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FEDERAL JURY REFORMATION: SAVING A DEMOCRATIC INSTITUTION

by Carl H. Imlay*

INTRODUCTION

In recent years Americans have been so preoccupied with collateral problems¹ in criminal cases that they have overlooked the central process by which the ultimate verdict in the case is reached. In its zeal for improving procedural due process in other areas, the American legal system had truly all but forgotten that its jury selection system was designed to produce unrepresentative jury venires.² Though courts had sought to assure that evidence would not be illegally obtained³ and that arrested persons would be speedily presented before a committing magistrate,⁴ be represented by attorneys⁵ and have a record of the proceedings against them,⁶ they nevertheless allowed juries to be selected through an unrepresentative process that infected the verdict itself.⁷

Such a process was perpetuated by the various systems adopted by federal courts for choosing prospective jurors. In one such system, courts delegated the jury selection function to court clerks who in turn relied upon prominent citizens in the community, called "key men," to supply them with lists of prospective jurors.⁸ This procedure, however, only selected jurors who were considered desirable by the "key men." Some courts adopted procedures whereby telephone books or tax rolls were used by the clerks as name sources.⁹ Such sources

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1. See, e.g., Kessler, *The Crime Crisis and Proposed Procedural Reform*, 5 *Loy. L.A.L. Rev.* 1 (1972).

2. See text accompanying notes 8-15 *infra*.

3. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

4. See *Malloy v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943).

5. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. See *Griffin v. Illinois*, 351 U.S. 12 (1956).

7. See text accompanying notes 8-15 *infra*.

8. ABA SECTION OF JUDICIAL ADMINISTRATION, *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 62 (5th ed. 1971).

9. *Id.* at 64.

tended to yield primarily the names of male heads of households of that economic stratum affluent enough to afford telephone listings or pay property taxes.¹⁰ Still other courts accepted volunteers for jury service.¹¹ The danger inherent in this practice was the possibility of getting "professional jurors" and the opportunity for "packing" the panel with jurors of certain views or allegiances.¹² One system utilized by courts conscientiously attempting to create a system of proportional representation was to ask for names of blacks, workers and women from which to compose jury lists.¹³ This also failed to produce a fair sampling of public attitudes because the lists generally contained only the names of persons associated with various organizations. These systems were even encouraged by the 1942 Knox Report¹⁴ submitted to the Judicial Conference by its Committee on Selection of Jurors which flatly suggested that "[c]ity and town officials, school authorities, ministers, doctors, and leading business men would seem to be the most likely sources for suitable lists" of jurors.¹⁵

Our legal system was strangely schizophrenic with respect to whether we really wanted representative juries. Discrimination against blacks

10. *Id.* This method also allowed the clerk to make discreet exclusions as he saw fit based on race and sex. See *Cassell v. Texas*, 339 U.S. 282 (1950); *Ballard v. United States*, 329 U.S. 187 (1946).

11. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT TO THE JUDICIAL CONFERENCE OF THE COMM. ON SELECTION OF JURORS 25-26 (1942).

12. Committee on the Operation of the Jury System of the Judicial Conference of the United States, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 432 (1960). A survey of 90 districts made by the Institute of Judicial Administration in 1958 found that of 87 responding, 25 used volunteers regularly and 11 rarely. *Id.* Although this study did not attempt to draw a correlation between volunteers and retired or economically self-sufficient persons, other studies have revealed a rather strong relationship. For example, Kalven and Zeisel found that volunteer jurors in Peoria, Illinois included 29% housewives, 23% unemployed, and 16% retired persons. *Hearings on Proposals to Improve Judicial Machinery for the Selection of Federal Juries Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 161 (1967). Both Professor Zeisel and Professor Edwin S. Mills reported separate studies showing disproportionate representation of affluent classes. *Id.* at 128, 207-08, 211-12.

13. ABA SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 62 (5th ed. 1971).

14. In 1941 the Judicial Conference of the United States authorized the appointment of a committee of five United States District Judges to investigate the need for improvement in the methods of jury selection in United States courts. That committee made a comprehensive study of the problems of jury selection and presented its final report, known as the KNOX REPORT, to the Judicial Conference in 1942. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT TO THE JUDICIAL CONFERENCE OF THE COMM. ON SELECTION OF JURORS (1942) [hereinafter cited as KNOX REPORT].

15. KNOX REPORT, *supra* note 14, at 17.

had been clearly proscribed by 1935 in *Norris v. Alabama*,¹⁶ and by 1940 the practice of "tokenism" in selecting blacks for jury service was likewise proscribed.¹⁷ However, the notion that the lists from which prospective jurors were selected should be cross sectional or representative of the community did not take hold. The Knox Report, after noting that a jury must represent a cross section of the community, offered the following caveat:

Nothing in the concepts offers any obstruction to efforts to obtain competent jurors. Nothing in them opposes the tradition of federal courts that jurors should be men of recognized intelligence and probity.¹⁸

The fact of the matter was that the cross sectional theory was only theory so long as those individuals responsible for the selection of jurors were allowed to make a subjective judgment as to who were such "men of recognized intelligence and probity."¹⁹ The use of the word "men" was perhaps more than a Freudian slip since women were then disqualified in 21 states, and in 15 other states and the District of Columbia they could claim excuse because they were women.²⁰ State disqualification automatically excluded women from federal juries because, prior to 1957, competency to serve on federal juries was determined by the law of the state in which the federal court was located.²¹ The practice of calling women in any significant numbers was by 1946 compelled by the Supreme Court in *Ballard v. United States*.²² Pro-

16. 294 U.S. 587 (1935).

17. *Smith v. Texas*, 311 U.S. 128 (1940). The problem of excluding persons because of race remained however as a sorrowful commentary in state jury selection. See *Cassell v. Texas*, 339 U.S. 282 (1950).

18. KNOX REPORT, *supra* note 14, at 14-15, quoting ABA SECTION OF JUDICIAL ADMINISTRATION, SELECTING FEDERAL COURT JURORS, AN INCIDENT OF THE JUDGE-JURY RELATIONSHIP IN FEDERAL COURTS 9 (1942).

19. KNOX REPORT, *supra* note 14, at 15. The use of "key men" (see text accompanying note 8 *supra*) in the selection of jurors was approved in a 1960 report to the Judicial Conference of the United States by its Committee on the Operation of the Jury System. Committee on the Operation of the Jury System of the Judicial Conference of the United States, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 470 (1960). In that report a sample of a letter to "key men" requesting lists of prospective jurors was included as an exhibit. *Id.* at 513. The letter specifically asked the "key men" to

bear in mind that a prospective juror should be esteemed in his community as a person of good character, approved integrity, sound judgment and fair education. *Id.* at 514 (emphasis added).

The report thus prevented the implementation of the cross sectional theory by approving the subjective method of choosing jurors.

20. KNOX REPORT, *supra* note 14, at 23.

21. Act of June 25, 1948, ch. 646, § 1861(4), 62 Stat. 951. See text accompanying note 31 *infra*.

22. 329 U.S. 187 (1946).

prietors, corporate officials and managers were represented far out of proportion to their numbers in the community, while various semi-skilled workers were grossly under represented.²³ The "Main Street town booster," a middle-aged male in the middle income bracket, remained the prototype of our federal juror. A study of the key man system by Professor Edwin S. Mills of Johns Hopkins University revealed that these functionaries tended to display occupational bias and their selections followed the statistical principle "that any sampling procedure involving human discretion almost inevitably leads to biased results."²⁴

The most significant standard for jury selection was declared in *Thiel v. Southern Pacific Co.*,²⁵ which dealt with a problem of systematic and intentional exclusion of daily wage earners from a federal court jury panel. The practice was sought to be justified on the basis that jury service constituted an economic hardship on such persons, although it was admitted that business men and their wives constituted at least 50% of the jury lists.²⁶ The Court, condemning such practice, said:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an *impartial jury drawn from a cross-section of the community.*²⁷

Despite the enunciation of this standard, however, the 1960 Report of the Judicial Conference from its Committee on the Operation of the Jury System²⁸ cited with apparent approval an extract from the Knox Report which read:

23. Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349, 354 (1969).

24. *Id.* at 354 n.27.

25. 328 U.S. 217 (1946).

26. *Id.* at 222.

27. *Id.* at 220 (citations omitted and emphasis added). The Court's decision was grounded upon its supervisory power over the administration of justice in federal courts. *Id.* at 220-22. See also *Ballard v. United States*, 329 U.S. 187 (1946). Compare *Labat v. Bennett*, 365 F.2d 698, 722 n.40 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1966) (declaring the exclusion of daily wage earners as a class to be in violation of the Due Process and Equal Protection Clauses, based in part on the belief that "the Court's language [in *Thiel*] seems to extend the holding beyond the mere application of supervisory power"), with *Moore v. New York*, 333 U.S. 565 (1948) and *Fay v. New York*, 332 U.S. 261 (1947) (holding the mere fact of disproportionate economic representation, resulting from character, literacy, and property requirements for state jurors, does not violate the Due Process or Equal Protection Clauses, even when this is accomplished by the use of special "blue-ribbon" juries for some cases).

28. 26 F.R.D. 409 (1960).

It is the sense of the Committee that jurors to serve in the district courts of the United States should be drawn from every economic and social group of the community without regard to race, color, or politics, *and that those chosen to serve as jurors should possess as high a degree of intelligence, morality, integrity, and common sense, as can be found by the persons charged with the duty of making the selection.*²⁹

This instruction was internally inconsistent since, while giving lip service to the cross sectional ideal, it also gave a license to those doing the choosing to reject all who did not fit their subjective ideal of the qualities enumerated. Moreover the 1960 Report apparently approved the "key man" system.³⁰

In 1957, Congress established independent federal juror qualifications for the first time.³¹ Nevertheless, much diversity in the selection of jurors remained and juries were no more representative of the total community than in the past.³² Why the *Thiel* principle³³ was not followed is difficult to explain. One judicial writer suggested that, until Congress acted, the clerks had no facilities to implement the decision's mandate.³⁴ Other commentators returned to the concept that only the intelligent should serve and that, absent any objective measure of this quality, the number of years in school should be the proper measure of eligibility to serve.³⁵ In any event, the basic key man system continued up to the middle 1960s despite the eclectic ferment of the earlier Warren years. By 1966 the issue of jury reform begged resolution; no less than 34 bills to reform the jury system³⁶ were pending in Congress. Even before corrective legislation was passed, the United States Court of Appeals for the Fifth Circuit played an important role³⁷ in jury reforms by challenging the validity of the "key man" system in *Rabinowitz v. United States*.³⁸

29. *Id.* at 425, quoting KNOX REPORT, *supra* note 14, at 13 (emphasis added).

30. 26 F.R.D. at 428-29. See note 19 *supra*.

31. Civil Rights Act of 1957, § 152, 71 Stat. 634 (1957), *as amended*, 28 U.S.C. § 1861 (1970).

32. See *Report of the Comm. on the Operation of the Jury System of the Judicial Conference of the United States*, 42 F.R.D. 353, 355 (1967).

33. See text accompanying notes 25-27 *supra*.

34. Goodman, *Federal Jury Selection as Affected by Thiel v. Southern Pacific Co.*, 6 F.R.D. 253, 258 (1946).

35. McLaughlin, *Needed Improvements to Our Jury System*, 16 F.R.D. 481, 483 (1954).

36. Address of Chief Justice Warren to the American Law Institute, May 18, 1966.

37. See Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349 (1969).

38. 366 F.2d 34 (5th Cir. 1966). The *Rabinowitz* court ruled that the Civil Rights Act of 1957 (cited in note 31 *supra*) did not create minimum qualifications to which the

Jury reformation began in August of 1966 when Chief Justice Warren reconstituted the Judicial Conference Committee on the Operation of the Jury System under the chairmanship of Circuit Judge Irving R. Kaufman of the United States Court of Appeals for the Second Judicial Circuit.³⁹ That committee, representing each of the eleven judicial circuits, commenced one of the most searching studies ever conducted by the federal judiciary in an effort to produce appropriate legislation to reform the jury system.⁴⁰ This project, which involved the close cooperation of all three branches of government, culminated in the Jury Selection and Service Act of 1968.⁴¹

THE REFORMATION OF THE FEDERAL PETIT JURY AS A DEMOCRATIC INSTITUTION

The Jury Selection and Service Act of 1968⁴² restructured federal jury selection procedures.⁴³ By so doing, it revived certain principles basic to a democracy which had long been honored in the breach. The language of the Act⁴⁴ evidences an overriding desire that the institution of the jury be revitalized as a democratic force to serve our always diversified and sometimes alienated peoples. Realization of this goal involved not only an expanded concept of the rights guaranteed to the litigant, but also a revival of the petit jury as a democratic institution which affords a public right of participation in the judicial process.

A. *The Structure and Purpose of the Jury Selection and Service Act of 1968*

The 1968 Act requires that selection of prospective jurors be made on a random basis from a fair cross section of the entire community

"key man" was free to add his own ideas as to "good character, intelligence and ability to understand the cases that are tried in court." *Id.* at 51.

39. See Kaufman, *The Judges and Jurors: Recent Development in Selection of Jurors and Fair Trial—Free Press*, 41 *COLO. L. REV.* 179, 181 (1969).

40. See *Report of the Comm. on the Operation of the Jury System of the Judicial Conference of the United States*, 42 *F.R.D.* 353 (1967).

41. 28 U.S.C. §§ 1821, 1861-69, 1871 (1970).

42. *Id.*

43. Other writers have previously outlined the specific provisions of the Act. See *ABA SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 64-68 (5th ed. 1971).

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

in which the court is located.⁴⁵ Names are selected from lists of registered or actual voters within the district or division⁴⁶ on the basis of a preestablished formula⁴⁷ devised to yield the estimated number of jurors required for a period specified by the local district court. These names comprise the master jury wheel.⁴⁸ From time to time, a quantity of names are publicly drawn at random from the master jury wheel;⁴⁹ juror qualification forms are mailed out,⁵⁰ returned by the recipients, and evaluated on the basis of narrowly defined and objective exclusions⁵¹ and excuse opportunities⁵² set forth in the district jury plan; and those names found to be qualified are placed in a qualified jury wheel. As names of veniremen are needed for service, random selection is made and summons for jury duty are mailed out to such qualified persons to appear for service at a certain time.⁵³ This entire procedure is strictly prescribed in a plan adopted by each United States District Court which specifies the precise procedures to be followed in

shall have an obligation to serve as jurors when summoned for that purpose. 28 U.S.C. § 1861 (1970).

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status. *Id.* § 1862.

45. *Id.* § 1861.

46. *Id.* § 1863. The Act allows selection from a source other than voter registration lists if necessary to protect the rights secured by sections 1861 and 1862. See note 44 *supra* and text accompanying note 71 *infra*.

47. 28 U.S.C. § 1863(b)(2) (1970). The names drawn must equal at least one-half of 1% of the total number of persons on the lists used as a source of names for the district. However, if this number is believed to be cumbersome and unnecessary, a lesser number of names may be placed on the master jury wheel, but in no event less than one thousand. *Id.* § 1863(b)(3).

48. *Id.* § 1863(b)(4), *as amended*, 28 U.S.C.A. § 1863(b)(4) (Supp. 1973).

49. *Id.* § 1864(a).

50. *Id.*

51. Any person must be deemed qualified to serve on a grand or petit jury unless he:

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

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

(3) is unable to speak the English language;

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

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty. 28 U.S.C.A. § 1865(b) (Supp. 1973), *amending* 28 U.S.C. § 1865(b) (1970).

52. A group or class of persons may be excused under the Act only if "jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862. . . ." 28 U.S.C. § 1863(b)(5) (1970).

53. *Id.* § 1866(a)-(b).

order to obviate any deviation from the objective standards of the Act.⁵⁴

These requirements promote the selection of juries which are representative and cross sectional⁵⁵ and prevent the kind of subjective screening which was possible prior to 1968. To insure that each district court abides by the law in drafting its district plan, a reviewing panel must approve the original plan and any subsequent modification thereto.⁵⁶ Each district court must submit reports on the jury selection process to the Administrative Office of the United States Courts, and the Judicial Conference of the United States may adopt rules and regulations governing the plans formulated.⁵⁷ Furthermore, litigants are given the right to challenge deviations from the prescribed procedures by appropriate and timely motion.⁵⁸ All of these procedures are important in assuring adherence to the principles of random selection from a fair cross section of the population and qualification on the basis of objective and prescribed standards.

Prior to the 1968 Act, few federal courts extended their jury selection programs much beyond the limits of the city in which the court was located.⁵⁹ One highly important change mandated by the 1968 Act requires that jurors be called on a random selection basis from all

54. *Id.* § 1863.

55. A number of state courts had also adopted the cross sectional standard for jury composition. *E.g.*, *State v. Madison*, 213 A.2d 880 (Md. 1965); *Allen v. State*, 137 S.E.2d 711 (Ga. App. 1964). The Court in *Brown v. Allen*, 344 U.S. 443 (1953), declared in dictum that:

Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross section of the population suitable in character and intelligence for that civic duty. *Id.* at 474.

56. The reviewing panel consists of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. 28 U.S.C. § 1863(a) (1970).

57. *Id.*

58. *Id.* § 1867.

59. *Cf.* Kaufman, *A Fair Jury—The Essence of Justice*, 51 J. AM. JUD. Soc'y 88, 92 (1967). Some of the more populous and larger districts limited their name selections to the geographical area surrounding the city where the courts were held. For example, California, Northern (30 mile range); California, Southern (40 mile range); New York, Northern (three counties in which terms of court were held); New York, Southern (rotation between the three counties adjacent to the court); Puerto Rico (greater percentage from the metropolitan area); Texas, Northern (major portion of names drawn from the city); Wisconsin, Western (only names from the counties in the area surrounding each place of holding court). Committee on the Operation of the Jury System of the Judicial Conference of the United States, *The Jury System in the Federal Courts—Appendix 23-28* (1960).

parts of the district if the court is sitting only in one place within the district.⁶⁰ If the district is partitioned into divisions jurors are called on a division-wide basis.⁶¹ While jurors can individually claim excuse from service if they live beyond a certain distance in miles from the court as specified in the district jury plan,⁶² they cannot be excluded from service on that basis.⁶³ This sort of geographical selection had been impossible prior to the 1968 Act because of the economic hardship (especially in the lower economic levels) which jury service would have imposed. Now even low income persons can respond to a jury summons since the basic per diem fee has been raised to \$20 a day⁶⁴ plus travel expenses to and from court and, if the juror is held in the court area overnight, in lieu of travel, he can obtain a \$16 per day subsistence payment both for the first and second day of the overnight sojourn.⁶⁵ Thus a blue collar worker, who in some judicial districts could live hundreds of miles from the courthouse, is now able to respond to a summons for jury service completely at the government's expense.⁶⁶ This is a virtual emancipation of the lower economic classes insofar as jury service is concerned, and has had the additional benefit of providing geographical and demographic distribution to the jury panels.⁶⁷ Since ethnic and racial minorities are often localized in specific areas within the judicial district, the Act insured more satisfactory horizontal as well as vertical bases for jury selection. It allowed rural as well as city dwellers to participate, and it reached other

60. 28 U.S.C. §§ 1863(b)(3), 1866(a) (1970).

61. *Id.* § 1863(b)(3). The Act defines "division" to mean:

(1) one or more statutory divisions of a judicial district; or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district plan shall determine. . . . *Id.* § 1869(e).

See generally United States v. Florence, 456 F.2d 46 (4th Cir. 1972).

62. 28 U.S.C. § 1863(b)(7) (1970).

63. *See* note 51 *supra*.

64. 28 U.S.C. § 1871 (1970). While the increase in fees was beneficial to the poor, it would appear that the middle class citizen must still suffer financially when called to jury duty. Any person who earns more than \$20 per day at his regular job will in effect pay the difference between that amount and his regular salary if his employer refuses to pay him for the days of work missed due to jury service.

65. *Id.*

66. H.R. REP. NO. 1076, 90th Cong., 2d Sess. 11 (1968).

Since names of prospective jurors will be selected from the voter lists of all political subdivisions within the district or division, persons living far from the courthouse will, in contrast to present practice, be afforded the opportunity to serve if they desire to do so, but a request for an excuse must be granted. *Id.*

67. *See* H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 467 (1966), which describes significant differences in juror attitudes towards leniency on guilt depending upon the size of the community in which they live.

diverse groups who had formerly been excluded from jury consideration.

The requirement that each district court conform its selection program to the specific prescription of a plan approved by a reviewing panel is a valuable innovation for several reasons. First, it creates the necessary atmosphere of objectivity and removes the public impression that juries are really hand picked by the court clerk. Second, it makes clear that the elitist concept of jury service is gone and that jury service will no longer be reserved for the few. Third, it enables a litigant to detect any evasions of the Act and to seek a clear remedy in the event such an evasion has actually occurred.

The blue ribbon jury concept died hard, but the problems inherent in any attempt to select such a panel were pointed out by United States Circuit Court Judge Irving Kaufman at the Senate hearing on the 1968 legislation:

How are the jury officials of the 93 federal district courts to determine in any meaningful, uniform, well-defined or clear-cut way who has "intelligence" and "common sense" and who does not? The words are like globules of mercury—impossible to grasp. The very nature of the determination the officials are called on to make insures that the result will depend on who is making it, and if this is so, then it follows that instead of uniformity in qualifications you would have variances from district to district. . . .

The end result of subjective tests is not to secure more intelligent jurors, but more homogeneous jurors. If this is sought in the American jury, then it will become very much like the English jury—predominantly middle-aged, middle-class and middle minded. This will be the achievement if we favor high literacy requirements and subjective tests of intelligence and character.⁶⁸

Judge Kaufman's criticism was one of many reflected in the passage of the Jury Selection and Service Act of 1968.⁶⁹ In the four years since the Act went into effect, the effectiveness and acumen of federal jurors have not been shown to have been diminished by the Act's direct implementation of an actual cross sectional method of jury selection.

B. Trial by a Cross Sectional Jury as a Right of Every Defendant

The 1968 Act secured to a litigant the right to a jury randomly

68. *Hearings on Federal Jury Selection Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., ser. 14, at 256 (1967).

69. 28 U.S.C. §§ 1861-69 (1970).

drawn from a fair cross section of the community.⁷⁰ This right to a jury picked at random must be contrasted to the notion that a jury wheel should proportionately represent various minority groups whose individual representatives could be hand picked by the court clerk. Although Congress in designating lists of registered or actual voters as the source for selection obviously considered such lists to be the best method of finding a cross section of the greater population, it placed the responsibility on each district court to assure that this premise remained valid and to specify other sources of names if at any time the premise should become invalid.⁷¹ The litigant thus was given a right to a color-blind, objective selection process which did not *categorize* prospective jury list members on the basis of race, color, religion, sex, national origin or economic status,⁷² even if such categorization were for the purpose of assuring a jury list comprised of a cross section of the community.

The 1968 Act really created no new rights which had not been previously recognized by the courts.⁷³ Rather, it created new statutory procedures by which these rights might more effectively be secured. The statutory implementation of the cross sectional ideal does nothing to disturb the right of a party to object to jury selection procedures which discriminate against *any* group. The belief that a defendant is injured by systematic exclusion of a group, even if he is not a member of that group, was clearly enunciated by the United States Supreme

70. *Id.* § 1861. The principle of the representative jury is not new. It was first articulated by the United States Supreme Court as a requirement of equal protection, in cases vindicating the right of a Negro defendant to challenge the systematic exclusion of Negroes from his grand and petit juries. *E.g.*, *Smith v. Texas*, 311 U.S. 128, 130 (1940). Subsequently, in the exercise of its supervisory power over federal courts, the Supreme Court extended the principle to permit any defendant to challenge the arbitrary exclusion from jury service of his own *or any other class*. *E.g.*, *Ballard v. United States*, 329 U.S. 187 (1946); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). Finally it emerged as an aspect of the constitutional right to jury trial in *Williams v. Florida*, 399 U.S. 78, 100 (1970), wherein the Court delineated as an essential feature of the jury that is guaranteed by the Sixth Amendment, *inter alia*, "a fair possibility for obtaining a representative cross-section of the community." Since *Duncan v. Louisiana*, 391 U.S. 145 (1968), applied the Sixth Amendment right to a petit jury to the states through the Due Process Clause of the Fourteenth Amendment, the representative cross section requirement will apply to any post *Duncan* petit jury. See note 74 *infra* for a discussion of the cross sectional standard to be applied to state jury cases commenced prior to *Duncan*.

71. 28 U.S.C. § 1863(b)(2) (1970).

72. *Id.* § 1862.

73. See *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966) (discussed in note 38 *supra*). See also cases discussed in note 70 *supra*.

Court in *Peters v. Kiff*,⁷⁴ wherein it was held that any criminal defendant, whatever his race, has standing to challenge a jury selection system which arbitrarily excludes Negroes from the grand or petit jury.⁷⁵ Justice Marshall observed:

[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.⁷⁶

There is evidence that the notion implicitly rejected by the *Peters* Court, that a class member called as a juror will inevitably vote for his own class,⁷⁷ is part of the courthouse apocrypha that has no basis in proof. One black juror, commenting on her jury service in the District of Columbia,⁷⁸ observed:

Some defense lawyers may feel that the predominantly middle-aged, predominantly black jury most often chosen in the District is more sympathetic to the black defendant. But they are espousing what seemed to me yet another bit of folklore. In fact, quite the opposite is true. Enough crime is enough, such juries feel. We are the victims. You see it on the unsigned exit questionnaires handed out at month's end in the early-sunset wintertime. "Give us more protection walking from

74. 407 U.S. 493 (1972). *Peters* concerned discrimination in the selection of a state jury and thus was not an interpretation of the federal act. Three members of the Court (Justices Marshall, Douglas and Stewart) based their decision on the Due Process Clause of the Fourteenth Amendment. Three other Justices (White, Brennan and Powell) concurred but based their decision on the prohibition contained in an 1875 statute:

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. . . . 18 U.S.C. § 243 (1970).

It is essential to note that *Peters* involved a petit jury selected *prior* to *Duncan v. Louisiana*, 391 U.S. 145 (1968). There is no doubt as to the Sixth Amendment requirement of a jury drawn from a representative cross section of the community after *Williams v. Florida*, 399 U.S. 78 (1970). See note 70 *supra*.

Even though *Peters* arose in the context of a state jury, it ably expressed the philosophy upon which the 1968 Act is based.

75. 407 U.S. at 504.

76. *Id.* at 503-04. See also *Ballard v. United States*, 329 U.S. 187, 195 (1946).

77. 407 U.S. at 503.

78. Spingarn, *Eye the Jury*, *The Washington Post*, Sept. 10, 1972, at 16, col. 6.

the Courthouse to the bus." Or "This is a high crime neighborhood; don't hold us in the court past dark."⁷⁹

Furthermore, Professors Kalven and Zeisel have noted:

We suspect there is little or no intrinsic directionality in the jury's response. It is not fundamentally defendant-prone, rather it is non-rule minded; it will move where the equities are, and where the equities are at any given time will depend on both the state of the law and the climate of public opinion.⁸⁰

Both the Jury Selection and Service Act of 1968⁸¹ and decisional law⁸² have rejected the notion that a party is harmed by exclusion of minorities only if he is a member of the group excluded, thus adopting and revitalizing the cross sectional random selection principle enunciated in *Thiel v. Southern Pacific Co.*⁸³

C. *The Petit Jury as a Democratic Institution*

The principle that a litigant can waive a jury trial⁸⁴ has often given encouragement to the thesis that the only purpose of jury service is to satisfy the individual rights of the litigants to trial by jury. However, the right of the public to participate in the judicial process is no less important. In his great essay, *Democracy in America*, Alexis de Tocqueville equated the system of the jury to universal suffrage, describing both as instruments of equal power which contribute to the supremacy of the majority.⁸⁵ Similarly, Justice Black in his dissenting opinion in *Green v. United States*⁸⁶ observed:

The jury injects a democratic element into the law. This element is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application.⁸⁷

Other commentators have also noted that the law can only command

79. *Id.*

80. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 495 (1966).

81. 28 U.S.C. §§ 1861-69 (1970).

82. See text accompanying note 74 *supra*.

83. 328 U.S. 217 (1946). See text accompanying notes 25-27 *supra*.

84. Generally the defendant in a criminal trial can effectively waive his right to trial by jury. See, e.g., FED. R. CRIM. P. 23(a). However, there is no unconditional constitutional right which allows the defendant to insist on a trial by judge alone. *Singer v. United States*, 380 U.S. 24 (1965).

85. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 283 (English transl. 1960).

86. 356 U.S. 165 (1958).

87. *Id.* at 215-16.

respect as long as citizens support its enforcement.⁸⁸ This sense of involvement in the law is crucial in an era of protest and disenchantment, and at a time when population growth has watered down the value of the political vote. The citizen may no longer feel that his vote, cast in an automated voting booth for a variety of candidates little known to him, is of much worth. On the other hand, the petit juror is empowered to cast a direct vote with knowledge that the outcome of an important federal case may turn on his own decision. Lord Devlin has aptly described the jury as "a lamp that shows that freedom lives."⁸⁹

Critics of the jury system have marshalled arguments for its limitation based on every rationale from a basic distrust of the common citizenry as fact-finder⁹⁰ to the expense and delay promoted by this system⁹¹ vis-a-vis a trial of both fact and law by the judge. These criticisms are thought to be particularly appropriate in civil cases where there is no public interest which need be reflected in the fact-finding process.⁹² With regard to the question of whether the common citizenry can competently cope with issues arising in a complex federal case Judge Kaufman⁹³ has remarked:

In a complicated trial, be it civil or criminal, the proverbial two sides to every story find strange ways of multiplying into a morass of irreconcilable contentions. The jury, as a deliberative body consisting of individuals possessed of a variety of backgrounds and experiences, would seem to be a better instrumentality to sort out truth from near-truth than a single judge.

My experience as a prosecutor, defense counsel, trial judge and appeals judge has convinced me that juries generally perform their task with extraordinary conscientiousness and accuracy.⁹⁴

88. Kaufman, *A Fair Jury—The Essence of Justice*, 51 J. AM. JUD. Soc'y 88, 91 (1967).

89. DEVLIN, TRIAL BY JURY 164 (1966).

90. Dean Griswold of Harvard Law School expressed such distrust:

The jury trial at best is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons? H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 5 (1966), citing Harvard Law School Dean's Report 5-6 (1962-63).

91. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 188 (1968) (Justice Harlan, dissenting):

[Jury trial] is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, but also contributing to delay in the machinery of justice.

92. See text following note 129 *infra*.

93. See text accompanying note 39 *supra*.

94. Kaufman, *Harbingers of Jury Reform*, 58 A.B.A.J. 695, 696 (1972) (emphasis added).

As to the criticism that trial by jury is inexpedient, it must be recognized that convenience is of limited value as a criterion by which to evaluate any democratic institution. As early as 1791 Blackstone, discussing methods of trial which fail to utilize the traditional twelve man jury, warned:

[H]owever *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.⁹⁵

The sense of public involvement is not the only reason for maintaining the jury as a democratic institution. The jury also provides a necessary flexibility in the application of legal rules. The judge must enforce the law in the same way for all, and it is expected that he will do so. But the jury is able to temper the rule of law to achieve justice in the particular case notwithstanding the legal presumption that juries follow the judge's instructions.⁹⁶

Appellate courts place great emphasis on the precise wording of the jury instructions during an appellate review of the trial record for reversible error. However, more often than not, jurors will employ their own sense of reality rather than the nuances of technical definitions when asked to apply the instructions to a particular human situation.

95. 4 BLACKSTONE, COMMENTARIES 350 (11th ed. 1791).

96. The extent to which a jury may temper the law with its own value judgments is largely dependent upon whether the particular case is civil or criminal in nature. In civil cases, the jury will never have an opportunity to decide the factual issues if the judge directs a verdict or grants a non-suit (such an order should be made only if the court finds that there is not sufficient evidence to support a verdict in favor of the party against whom the motion has been made). See *Kingston v. McGrath*, 232 F.2d 495 (9th Cir. 1956). A similar result is reached when the court grants a motion for judgment notwithstanding the verdict. See FED. R. CIV. P. 50(b). However, when the case is criminal in nature the jury is given much greater latitude in reaching a verdict of acquittal. The ability of the jury to disregard the evidence is often referred to as "jury nullification." See Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972). Because of the restriction embodied in the Double Jeopardy Clause of the United States Constitution, normally the prosecutor will be unable to appeal the acquittal regardless of the weight of the evidence pointing to the guilt of the defendant. U.S. CONST. amend. V. It should be noted, however, that the prosecutor is able to appeal based on prescribed limited grounds other than insufficiency of the evidence. See 18 U.S.C. § 3731 (1970).

Kalven and Zeisel, in their study of the American jury,⁹⁷ found that jurors will consider whether Providence has already punished the defendant enough, will place their own interpretation on provocation, and will consider the issue of the penalty together with that of guilt. As they put it, the jury "will move where the equities are."⁹⁸

Critics of the jury system would argue that the ultimate effects emanating from the infusion of juror attitudes into legal verdicts are disregard of the law and judicial anarchy. Such criticism fails to recognize that more is involved in the jury process than simply a mirroring of *individual* juror attitudes; because juries *en masse* reflect the conscience of the community, the jury system is very much a democratic institution by which the attitudes of the community at large are brought into the court room and given a voice in the judicial determination of a wide range of community conflicts.⁹⁹ A trial judge cannot possibly fulfill this function because, despite his legal expertise, he cannot express the conscience of the community. Since he is normally from an upper middle class milieu, and is educated far beyond the average member of the community, his attitudes and perceptions differ substantially from those of many jurors. Furthermore, even if the judge does reflect attitudes similar to those of any "average juror," he is only one person reflecting a single background rather than the collective experiences of the jury panel.

Both the Senate and House reports on the 1968 Act expressed the desire to bring public attitudes into the court room:

It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it.¹⁰⁰

Thus, Congress has for the first time recognized the interest of the general public in the jury as a democratic institution.

THE REFORMATION: FOUR YEARS LATER

While the Jury Selection and Service Act of 1968 made great strides toward revitalizing the jury system as an effective instrument for public participation, several problems remained. Some of these problems have subsequently been dealt with; others continue to exist. The exclusion of youthful jurors and the unavailability of certain information

97. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

98. *Id.* at 493.

99. *Id.* at 493-95.

100. S. Rep. No. 891, 90th Cong., 1st Sess. 24 (1967); H.R. Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968).

necessary to enforce the Act are difficulties which in large part have been remedied. On the other hand, the move toward smaller jury panels in criminal cases,¹⁰¹ the failure of the judicial system to effectively utilize jurors, the continuing use of peremptory challenges, and the disruptive effect of the news media on juries present problems which continue to threaten the democratic nature of the jury.

Although the 1968 Act provided a broad base from which to gather jurors, it still did not provide for the fullest possible public participation in federal juries because of its exclusion of veniremen under the age of twenty-one.¹⁰² However, the inclusion of youths on federal juries was stimulated by passage of the Twenty-Sixth Amendment to the United States Constitution¹⁰³ and by the growing insistence of youths that persons liable for military service should be able to obtain the rights and responsibilities of full citizenship. Furthermore, the median age of the criminal defendant had declined from 33.7 years in 1963 to 27.1 years in 1970.¹⁰⁴ The average age of those offenders violating the Selective Service law¹⁰⁵ and the Dyer Act,¹⁰⁶ two federal provisions most frequently infringed by young people, was even lower. Thus, the belief prevailed in these younger offenders that they were not being tried by a jury composed of their peers. Despite the disparity between the ages of jurors and defendants in such cases, the United States Court of Appeals for the Fifth Circuit ruled in 1971¹⁰⁷ that the exclusion of jurors under the age of twenty-one did not deny the defendant a jury of his peers.¹⁰⁸ Additionally, the fact that a youth registering to vote between the ages of 21 and 23 might not be chosen and summoned to jury service for up to four years from the time of registration has been held not to render the jury selection system imbalanced.¹⁰⁹

Although constitutional arguments failed, federal legislation has succeeded in allowing younger persons to sit on federal juries. On April

101. *See Williams v. Florida*, 399 U.S. 78 (1970).

102. 28 U.S.C. § 1865(b)(1) (1970).

103. U.S. CONST. amend. XXVI:

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

104. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 67 (1970).

105. 50 U.S.C. App. § 451 *et seq.* (1970).

106. 18 U.S.C. §§ 10, 2311-13 (1970).

107. *United States v. Allen*, 445 F.2d 849 (5th Cir. 1971).

108. *Id.*

109. *United States v. Kuhn*, 441 F.2d 179 (5th Cir. 1971).

6, 1972, the 1968 Act was amended to require provisions in each district jury plan mandating the inclusion of names of persons from ages 18 to 21 in master jury wheels, and the emptying and refilling of such wheels at least once every four years.¹¹⁰ The 1972 statute also required that each master jury wheel be initially emptied and refilled by September 1, 1973, using names taken from voter lists for the 1972 general election¹¹¹ (which, of course, will contain voter names in the lower age group). While younger persons are now legally qualified for jury service, the time-lag created by the four-year cycle of name selection from quadrennial general elections and the one-year residency requirement for jury service¹¹² make it improbable that large numbers of persons from ages 18 to 21 will be called for jury duty. The amendment will insure, however, that more persons in their early twenties will serve on juries.

Even though the 1968 Act created procedures by which its provisions could be enforced,¹¹³ some procedures soon were discovered to be inherently ineffective. While the Act required that the court system monitor the juror selection program to insure that a fair cross section of the population was being considered for jury duty, the same Act allowed the recipient of juror qualification questionnaires the option of refusing to answer the race question.¹¹⁴ In practice it was found, based on surveys of the courts in the Fourth and Fifth Judicial Circuits, that up to 30% of recipients of the qualification form did not answer the race question.¹¹⁵ The lack of information made accurate sampling procedures impossible.¹¹⁶ The anomalous result of the Act

110. Act of April 6, 1972, Pub. L. No. 92-269, §§ 1-2, 86 Stat. 117, amending 28 U.S.C. §§ 1865(b)(1), 1863(b)(4) (1970) (codified at 28 U.S.C.A. §§ 1865(b)(1), 1863(b)(4) (Supp. 1973)).

111. Act of April 6, 1972, Pub. L. No. 92-269, § 3, 86 Stat. 117.

112. 28 U.S.C. § 1865(b)(1) (1970), as amended, 28 U.S.C.A. § 1865(b)(1) (Supp. 1973).

113. The 1968 Act vested the Judicial Conference of the United States with the power to adopt rules and regulations governing the provisions of the Act. 28 U.S.C. § 1863(a) (1970). One such rule, adopted by the Conference at its Fall 1969 session, required that reports be submitted after the refilling of each master jury wheel reflecting (1) the race and sex of a prescribed sample of persons whose names were placed in the master jury wheels in each division and (2) the race, sex and occupation of a prescribed sample of those who were summoned and appeared for jury service. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 65-66 (1969).

114. 28 U.S.C. § 1869(h) (1970).

115. *Hearings on H.R. 8829 and Identical Bills Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 16, at 34-43 (1971).

116. *Id.* at 35, 43.

was that, while the courts were charged with insuring that a fair cross section of the population was considered for jury service, there was no way to accurately test actual jury composition. Obviously, to assure compliance with those provisions of the Act proscribing discrimination in the jury selection process,¹¹⁷ it is necessary to have enough information to compare the percentage of a recognized minority in the jury wheel against census data for the district.¹¹⁸

Congress has very recently corrected this situation by amending the definition of "juror qualification form" in the Act to make the race question mandatory.¹¹⁹ The 1972 amendment requires that the form shall contain words explaining that "information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service."¹²⁰ Hopefully, this amendment will allow the federal courts to monitor the jury selection program to detect more accurately imbalance in voter lists, or in the master jury wheels themselves, and thus protect the system against even inadvertent discrimination.

Whether the jury should be reduced in size so as to make it a more efficient fact finding body is an issue which has become the subject of considerable discussion in recent years.¹²¹ The smaller jury is less expensive¹²² because it can be managed with more facility from voir dire to the rendering of the verdict. The time saved in selection of jurors, in their handling of exhibits during trial, in their going to and returning from the jury box, and in other miscellaneous matters of trial routine greatly reduces the time of trial according to the advocates of the smaller jury panel.¹²³

117. 28 U.S.C. §§ 1861, 1865 (1970).

118. See *Turner v. Fouche*, 396 U.S. 346 (1970); *Carmical v. Craven*, 457 F.2d 582 (9th Cir. 1971); *Preston v. Mandeville*, 428 F.2d 1392 (5th Cir. 1970); Note, *Carmical v. Craven: De Facto Racial Discrimination in Jury Selection*, 23 HASTINGS L.J. 1291 (1972).

119. Act of September 29, 1972, Pub. L. No. 92-437, 86 Stat. 740, amending 28 U.S.C. § 1869(h) (1970) (codified at 28 U.S.C.A. § 1869(h) (Supp. 1973)).

120. *Id.*

121. See, e.g., Bogue & Fritz, *The Six-Man Jury*, 17 S. DAK. L. REV. 285 (1972); Devitt, *Six-Member Civil Juries Gain Backing*, 57 A.B.A.J. 1111 (1971); Tamm, *A Proposal for Five Member Civil Juries in Federal Courts*, 50 A.B.A.J. 162 (1964).

122. Based upon the experience of the United States District Court for the District of Minnesota in utilizing six member juries, the Chief Judge for that district estimated that an annual savings of over \$1,600,000 could be realized by employing smaller juries nationwide in the federal courts. Devitt, *Six-Member Civil Juries Gain Backing*, 57 A.B.A.J. 1111, 1112 (1971).

123. See note 122 *supra*; cf. FEDERAL JUDICIAL CENTER, GUIDELINES FOR IMPROVING JUROR UTILIZATION IN UNITED STATES DISTRICT COURTS 4-6 (1972).

Any question of a constitutional ban against reducing the size of criminal juries was disposed of in 1970 when the United States Supreme Court ruled in *Williams v. Florida*¹²⁴ that the Sixth Amendment, as applied to the states by the Due Process Clause of the Fourteenth Amendment, does not mandate a twelve man jury in criminal trials.¹²⁵ The Court reasoned that the number of twelve "is an historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'"¹²⁶

Congress has shown little interest in reducing the size of federal criminal juries since the *Williams* decision;¹²⁷ fifty-eight federal district courts, however, have reduced the size of civil juries to six by local rule.¹²⁸ And in 1971 the Judicial Conference approved in principle

124. 399 U.S. 78 (1970).

125. *Id.* at 86. The Court has also held that, at least in state criminal trials, the right to trial by jury does not require a unanimous verdict. In *Johnson v. Louisiana*, 406 U.S. 356 (1972), the United States Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment is not violated by a state law which allows conviction or acquittal by the vote of nine out of twelve jurors in a criminal case. Since the *Johnson* case was tried prior to the time that the Sixth Amendment guarantee of trial by jury was applied to the states, the Court's decision did not reach the question of whether the Sixth Amendment itself requires unanimous jury verdicts. This question was involved, however, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), a companion case to the *Johnson* decision. In *Apodaca*, four justices (White, Burger, Blackmun and Rehnquist) ruled that less than unanimous juries do not violate the Sixth Amendment. *Id.* at 411-12. Justice Powell felt that, although the Due Process Clause does not require unanimous juries in state courts, the Sixth Amendment would impose such a requirement in federal cases. *Id.* at 371. The four dissenting justices (Stewart, Douglas, Marshall and Brennan) would require unanimity in federal and state courts. *Id.* at 414. It should be noted that Justice Powell's conclusion that a different standard applies in federal and state cases would provide the necessary fifth vote for a majority holding that unanimity is required in federal cases.

126. 399 U.S. at 102, quoting *Duncan v. Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting). See generally Helwig, *The American Jury System: A Time for Reexamination*, 55 J. AM. JUD. SOC'Y 96, 97 (1971). The *Williams* Court left open the issue whether the two references to the "common law" in the Seventh Amendment require the traditional twelve member jury. This issue was recently resolved in *Colgrove v. Battin*, 41 U.S.L.W. 5025 (1973), wherein the Court extended the *Williams* analysis to uphold a federal district court's local rule prescribing six-member juries in civil cases.

127. One bill was introduced in the 92nd Congress which would reduce the size of federal juries in both civil and criminal non-capital cases. H.R. 7800, 92d Cong., 1st Sess. (1971).

128. Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 535-42 (1973) (listing fifty-four district courts which have reduced the size of juries to six members) (The remaining four districts which have similarly reduced the size of juries are Connecticut, South Carolina, Puerto Rico and Vermont). The United States Supreme Court has quite recently upheld the validity of such local rules. *Colgrove v. Battin*, 41 U.S.L.W. 5025 (1973).

a reduction in the size of civil juries.¹²⁹

As has been previously discussed, one important attribute of the jury system is the vicarious participation of the community at large in the judicial process through its twelve representatives in the jury box.¹³⁰ Thus, when appraising any possible impairment to the judicial process resulting from a reduction in jury size, it is necessary to consider not only the possibility of decreased jury competence as fact finders, but also the likelihood that a smaller number of jurors would be less representative of community values than a larger panel.¹³¹ In civil cases, where the function of the jury is more in the nature of pure fact-finding between rival private parties, we may well be willing to settle for a less representative jury as the price paid for increased jury efficiency. Social values are far less important in a civil case than in a criminal trial where "the people" are directly concerned with the verdict and may have strong feelings as to the ultimate sentence which they expect to be levied against the offender. However, when the case is criminal in nature and thus the interests of society are directly in issue, a larger group is needed to represent a broader spectrum of social attitudes on crime and punishment, to share public responsibility for the verdict, and to insure that there is no reasonable doubt as to the guilt of the defendant. Whether the twelve man jury will eventually be replaced with smaller panels in federal criminal cases is still an unanswered question; but it is important to recognize that such a change would possibly affect the nature of the jury as a democratic institution.

Regardless of the size of the panel upon which the juror serves, one of the most frustrating aspects of his service is the endless waiting in assembly rooms which usually accompanies the courtroom experience.¹³² A 1971 study showed that 45.8% of jurors called to the courthouse did not serve on trials.¹³³ In the federal district court serving New York city this figure was in excess of 78%.¹³⁴ This prob-

129. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-6 (1971).

130. See text accompanying note 99 *supra*.

131. See Ginger, *Doris Brin Walker Discusses the Angela Davis Case*, 2 HUMAN RIGHTS 139, 149 (1972).

132. FEDERAL JUDICIAL CENTER, GUIDELINES FOR IMPROVING JUROR UTILIZATION IN UNITED STATES DISTRICT COURTS 3 (1972). See also Kaufman, *The Wasted Juror*, 56 J. AM. JUD. SOC'Y 72 (1972).

133. ADMINISTRATIVE OFFICE OF THE UNITED STATES, JUROR UTILIZATION IN UNITED STATES COURTS 2 (1971).

134. *Id.*

lem is caused in large part because many civil cases are settled only on the day of trial.¹³⁵ Similarly, in criminal cases there is a tendency to enter a guilty plea only at the last moment after dilatory motions have been disposed of and the possibility of plea bargaining has been fully explored.¹³⁶ Meanwhile, jurors must wait until a trial is firmly set on the morning of their appearance. As a result, jurors are frequently sent home without ever seeing a courtroom.¹³⁷ The explanation often given to such jurors—that they are performing a vital service by just being present—often falls on deaf ears.

The federal judiciary is considering use of the "omnibus hearing" procedure, primarily to speed up trials, but also to reduce the problem of poor juror utilization.¹³⁸ This omnibus plan requires that all motions be heard at one time and encourages early pleas.¹³⁹ Also contemplated is application of a jury selection formula which would provide for staggered trials¹⁴⁰ and the use of left over jurors from one trial part in another trial part.¹⁴¹ The effect of the suggested new procedures would be a reduction in the total number of jurors called and a more efficient utilization of those serving.¹⁴² At the very least, it appears that there has been a recognition of the problem of poor juror utilization. This problem must be solved if we expect the jury system to remain vital.

The 1968 Act had as its purpose the establishment of a cross sec-

135. *Id.*; FEDERAL JUDICIAL CENTER, GUIDELINES FOR IMPROVING JUROR UTILIZATION IN UNITED STATES DISTRICT COURTS 22-23 (1972).

136. ADMINISTRATIVE OFFICE OF THE UNITED STATES, JUROR UTILIZATION IN UNITED STATES COURTS 2 (1971); FEDERAL JUDICIAL CENTER, GUIDELINES FOR IMPROVING JUROR UTILIZATION IN UNITED STATES DISTRICT COURTS 23 (1972).

137. In the fiscal year 1971 there were 512,553 "paid juror days." Of this total, 234,807 juror days represent days when jurors performed no trial service. *Id.*

138. See 1969 Judicial Conference Proceedings (10th Cir.), *Minimum Standards for Criminal Justice*, 49 F.R.D. 347, 446-47 (1970).

139. *Id.*

140. The effect of staggering trials is illustrated by the following example:

If 25 jurors are needed to conduct one trial, then the number of jurors needed for the jury itself is 12, leaving 13 jurors for purposes of peremptory challenges and as a safety factor or hedge against last minute absences of jurors or unexpected disqualifications. If two judges are trying cases, only 12 additional jurors or a total of 37 need be called. One of the two judges will select his jury from the entire venire of 37 and the remaining 25 jurors can be returned to the second courtroom for the second trial. A staggering in the selection of jurors is sometimes required. FEDERAL JUDICIAL CENTER, GUIDELINES FOR IMPROVING JUROR UTILIZATION IN THE UNITED STATES DISTRICT COURTS 25, 26 (1972), quoting ADMINISTRATIVE OFFICE OF THE UNITED STATES, PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, Item H2, Att. 5 (1970).

141. FEDERAL JUDICIAL CENTER, GUIDELINES FOR IMPROVING JUROR UTILIZATION IN THE UNITED STATES DISTRICT COURTS 24 (1972).

142. *Id.* at 24-25.

tional jury system, under which no juror would be eliminated from service as a result of his or her race, religion or national origin.¹⁴³ At the same time, however, Congress authorized the continuing use of a device by which jurors may be excluded for these very reasons—the peremptory challenge.¹⁴⁴ The practice of allowing parties the opportunity to challenge jurors without cause is an ancient practice, originating at a time when no procedures for prior screening of jurors were employed.¹⁴⁵ The peremptory challenge was perhaps needed at that time to ferret out jurors whose bias was revealed during the *voir dire* examination. Whether the peremptory challenge, retained in both civil and criminal cases by the 1968 Act,¹⁴⁶ remains a necessary practice today is questionable. The requirement that jury lists represent a community cross section¹⁴⁷ and the ability of a party to challenge a juror for cause¹⁴⁸ if prejudice is uncovered during the *voir dire* examination¹⁴⁹ may be sufficient to assure a fair jury without the delay resulting from the use of peremptory challenges. The most forceful argument against the peremptory challenge, however, is not that it is a time consuming procedure, but rather that it introduces into the jury selection system an opportunity for the very kind of prejudice and bias which the Act proscribes. Because there is no inquiry into the reason behind the exercise of a peremptory challenge, a juror may be excluded merely because of the way he answers a question, the accent with which he speaks, or even because he is a member of a minority race.¹⁵⁰ Nevertheless, the United States Supreme Court has upheld the arbitrary

143. See note 44 *supra*.

144. The 1968 Act authorizes each party to exercise three peremptory challenges in civil cases. 28 U.S.C. § 1870 (1970). FED. R. CRIM. P. 24(b), which allows each side a varying number of peremptory challenges in criminal cases, depending upon the seriousness of the crime, was left unchanged.

145. See *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 481 (1827).

146. See note 144 *supra*.

147. See text accompanying notes 70-83 *supra*.

148. 28 U.S.C. § 1870 (1970).

149. It is the practice in federal courts for the trial judge, rather than the adversary attorneys, to conduct the *voir dire*. See FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a). The same practice may soon become prevalent in California as a result of a recent decision by the California Supreme Court. *People v. Crowe*, 8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973). The effectiveness of the *voir dire* as an instrument for the uncovering of prejudice may be reduced under this procedure if the trial judge is unduly concerned with the expedient conduct of the trial. On the other hand, attorneys have frequently misused *voir dire* to generate bias and to influence the jurors in favor of the examining lawyer and his case. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 2.4, Commentary, at 64 (1968).

150. *Swain v. Alabama*, 380 U.S. 202, 221 (1965).

nature of the peremptory challenge in *Swain v. Alabama*,¹⁵¹ ruling that the Equal Protection Clause of the Fourteenth Amendment does not prohibit either side in a state criminal trial from excusing jurors solely on the basis of race.¹⁵²

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without . . . being subject to the court's control. . . .

[W]e cannot hold that the striking of Negroes *in a particular case* is a denial of equal protection of the laws.¹⁵³

The *Swain* court did suggest, however, that if the prosecutor systematically excludes a racial group by means of peremptory challenges, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be," such conduct would violate the Equal Protection Clause.¹⁵⁴

Clearly, the peremptory challenge system is due for examination and study. Does it serve a purpose today? Is it a proper method for excluding the prospective juror whose responses on *voir dire* eluded a challenge for cause but who seems to stand out by his demeanor as a prejudiced person? It must be recognized that, although the peremptory challenge was originally intended to avoid prejudice, today, given the license of the *Swain* decision,¹⁵⁵ it is probably the single most significant means by which such prejudice and bias is injected into the jury selection system.

Not all juror bias is the result of ethnic background, environmental surroundings and peer associations. Frequently, the objectivity of the jury panel is threatened by the very nature of the case it is called upon to hear. One of the more challenging tasks faced by the federal judiciary in the second half of this century has been that of preserving the impartiality of the jury trial in the face of the pervasive publicity given the sensational criminal case, while at the same time securing the right of the press to print,¹⁵⁶ and of the public to know, the issues and

151. *Id.*

152. *Id.* at 221-22.

153. *Id.* at 220-21 (emphasis added).

154. *Id.* at 223. One might question how such conduct on the part of the prosecutor could ever be established. In *Swain*, despite the fact that there had not been a Negro on a jury since about 1950, the Court ruled that there was not sufficient evidence to support an inference that the prosecutor was bent on striking Negroes. *Id.* at 224-26.

155. See text accompanying notes 151-54 *supra*.

156. U.S. CONST. amend. I. Despite the guarantee of the First Amendment, the United States Supreme Court has consistently ruled that the press can be punished by way of contempt for failure to obey a court order when there is a clear and present

details of both criminal and civil trials.¹⁵⁷ The problem of prejudicial publicity has become greatly magnified by the immediacy and universality of the television camera which is capable of capturing not only the drama of the courthouse but also, upon occasion, the crime itself. The camera inevitably tends to focus on the sideshow aspects of the case: the tearful wife, the boastful prosecutor, the statements of neighbors who knew the defendant in his youth. It is often difficult to find jurors who have not followed a sensational crime via the news media and therefore formed an opinion about the case before entering the courtroom. Jurors, aware that they have been drawn into the eye of the storm, may be influenced more by their role as participants in a public story than by the evidence presented during the trial.¹⁵⁸ It is at this point that individual rights of litigants to a fair and impartial trial collide with the freedom guaranteed to the press by the First Amendment. The United States Supreme Court discussed the accommodation necessary to preserve these competing rights in *Shepard v. Maxwell*,¹⁵⁹ wherein the trial court was placed under a duty to take affirmative action to reduce the massive, pervasive and prejudicial publicity attending the defendant's prosecution.¹⁶⁰ The Judicial

danger that justice will be obstructed. *See, e.g.,* *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *cf. Wood v. Georgia*, 370 U.S. 375 (1962); *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971).

157. The United States Court of Appeals for the Tenth Circuit recently stated the essence of the problem:

Media of publicity have the right to report what happens in open court. An accused has a right to a trial by an impartial jury on evidence which is legally admissible. The public has the right to demand and expect "fair trials designed to end in just judgments." These rights must be accommodated in the best possible manner. *Mares v. United States*, 383 F.2d 805, 808 (10th Cir. 1967), *quoting* *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

158. The treatment of the jurors in *Shepard v. Maxwell*, 384 U.S. 333 (1961), illustrates the extent to which a juror may become a public figure:

As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the [defendant's] home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered—while the jurors were at lunch and sequestered by two bailiffs—the jury was separated into two groups to pose for photographs which appeared in the newspapers. 384 U.S. at 345.

159. 384 U.S. 333 (1966).

160. *Id.* at 362-63. Justice Clark noted several specific actions which the trial court should have taken to ensure that the defendant was not deprived of due process of the law: (1) the number of reporters in the courtroom should have been limited, (2) the witnesses should have been insulated from the news media, and (3) release of leads, information and gossip to the press by police officers, witnesses and counsel for both sides should have been proscribed. *Id.* at 358-59.

Conference Committee on the Operation of the Jury System spent approximately two years studying procedures which might satisfy the requirement of the *Shepard* case.¹⁶¹ The culmination of the Committee's effort was the promulgation of several specific recommendations by which federal courts could balance the *Shepard* mandate for a fair trial with the First Amendment's guarantee of a free press.¹⁶² The Committee recommended that each district court control the release of information by attorneys and other officers of the court,¹⁶³ provide by local rule for special orders governing the proceedings in any case in which prejudicial influences might penetrate into the trial,¹⁶⁴ and implement rules to prohibit photography and radio and television broadcasting, in both the courtroom and its environs, in connection with judicial proceedings.¹⁶⁵ No recommendation was made to place a direct restraint on the press with regard to publication of potentially prejudicial material,¹⁶⁶ nor was any recommendation made with respect to the exclusion of the press from preliminary hearings and other hearings held outside the presence of the jury.¹⁶⁷ Additionally, the Committee declined making any recommendation as to judicially imposed restrictions on the release of information by federal law enforcement agencies.¹⁶⁸ Implementation of the Committee's recommendations have done much to reduce the gross violations of the defendant's right to a fair trial. Nevertheless, the sensational criminal trial continues to receive massive coverage by the news media. While this infringement upon the guarantee of a fair trial may be the price we must pay for a free press, such publicity, and the resulting inability to obtain unbiased veniremen, must continue to be considered a problem affecting the jury system.

CONCLUSION

Reshaping the entire jury system was no easy task. Judges are used to proceeding by the building block system—a little change at a time

161. *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391 (1968).

162. *Id.* at 404. While the initial Report only concerned criminal cases, the recommendations have subsequently been extended to cover civil cases as well. *Supplemental Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 51 F.R.D. 135 (1971).

163. 45 F.R.D. at 404-08.

164. *Id.* at 409.

165. *Id.* at 401, 414.

166. *Id.* at 401-02.

167. *Id.* at 403.

168. *Id.*

until the form achieves substance. It took a strong interaction among all three branches of government to produce the impetus for change in 1966,¹⁶⁹ culminating in the Jury Selection and Service Act of 1968.¹⁷⁰ The Act ended a system of jury selection which often produced panels unrepresentative of the community. The passage of the Act additionally led to further introspection by the judiciary, which initiated changes to protect the jury as a body of fact finders which ideally is sensitive to the pulse of the community without being dominated or overwhelmed by the momentary group passions that surround a sensational trial. Perhaps, today, those groups previously excluded from federal juries feel a stronger sense of involvement in government as a result of the broadened participation in the jury system. Not only is the sense of public participation important, but a court ceases to function effectively when it is so detached from the community that its decisions, including its attempts to control antisocial behavior, are rendered in a vacuum. Now, more than ever, courts are coping with human problems that eschew the legal cult of the powdered wig and the quill pen. Perhaps, looking through a glass darkly, the future will prove that some of those concerned with an impersonal world did something to insure that the public still has a voice in the Third Branch of Government.

169. See text accompanying notes 36-41 *supra*.

170. See text accompanying notes 42-69 *supra*.