may be sworn at any time before the trial is commenced by the reading of the indictment.” *State v. Scruggs*, 165 La. 842, 859, 116 So. 206, 213 (1928). The court held that refusal to swear the jury until all twelve jurors had been selected was not error. In *State v. Hoover*, 203 La. 181, 13 So.2d 784 (1943), the court held that an accused could not object for the first time in a motion for a new trial for a failure to swear the jury.

217. LA. Acts 1944, No. 225.

218. LA. R.S. 15:360 (1950).

plaint, unless the effect of such ruling is the exercise by the prosecution of more peremptory challenges than it is entitled to by law, or unless the defendant by such ruling is forced to accept an obnoxious juror."

According to the first part of Article 353 (the part of the article preceding the semicolon), the defendant cannot complain of any ruling as to a challenge for cause unless his peremptory challenges are exhausted before the completion of the panel. The defendant cannot complain of the court's refusal to excuse a juror for cause, even if his challenge had merit, unless he can show that he had exhausted his peremptory challenges before the completion of the panel, notwithstanding the fact that the defendant's peremptory challenges are diminished by the error, when the defendant excuses that venireman from jury service. The argument is that the error is not material if his peremptories are not exhausted in the completion of the panel. This is an old and fundamental common law rule based upon the conception that a defendant should not be allowed to complain of a juror if he could have excused him by use of a peremptory challenge in completing the panel, so as to show that the judge's ruling was prejudicial.

Suppose the judge wrongly allows the state's challenge for cause. To be substantial error, it is also necessary that the defendant exhaust his peremptory challenges, in order to show that other acceptable jurors could not be obtained. The second part of Article 353, beginning with the word "moreover," in effect states that if a qualified juror is challenged for cause by the state and this is allowed, the defendant can complain if: (a) the state's peremptory challenges are exhausted and this ruling in effect gives the state an additional peremptory challenge, or (b) the erroneous allowance of the challenge by the state brings up a juror who is obnoxious to the defendant and the defendant has no peremptory challenges remaining to excuse him. The latter part of Article 353, it should be observed, states two points disjunctively, that is to say, the defendant can show either that the state was allowed an extra peremptory challenge, or that he was forced to take an obnoxious juror. It should also be noted that Article 353 does not state that the defendant, before he can complain, must be forced to accept an incompetent juror, because if this were so, he would have a good ground for challenge. The article says an "obnoxious" juror. In other words,

although the juror who comes up is qualified, but is nonetheless obnoxious to the defendant, this obnoxiousness being short of grounds for a challenge for cause, the defendant can complain.

In *State v. Breedlove*,²¹⁹ a landmark case in Louisiana law, the trial court erroneously overruled the defendant's challenge of a prospective juror for cause. The defendant then peremptorily challenged the objectionable juror and exhausted the remainder of his peremptory challenges before the jury panel was completed. Nothing in the record indicated that he was not entirely satisfied with the jurors finally selected to determine the case. He did not complain that he was forced to accept an obnoxious juror. After conviction, the defendant urged the erroneous refusal to discharge a juror for cause.

It was admitted by the Supreme Court that the challenged juror was incompetent and that the defendant's challenge for cause should have been upheld. Therefore, on the face of Article 353, the defendant, who had used up all of his peremptory challenges, could claim reversible error. However, the Supreme Court concluded that when a challenge for cause is erroneously overruled, the defendant, in addition to exhausting his peremptory challenges, must specifically show that he was compelled to accept an obnoxious juror as a result of the erroneous ruling. The defendant, in order to complain under Article 353 on a ruling on his challenge for cause, must show error in refusing the challenge, exhaustion of his peremptory challenges, and a forced acceptance of an obnoxious juror. In other words, the court took the last clause of Article 353, which seems to deal with the situation where the state has been allowed an erroneous challenge for cause, and brought it up to apply also to the first part of Article 353. This was a four to three decision.

On rehearing, the court said that two Justices of the original majority were dubious of their holding, but concluded that since there was no prejudice shown to the defendant, then under Article 557, he could not complain. Much emphasis was placed upon Article 557 which declares that a judgment shall not be set aside without a specific showing of prejudice, harm or injury from the erroneous ruling. The court concluded, that, since defense counsel made no objection to any of the jurors selected

219. 199 La. 965, 7 So.2d 221 (1942), discussed in *The Work of the Louisiana Supreme Court—Criminal Law and Procedure*, 5 LOUISIANA LAW REVIEW 241, 253 (1943).

after he had exhausted all of his peremptory challenges, the defendant had no need for the twelfth peremptory challenge which had been used to excuse the juror which the court erroneously refused to discharge for cause. In addition to exhausting his peremptory challenges, the defendant must show that he has been forced to accept an obnoxious juror, and this is done by objecting to a juror after his peremptory challenges have been exhausted. This must be done in order to show specific prejudice, which is required by the majority opinion to justify a reversal under Articles 557.

Chief Justice O'Niell on rehearing dissented again on the ground that under Article 557 actual prejudice need not be shown if the defendant can show a clear violation of his statutory rights.²²⁰ And under Article 353, the dissenter argued that, when a challenge for cause is improperly overruled and the defendant's peremptory challenges are exhausted before the jury panel is completed, the accused is per se prejudiced, and the verdict should be set aside. By this view, a sufficient presumption of injury is established by the fact that defense counsel has exhausted his peremptory challenges in impaneling the jury, without requiring him to challenge and thus to prejudice a juror that he is ultimately forced to keep.

The judges of the court in the *Breedlove* case were sharply divided. The three dissenting judges were of the opinion that it is only necessary for a defendant to exhaust his peremptory challenges in order to secure a reversal on the ground of an improper overruling of his challenge of a juror for cause. Of the majority opinion, some argued that little significance should be placed upon the semicolon in Article 353, and that, in addition to exhausting his peremptory challenges, the defendant must show that he has been forced to accept an obnoxious juror, and he can do this by objecting to a juror after his peremptory challenges have been exhausted. Others of the majority opinion, having doubt of this interpretation of Article 353, stressed the broad provisions of Article 557 requiring a specific showing of prejudice from the erroneous ruling. The result is the same: the defendant, in order to obtain a reversal, must object to a venireman after his peremptory challenges have been exhausted.

220. See, e.g., *State v. Ferguson*, 187 La. 869, 175 So. 603 (1937), where it was held to be reversible error, even though actual prejudice is not shown, for the state to cause the defendant first to accept or reject prospective jurors.

Subsequently, the court in *State v. Henry*,²²¹ despite the force of the dissent in the *Breedlove* case, followed the original holding by a six to one vote, to wit, that under Article 353, the defendant must show not only that the refusal of his challenge for cause was erroneous and that he exhausted all of his peremptory challenges, but also that he was forced to accept an obnoxious juror. Chief Justice O'Niell again dissented but he was not joined by the two judges who had agreed with him in the *Breedlove* case.²²²

Subjective Factors in Selection of Jury

What are the considerations which govern the use of a peremptory challenge in the selection of a juror? This is to ask, what are the factors which are considered by counsel which are independent of the legal qualifications required for jury service. As these considerations are extremely subjective, a cross-section of the Criminal Bar was consulted for their opinions.

It is frequently stated by the veteran criminal lawyer that the selection of the jury constitutes the most important part of the trial of the case.²²³ On the other hand, a great number of attorneys select jurors without any regard to their psychological make-up. The selection of jurors is considered by them to be unimportant, and is left to the simple statement: "Mr. Clerk, any twelve ladies and gentlemen will suit us. If there is anyone on this panel who knows that he cannot give my client a fair trial, I am sure he will be asked to be excused without my asking him any questions."²²⁴ However, if it is obvious that some of the jurors do not consider a fellow juror competent, attorneys who are prone to accept jurors as they come often deem it advisable to challenge and leave the impression with the remainder that "they are the chosen few." In addition, practical reasons, such as the lack of separate facilities for eating and sleeping, may cause the state to excuse women and Negroes from jury service.

221. 200 La. 875, 9 So.2d 215 (1942).

222. Since the time of the *Breedlove* and *Henry* cases, the composition of the Supreme Court has considerably changed. Only one judge of the present court, Chief Justice Fournet, has not expressed doubt as to the merits of the *Breedlove* decision.

223. See GOLDSTEIN, TRIAL TECHNIQUE, c. 4 (1935); KEETON, TRIAL TACTICS AND METHODS, c. 7 (1954).

224. See LAKE, HOW TO WIN LAW SUITS BEFORE JURIES, c. 2 (1955). In a light vein, one writer remarks: "[S]kill will not suffice . . . selection of a jury is just like throwing dice." Jackson, *Picking a Jury*, 61 CASE & COMMENT 40 (March-April 1956).

The prohibition against the systematic exclusion of a group has not been used as a control over the exercise of peremptory challenges.

Race, religion, nationality, and other affiliations. We are aware of the hostile attitudes which exist toward some social group having some distinctive common characteristic, whether it be race, religion, national origin, or something else. A factor which is considered in the selection of the jury is whether the prospective juror is a member of the same group as the defendant or the victim. The types of prejudices against a social group are numerous, but anti-Negro prejudice in the United States is the kind of prejudice that is most intense. The effect of prejudice is to distort the judgment and interpretation of situations.

Prejudices are attitudes, and just like any other attitude, they are learned. They serve the purpose of gratifying an individual's needs. Probably the need best served by prejudice is the need for status. A prejudice creates a social hierarchy in which the prejudiced person has a superior status. Some people need to think well of themselves, to think themselves better than others. The poorest, least educated, most unimportant white in a backwoods southern town has the consolation of "knowing" that he is mentally, morally, and socially superior to many of the residents of his area. Prejudice also serves the need to express aggression. Hostility or aggression usually originates in the frustration of needs. Most people and particularly the underprivileged are sometimes frustrated and consequently to some extent aggressive. Aggression resulting from frustration can often be simply vented at whatever is doing the frustrating, but when this is not possible, the aggression is displaced, and is called scapegoating. The most convenient object to displace his aggression is likely to be the group against whom he already has a prejudice.

Racial prejudice, of course, is not limited to the situation in which a Negro is charged for a crime against a white person.²²⁵ The attitude is equally vicious when a white person is accused of a crime against a Negro. In such a situation, defense counsel generally does not want a Negro member of the jury. The Negro bears a grievance against the white for the manner in which he

225. A juror may have a resentment against a lawyer of the colored race pleading before the jury. See *State v. Sanders*, 103 S.C. 216, 88 S.E. 10 (1916).

has been ill-treated, and probably looks for an opportunity to even the score. The Negro feels that the members of the white race violate the rights of the Negro almost without hesitation, and as a result he might tend to punish this particular accused for all the offenses committed against his race.

The state will tend to exclude an individual from the panel when he is a member of the same group as the defendant, particularly so when the group is closely knit such as the Irish, the Hebrew, the Italian, the French and the Spanish. On the other hand, defense counsel will desire a juror who will be sympathetic towards the accused. Some defense attorneys prefer jurors of the Jewish faith because it is felt that their history as a persecuted group tends to align them with the person being prosecuted. They may feel that, generally speaking, a Hebrew will be less inclined to vote for capital punishment.

In narcotic cases, defense counsel will frequently excuse a juror who has teen-age children because of the tendency to think that, "there, but for the grace of God, is my child, ruined by the activities of this nefarious person."

Women jurors. Women are often placed in the category of the emotional and sympathetic type of juror. Defense counsel, when he has to rely on his histrionic ability to achieve an acquittal, willingly accepts women jurors because "they will muddy the judicial waters." As the services of women are voluntary, and they must expressly waive exemption in order to serve on the jury, the prosecution will accept women jurors because they have an exceptional interest in the community and will probably be "state-minded." A woman who will go down to the courthouse and register for jury service is perhaps too interested in civic matters to be a desired juror for the defense.

Age. The age of the prospective juror can be an important consideration. If a young man is on trial, the prosecution will try to eliminate other young men as they would tend towards self-identification and sympathy. In capital cases the prosecution prefers to stay away from men over sixty-five years of age as they generally cherish life too dearly. Thirty-five is considered by the prosecution to be the best age for a juror, since he then has seen enough of life not to be swayed by an emotional appeal, and he still has enough time ahead of him not to be excessively conservative about the life of the defendant. The de-

fense, on the other hand, prefers an older person, a person who will no longer have a crusading attitude and who will have come to realize that "life is not a bowl of cherries and never will be."

Economic status. The neighborhood in which the prospective juror lives is an important consideration. As violence and fighting is a more normal part of the lives of people from tough neighborhoods, they are not as apt to be morally shocked by brutality on the part of the defendant, but to accept it as a matter of course. In crimes of violence, the state will seek educated jurors from a good neighborhood.

The type of job which the potential juror holds is considered. The state often likes to have a "one-man jury." Embezzlement cases generally involve technical matters, and specialized training is needed to understand properly the oral and documentary evidence. One individual on the jury who understands the facts can influence the entire jury with his knowledge and his experience. Also, one individual on the jury who has studied law can develop into a "one-man jury." The defense will immediately excuse such a person. Defense counsel who has a weak case wants jurors whom he can easily influence.²²⁶ On questions of law, however, the defense will want an intelligent jury.

In cases requiring a unanimous decision, the defense will not want a juror whose mind is on his business, and as a result will be in a hurry to get through with the case. But probably the only persons who will not be in a hurry are those who have retired or are on pension.

Some defense attorneys do not desire jurors who are insurance adjustors, bank tellers, or government employees because of their tendency "to have a regimented thinking process and to be somewhat sanctimonious."

Manner of counsel. All questions asked of any juror should be presented in a polite and respectful manner. Repetitious questions and questions which tend to embarrass, shame, degrade, confuse, or antagonize the juror should be avoided. Chal-

226. "The woeful lack of intellectual endowment on the part of a juror is no doubt a most serious difficulty of common occurrence. Such lack of endowment is, to the defense lawyer in a criminal case, the very highest qualification any juror can possess. If a prospective juror discloses intelligence and competency he is promptly excused by the defense. . . . The highest achievement of the defense lawyer in a criminal case with a guilty client rests in his successful effort to confuse and befuddle twelve inexperienced and sentimental jurors with issues entirely foreign to the merits of the case." Miner, *The Jury Problem*, 41 ILL. L. REV. 183, 184 (1946).

lenging or excusing a juror should be accomplished in a quiet, dignified manner so as not to arouse the resentment of any other juror or any friend that the excused juror may have on the panel. In short, counsel should practice the art of being a gentleman.

The voir dire is useful to implant certain ideas in the mind of the juror. Defense counsel can use the opportunity of the voir dire to accentuate the fact that the indictment and the opening statement do not mean that the facts included therein are true or that the defendant is presumed guilty. Counsel can emphasize to the jurors that they must vote as individuals and not be swayed by the majority.

The voir dire is also employed by counsel to ingratiate himself with the jury. By memorizing the names of the jury members, calling them by name on voir dire, asking them about their business and their home, and in general becoming acquainted with the jurors and showing a genuine interest in them as people, counsel will be able during the trial to direct his argument to that particular juror who will best influence the other jurors. This procedure compliments that juror, because he feels that the attorney recalls him and has remembered his particular history.

The individuals who make up the jury will determine the fate of the accused. It is therefore important for the attorneys to know what kind of person will be on the jury if they hope to be effective in their courtroom presentation.

The prosecuting official will often make a special effort during the voir dire to appear before the jurors as completely fair in order to remove any impression that they might have of the bloodthirsty prosecutor. For example, he will ask if any member of the jury knows either himself or any member of his family. If an answer is in the affirmative, the prosecutor will make a grand speech in which he will say that he knows that the juror would try to be fair, but in view of the circumstances and the desire of the state to see that the defendant gets an absolutely fair trial, he knows that the juror will agree that he should be excused.

As most of the state witnesses are policemen, and since many jurors are skeptical of police testimony, the district attorney will ask on voir dire if the juror has any prejudice against the police as witnesses. Seldom will a juror admit that he is prejudiced against the police force. In the closing argument the district

attorney will remind the jurors that they have promised not to let the fact that the witness is a policeman prejudice their thinking as to the validity of the testimony. A juror who is placed on the defensive about these prejudices may lean over backwards to accept the testimony of the police.

7. BEHAVIOR OF JURY DURING TRIAL

Separation and Misconduct of Jury

At common law, in the trial of felonies (and most offenses were classified as felonies) the jury was not permitted to separate from the time the jurors were sworn until a verdict was rendered; in the trial of misdemeanors, the court in its discretion might permit the jury to separate at any time before verdict. Those who would retain the ancient common law rule base their argument on the need for an impartial and unbiased jury, confinement and non-separation being necessary to keep the jury free from public opinion and other influences, and also to obtain a decision resulting from a group deliberation. The requirement in Article 394 that, from the time the jury is sworn until the verdict is rendered, "the jurors shall be kept together under the charge of an officer in such a way as to be secluded from all outside communication" is predicated upon the principle that the jurors should be completely protected against any attempt which might be made to influence their decision.²²⁷ But the consequences of the ancient rule forbidding the separation of jurors during a trial would deprive jurors of all association with their families, and interrupt their attention to their ordinary affairs for so long a period that jury service would become a weary burden. So there has been some relaxation of the old rule. The present rule in Louisiana is that no separation is permitted in capital cases, but in the trial of felonies not capital the court may permit the jury to separate at any time before the actual delivery of the charge.²²⁸

Misconduct of the jury or of other persons toward them may or may not, according to the circumstances, be ground for a new trial. It has just been pointed out that the court in non-capital

227. LA. R.S. 15:394 (1950). *Accord*, State v. Hornsby, 8 Rob. 554 (La. 1844). See Comment, 15 LOUISIANA LAW REVIEW 446 (1955); Note, 12 B.U.L. REV. 518 (1932).

228. LA. R.S. 15:394 (1950); State v. Wells, 168 La. 925, 123 So. 621 (1929); State v. Robichaux, 65 La. 497, 115 So. 728 (1928); State v. Baudoin, 115 La. 773, 40 So. 42 (1905); State v. Antoine, 52 La. Ann. 488, 26 So. 1011 (1900).

cases may permit the jury to separate at any time before the delivery of the charge. What effect is to be given to a judicially-authorized separation? The court has held that a judicially-authorized dispersal of a jury prior to delivery of the charge in a non-capital case is immaterial unless the defendant proves that he was thereby prejudiced.²²⁹ In non-capital cases the mere fact of separation during the trial does not render a verdict invalid, but rather improper influences while separated must be shown to nullify the verdict. The rule, however, has not been relaxed in non-capital cases in regard to dispersal of the jury after the delivery of the charge.²³⁰ In capital cases a dispersal of the jury at any time during the trial is inherently wrong and it is probable that prejudice will be presumed to result from the mere fact of a separation.²³¹

The court has frequently held in capital and non-capital cases that a momentary or accidental violation of the rule requiring isolation of the jurors from third parties which is apparently non-prejudicial to the defendant is not ground for reversal. In the case of *State v. Oteri*,²³² the court refused to set aside a capital verdict because a barber was permitted to enter the jury room to shave and trim the hair of members of the jury. In *State v. Hogan*²³³ the court refused to set aside a capital verdict on account of the jury being permitted to enter a store where one of the jurors purchased a shirt, in the absence of any showing of prejudice. In *State v. Fuller*,²³⁴ a non-capital case, the jury had been taken to a crowded restaurant where two jurors were seated at a separate table with a third person. This separation of the jurors had not been authorized, but no misconduct was shown. The Supreme Court held that an unauthorized temporary

229. See LA. R.S. 15:559 (1950); *State v. Baudoin*, 115 La. 773, 40 So. 42 (1905); Note, 25 TUL. L. REV. 511 (1951). The failure of the defendant to make timely objection to an unauthorized separation operates as a waiver of his right to object. See LA. R.S. 15:502 (1950); *State v. Jefferson*, 125 La. 296, 51 So. 203 (1910). See also *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Criminal Law and Procedure*, 16 LOUISIANA LAW REVIEW 334, 351 (1956).

230. See *State v. Populus*, 12 La. Ann. 710 (1857). The rule prohibiting separation applies until the closing of the trial by the delivery and reading of the verdict in open court and the discharge of the jury. *State v. Hornsby*, 32 La. Ann. 1268 (1880).

231. See *State v. Frank*, 23 La. 213 (1871); *State v. Populus*, 12 La. Ann. 710 (1857); *State v. Costello*, 11 La. Ann. 283 (1856); *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Criminal Law and Procedure*, 12 LOUISIANA LAW REVIEW 175, 177 (1952); Note, 25 YALE L.J. 332 (1915). See also Note, 25 NOTRE DAME LAW. 760 (1950).

232. 128 La. 939, 55 So. 582 (1911).

233. 157 La. 287, 102 So. 403 (1924).

234. 218 La. 872, 51 So.2d 305 (1951), 25 TUL. L. REV. 511.

separation of jurors does not vitiate their verdict unless they were guilty of misconduct.²³⁵

The rule requiring the isolation of a jury against improper influences does not preclude the allowance of some recreation and exercise to the jury. While the practice of allowing jurors impaneled in important criminal cases to attend public entertainments or services should not ordinarily be permitted, in the absence of any showing that the defendant's rights were thereby prejudiced the fact that such indulgence is granted is not in itself sufficient reason for setting aside a verdict.²³⁶ In *State v. Ledet*,²³⁷ a murder case, the jurors during this trial for murder were permitted to attend a moving picture show. The jurors were kept together at all times and were never separated. The rows of seats immediately in front and to the rear of them were occupied by other persons, but there was nothing in the evidence to show that an attempt was made to communicate with any of the jurors, or that anything was done that might have had a tendency to influence the verdict of the jury. Because no misconduct was shown, the Supreme Court affirmed the conviction and sentence.²³⁸

In the case of *State v. Dallao*,²³⁹ the court refused to set aside a capital verdict because the jury was permitted to go to the home of the foreman, where no one was present except a servant, and partake of spiritous liquors, while at the same time one of the jurors used an extension telephone and held a brief conversation with his wife. The court stated, in effect, that it would be pushing technicalities too far to set the verdict aside when no reasonable room exists for any reasonable hypothesis of misconduct.

235. A law review writer summarizes the decisions in Louisiana: "One consistent point can be noted in all the Louisiana jury separation cases — convictions are set aside only in instances where one or more jurors have passed out of surveillance of the court or its sworn deputies, thereby possibly exposing them to influence from outsiders. Though there be a physical separation of the jury, even for a period of several hours, a conviction will nonetheless be upheld if all jurors were constantly supervised by a deputy who can testify that they have had no outside contacts sufficient to prejudice their verdict. In view of this, the selection of mixed juries should cause no apprehension among Louisiana district attorneys, even though it be necessary for such juries to separate for sleeping and other purposes during the course of the trial." Comment, 15 LOUISIANA LAW REVIEW 446, 451 (1955).

236. See 53 AM. JUR. 623, § 853.

237. 211 La. 769, 30 So.2d 830 (1947).

238. *Accord*, *State v. Clary*, 136 La. 589, 67 So. 376 (1915). *Cf. State v. Walters*, 135 La. 1070, 66 So. 364 (1914) (separation of jurors in three adjoining but separated suites of hotel rooms was held improper).

239. 187 La. 392, 175 So. 4 (1937).

A frequent form of misconduct among jurors in the past has been the drinking of intoxicating liquor while they deliberate upon the verdict. In the case of *State v. Price*²⁴⁰ the deputies furnished whiskey to the members of the jury during deliberation. On the hearing to impeach the verdict, the jurors testified that none of them drank to excess. The Supreme Court stated that "the drinking of intoxicating liquor by the members of a jury during the trial of a criminal case is not a sufficient cause to set aside their verdict, if the drinking was done in moderation and was not accompanied by any misconduct on the part of any juror."²⁴¹ The court, although upholding the verdict, added that it "condemned the allowing of jurors to drink intoxicating liquor at all during the trial of a criminal case, and particularly a capital case." It goes without saying that the parties have a clear right to the serious and dispassionate judgment of each juror.²⁴²

Improper communication on the part of the officer in charge which prejudices the defendant is cause to set aside the verdict. In *State v. Langford*²⁴³ the bailiff told a juror who was holding out for the defendant against eleven other jurors, "Why, John! This is a plain case." This constituted reversible error. It is sometimes held that the officer's presence in the jury room during the deliberations is error, because whether or not he converses with the jury, his presence to some extent operates as a restraint upon their proper freedom of action and expression.²⁴⁴

Discharge of Jury Before Verdict

In the early common law a jury, once impaneled and sworn, could not be discharged without rendering a verdict. A failure to observe this rule was tantamount to an acquittal. The fact

240. 192 La. 615, 188 So. 718 (1939). See also *State v. Broussard*, 41 La. Ann. 81 (1889); Hebert, *Reversible Error in Louisiana*, 6 TUL. L. REV. 169, 194 (1932).

241. Herodotus, the Greek historian (484?-425?), tells how the Persians considered serious matters: "They drink wine freely, and it is their custom to take counsel on the most serious matters while they are drunk. On the following day the master of the house in which the deliberation took place proposes to them again, while sober, the decision that they reached the night before, and if it is also agreeable to them when sober, they adopt it; if not, they reject it. Furthermore, the conclusions that they reach first when sober, they consider again while drunk."

242. In *State v. White*, 48 La. Ann. 1444, 21 So. 26 (1896) a juror asked the court to hurry the case so it would be over before Sunday. Because the juror was not serious enough, the court reversed the conviction.

243. 45 La. Ann. 1177, 14 So. 181 (1893).

244. See *People v. Knapp*, 42 Mich. 267 (1879). The court in *State v. Caulfield*, 23 La. Ann. 148 (1871) ruled that the presence of the sheriff, or his deputies, in the jury room during the trial is not misconduct.

that the jury could not agree on a verdict was no excuse. Jurors were, therefore, deprived of "meat, or drink, or candle, or rest of any kind," in order to induce them to reach a decision. But the justification for coercing a jury to a verdict no longer exists because the judge may now under certain circumstances discharge the jury without barring a future trial of the accused on the same charges.²⁴⁵ A judge, therefore, will be deemed guilty of misconduct by coercing the jury to a verdict. When informed by the jury that they cannot agree, the judge may impress upon them the importance of their arriving at an agreement if they honestly can do so, but he cannot persuade the jury to arrive at a verdict by saying that he will not accept a mistrial and that the jury must renew their deliberations.

There must be necessity for the discharge in order to bar a future trial of the prisoner on the same charges, inasmuch as jeopardy attaches when a jury has been impaneled and sworn, and a discharge which is unjustifiable will operate as an acquittal. Impossibility of the jurors agreeing upon a verdict, as the illness of one of the jurors or the judge, is a justified reason for discharging the jury.²⁴⁶ The consent of the defendant is not necessary. However, before the jury is discharged because of an inability to agree, they must have had a reasonable time in which to deliberate. The defendant can then be tried again.

Note-Taking and Taking Evidence into Jury Room

After hearing the instructions by the trial judge, the jury retires to deliberate upon its verdict. In reaching its decision, the jurors in Louisiana are required to rely almost entirely upon their memories, as they are not allowed access in the jury room to any written evidence or to any notes of the testimony of any witness.²⁴⁷ They are only permitted, upon their request, to take to the jury room objects or documents which have been physically offered in evidence.²⁴⁸

The problem of note-taking by the jury is an issue upon which there is considerable conflict. In the absence of statutes

245. LA. CONST. art. I, § 9; LA. R.S. 15:397 (1950); *State v. Rodman*, 208 La. 523, 23 So.2d 204 (1945); *State v. Fuselier*, 51 La. Ann. 1317, 26 So. 264 (1899). See Notes, 10 TEMP. L.Q. 88 (1936); 15 VA. L. REV. 601 (1929).

246. LA. R.S. 15:397 (1950).

247. *Id.* 15:395.

248. *Ibid.* See *State v. McKinney*, 174 La. 214, 140 So. 27 (1932); Note, 48 MICH. L. REV. 721 (1950).

which give the jury the right to take notes (only nine states have statutes on the subject), the practice has generally been regarded by the courts as improper, but unless counsel having knowledge fails to object, he is presumed to consent.²⁴⁹ One view is that note-taking is objectionable because the attention of the juror, while he is taking notes, is diverted from the evidence as it is logically being presented. Moreover, the idea that the juror "is to register the evidence, as it is given, on the tablet of his memory, and not otherwise" is based on the fear that jurors would be too apt to rely on what might have been imperfectly written. This view might have been valid in the times when many, if not most, of the jurors were illiterate. It is also said that note-taking gives the juror taking notes an undue influence in discussing the case when he appeals to his notes in the jury room to settle conflicts of memory. Unless the jurors are allowed to take all of the evidence including a transcript of the testimony into the jury room, then whatever part is taken will be accentuated. The case, it is said, might then turn on only a part of the facts.²⁵⁰

It would seem that if there is a conflict between the recollection of the jurors and the notes, the jury could request to have the testimony read again. Moreover, it is unlikely that notes would have any unjustified effect on the jurors. These notes would be valuable as memory refreshers. In many instances it is impossible for a jury to remember a great mass of figures or facts, as in cases involving complicated book-keeping transactions.

249. See *United States v. Davis*, 103 Fed. 457, 470 (1900); *State v. Robinson*, 117 Mo. 649 (1893); Note, 19 HARV. L. REV. 303 (1906).

250. An Indiana court remarked: "The juror is to register the evidence, as it is given, on the tablets of his memory, and not otherwise. Then the faculty of the memory is made, so far as the jury is concerned, the sole depository of all the evidence that may be given; unless a different course be consented to by the parties, or the court. The jury should not be allowed to take the evidence with them to their room except in their memory. . . . Jurors would be too apt to rely on what might be imperfectly written, and thus make the case turn on a part only of the facts." *Cheek v. State*, 35 Ind. 492 (1871). *Accord*, *State v. Colbert*, 29 La. Ann. 715 (1877). And a federal court reasoned that: "It gives the juror taking notes undue influence in discussing the case, when he appeals to his notes to settle conflicts of memory. Without corrupt purpose, his notes may be inaccurate or meager or careless and loosely deficient, partial and altogether incomplete. With a corrupt purpose, they may be false in fact, and entered for the purpose of misleading or deceiving his fellows, when he comes to appeal to them. There is no protection against such dangers except to forego the practice." *United States v. Davis*, 103 Fed. 457, 470 (1900).

For the view that note-taking better enables the jury to reach a proper result, see Comment, 42 J. CRIM. L. & CRIMINOLOGY 490 (1952). The court in *United States v. Carlisi*, 32 F. Supp. 479, 483 (E.D.N.Y. 1940) stated: "Judges and lawyers make notes, why not jurors? Certainly the making of notes would better aid their memories and thus enable them to more intelligently consider the evidence."

Therefore, it has been held that, with the consent of the parties, the jurors can take notes for use during their deliberations.²⁵¹

The Louisiana statute is directed, not against the jurors taking notes, but against the jurors taking notes into the jury room.²⁵² However, not every breach of the rule is ground for a new trial. The granting of a new trial depends upon whether the defendant was prejudiced by the misconduct.²⁵³

Depositions partake of the nature of oral testimony which the jurors are to take away with them "on the tablets of their memory."²⁵⁴ The introduction of a deposition into the jury room would give to one utterance, merely because it happened to be written down, an undue prominence and effect over other equally or more important oral testimony.

The Louisiana Code of Criminal Procedure makes an exception to the rule barring the taking of evidence to the jury room for certain types of physical evidence. The jurors are permitted, upon their request, to take with them when they retire to deliberate "any object or document received in evidence that requires a physical examination to enable them to arrive at a just conclusion."²⁵⁵ In the case of *State v. Harrison*,²⁵⁶ which occurred prior to the adoption of the Code, the prosecutor placed in evidence the pedigree papers of certain dogs that allegedly had traced a route from the scene of the crime to the defendant's home. At the conclusion of his charge to the jury, and without suggestion from either the district attorney or the defendant's attorney, the judge handed the documentary evidence

251. See *Cluck v. State*, 40 Ind. 263 (1872). The question whether the judge must permit note-taking is discussed in Comment, 42 J. CRIM. L. & CRIMINOLOGY 490 (1952). See also *United States v. Campbell*, 138 F. Supp. 344 (N.D. Iowa 1936), 47 J. CRIM. L. & CRIMINOLOGY 212.

252. See LA. R.S. 15:395 (1950).

253. See *State v. Joseph*, 45 La. Ann. 903 (1893). Here, one of the jurors had made a memorandum of the testimony of some of the witnesses and carried it into the jury room. As a witness on the trial of the rule for a new trial, the juror in question testified that there were but three or four lines on the back of an envelope; that he saw defendant's counsel looking at him while he wrote; that another juror told him he had better quit writing, and he did so, putting the envelope in his pocket; that he did not show the notes to the other jurors; and that since there was so little writing, he himself could not benefit from it and tore it up. The court refused a new trial, holding that "it is impossible to conceive of any injury resulting from so slight an indiscretion, or that an irregularity such as this could have prejudicially influenced the jury, or caused them any bias in their deliberations." *Id.* at 909.

254. See note 248 *supra*.

255. LA. R.S. 15:395 (1950); *State v. McKinney*, 174 La. 214, 140 So. 27 (1932).

256. 149 La. 83, 88 So. 696 (1921).

to the jury for their examination during their deliberations in the jury room, to which procedure the defense attorney promptly objected. The Supreme Court, reversing the conviction, stated that "the jurors had to depend upon their recollection of the testimony, during their deliberations." It is wrong, the court said, "for the jurors to have had a better means of being impressed by that evidence than by the testimony given by the witnesses in the case; and it was especially wrong for the judge thus to remind the jurors of that particular evidence in the case."²⁵⁷

257. *Id.* at 89, 88 So. at 698.