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Utilization of Encounter Groups in a Residence Hall

Robert Melville Keith, Jr.

19

THE "CONSCIENCE OF THE COMMUNITY" IN SOUTH DAKOTA

THOSE RECENT CHANGES IN THE JURY SELECTION SYSTEM: WHAT EFFECT WILL THEY HAVE ON THE CORPORATE ATTITUDE?

BY

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(A series of in-depth articles that attempt to depict the jury system in South Dakota at a moment in history, detailing the factors that caused the changes)

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This thesis is approved as a creditable and independent investigation by a candidate for the degree, Master of Science, and is acceptable for meeting the thesis requirements for this degree. Acceptance of this thesis does not imply that the conclusions reached by the candidate are necessarily the conclusions of the major department

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The Conscience of 'Frontier County' STORY NUMBER 1

LOOKING AT THE 'COMMUNITY CONSCIENCE'
OF ONE OF THE LAST JURIES OF ITS KIND

One of the most fiercely guarded concepts of American democracy is the jury system. Judges allude to the jury as "the conscience of the community." This is because, they say, the jury can determine not only whether a man is guilty or not guilty, but whether he should be punished further.

This investigative article, dealing with the "Conscience of Frontier County," is the first of a series of 10 articles and an editorial on the recent changes in the jury selection process in South Dakota. It looks at the attitudes, "the community conscience," of one of the last, almost completely white juries in a South Dakota county with a large Indian population before the winds of social change, wrought by the Civil Rights Movement and court actions, rumbled in and remodeled the jury selection system.

The actual cases examined in this article--at least the murder and manslaughter cases--may have had little to do with these sweeping changes. The significance is that while they were being heard, the currents of change were already swirling through the land.

Took Study Suggestion by Presiding Judge

Circuit Judge John B. Jones, Presho, of the 10th Judicial Circuit of South Dakota, who presided over the homicide cases in 1969,

in looking back in early 1972, said, "I don't think that the 'Washington' /murder/ case or the facts that were presented to the jury were particularly socially significant."

Later during the interview, Judge Jones added, "The interesting things were all of the other economical and social changes that were taking place at this time and the changes in the court system." He said, "South Dakota can't escape change and the court can't escape change any more than any other aspect of society, any more than any area of the country can. A study of the changes that are occurring would seem to me to be a very interesting and profitable area for study."

In discussing study possibilities, Circuit Judge Jones suggested that a researcher might try to: "Grab an instant in time--then use that as a benchmark for measuring change. You may be able to take that particular instant in time and the attitudes that you are developing that existed in that specific case." He suggested that through interviews a researcher may be able to reflect the views of the community through the jurors and "use that as the benchmark, so to speak, to determine whether or not at some point subsequent to it there has been change."

This series of investigative articles attempts to follow the judge's suggestion and, hopefully, the raw material gathered will provide the basis for future studies by social psychologists, sociologists, legal scholars, legislators, criminologists and journalists.

The Basic Rights

The modern-day interpretation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution is that the citizen jury, an institution conducted under government compulsion, has tremendous potential for insuring justice in the face of many other shortcomings of the judicial system, provided that a good cross-section of the local citizenry is included in the jury decision-making process.

These are the amendments which provide each citizen the right to equal protection of the law, the right to an attorney, and the right to a just and impartial jury of his peers.

The problem in recent years with South Dakota juries, according to interviews with judges, clerks of court and court reporters, has been that the "same old faces" were appearing in circuit courts for jury duty, year after year. Judges, lawyers and legislators and others were concerned in the eastern circuits as well as in western South Dakota, in mostly all-white communities as well as in racially mixed communities.

Significant changes occurred in South Dakota in 1968, 1970, 1971 and 1972 to rewrite the rulebook for jury selection:

First, the Federal Service and Jury Selection Act of 1968, with its plan for random selection of grand and petit jurors, was placed in operation in the federal courts serving South Dakota.

Secondly, the Long Warrior versus Peacock class action in federal district court resulted in a consent decree by a federal

district court judge in 1970 which instructed a county with a large Indian population to put a greater share of Indians on the jury requisition list--they would have a ratio in proportion to their population in that particular county.

Thirdly, the South Dakota Supreme Court reversed a guilty decision on a forgery case. In State versus Plenty Horse the Supreme Court of South Dakota on March 3, 1971, reversed the guilty decision on the grounds that an Indian's constitutional rights to equal protection of the law had been violated by exclusion of his race in the jury selection process.

Fourthly, the 1972 South Dakota Legislature changed the state's jury selection law with House Bill 552. Instead of allowing township boards to decide whom to name to the annual jury requisition lists, the voter registration list will be used. This law is patterned after the federal random selection system.

Fifthly, South Dakota voters on November 7, 1972, passed a constitutional revision article which will enable the state to streamline the court system.

Background

The purpose of this study is not to muse over the possible guilt or innocence of the men tried--the courts and the juries had done that. Even one of the Legal Aid Service attorneys who laid the foundation cases to change the jury selection process doubts whether the outcome in the murder case would have been any different had

Indians served on the jury. Looking back after about two years, he commented, "Practically speaking, there probably would not have been much difference in the outcome." As suggested by the circuit court judge, the long range objective is to look at the juries and to record the attitudes of all participants at one moment in history. For this reason, pseudonyms are used; however, the information is factual, gleaned from court, county or city records, law books, legal notices in newspapers and interviews with reliable sources.

"Frontier County" is a sparsely-populated area with Indians representing about a third of its population. According to the white sheriff of "Frontier County," at least 70 per cent of the people he jails are Indian, a great percentage of them for drunken brawls, fights and public intoxication. Town marshals and the state's attorney confirm this. The state's attorney also stated that more Indians than non-Indians are prosecuted in criminal cases.

In all, four criminal cases were heard by juries seated in "Frontier County" during the May, 1969, term of court.

Forgery--Indian	Manslaughter--Indian	Murder--White	Forgery--Indian
CASE A	CASE B	CASE C	CASE D
Guilty Verdict	Acquitted	Acquitted	Guilty Verdict

All of the cases, with the exception of the murder case (Case C--involving the most soul-searching decision asked of a jury--the possible verdict of guilty that could lead to the death penalty), involved Indians; however, the slain man was an Indian in this case.

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The other jury trials in "Frontier County" in 1969 included: (1) A third-degree forgery case (Case A)--an Indian defendant; (2) A first-degree manslaughter case (Case B)--an Indian slaying another Indian; and (3) Another third-degree forgery case (Case D)--an Indian defendant.

Juries granted acquittals in the homicide cases, but they returned guilty verdicts in the forgery cases. Legal Aid Service attorneys, representing the forgery defendants, prepared appeals, complaining of de facto racial discrimination during the jury requisition process. The circuit court judge sentenced the Case A forgery defendant to 30 days in jail, but released him before his sentence ran out. This case never reached the appeal stage, although preparations had been made. The Case D defendant was sentenced and appeal procedures on alleged jury selection discrimination were initiated. Case D remains in limbo somewhere in the state courts. Another Indian defendant, tried, convicted and sentenced during the previous term of court (April 1969), successfully appealed his case to the South Dakota Supreme Court and won a reversal on the grounds of de facto discrimination. The same names of defendants and the same basic foundations, built by the Legal Aid attorneys, were used in all three forgery cases. According to the "Frontier County" clerk of courts, the forgery defendants had previous arrests.

A study of the actual jury list for the four trials held during the May 1969 term of court reveals that one was Indian (a mixed-

blood in the Case A forgery trial). This was out of 33 jurors selected to hear the cases. In a county which the 1970 U. S. Census shows an almost equal ratio of men to women, women dominated all of the trial juries except for the first forgery case, where there were seven men. There were 20 female and 13 male jurors serving the four cases. In a county where Democrats make up 41 per cent of the voter registration list, 80 per cent of the jurors (26) who heard cases were Republican. The county's only practicing attorney is the Republican state's attorney.

Forgery	Manslaughter	Murder	Forgery
CASE A	CASE B	CASE C	CASE D
Women . . . 5 (4 Rep.) (1 Dem.)	Women . . . 8 (6 Rep.) (2 Dem.)	Women . . 10 (8 Rep.) (2 Dem.)	Women . . 7 (4 Rep.) (3 Dem.)
Men . . . . 7 (5 Rep.) (2 Dem.)	Men . . . . 4 (4 Rep.)	Men . . . 2 (2 Rep.)	Men . . . 5 (5 Rep.)
(Indian is Dem.)			

There was a significant number of jurors who heard the cases who were directly related, or related by marriage or law, to law enforcement officials, other jurors, representatives of the court or jury selectors from the various communities. For example, 17 of the 150 names on the master jury list for 1969 were persons chosen at annual township elections to select the names to send to the county clerk of courts for the county jury requisition list. The 17 had

named themselves to their own requisition list. In addition, at least five more jurors were married to local jury selectors. However, there were numerous other linkages as this article shall relate.

The ratios of men to women or Republicans to Democrats on the master panel were nearly proportional to the ratios found on the 1972 voter registration list and the 1970 U. S. Census Report. The changes in distribution occurred during the voir dire examination of jurors, a screening process by attorneys and judges which immediately precedes the trial.

In American courts, it is the defendant's right under Amendment 14--the equal protection amendment--to have a hearing by a grand jury or a trial by petit jury from which members of his race have not been intentionally excluded. However, he also may find it to his advantage to exclude them sometimes (see story on "Gut Feelings of Judges--How Judges Feel Race, Sex May Influence Jury Decisions").

In "Frontier County" there are probably two ways to look at the apparent multiple relationships and ties of jurors to one another and to key administrative or elected officials: (1) Dissidents pressing for change or opposing the status quo would tend to view it as "elitism" or de facto discrimination; and (2) Those involved in the existing system would likely think of it as a chronic problem of most small communities--too few people and a lot of work to be done (as a result, those willing to invest time or wanting to serve their communities end up with several tasks--those reluctant to serve, don't).

This analysis is merely speculative and may deserve future sociological study.

Whom They Judged

One of the men tried in the homicide cases, a white rancher we will call "Mr. Washington," was acquitted of murder of an Indian. He alleged that he shot the man twice in self-defense and on his home grounds, declaring that the slain man had made a threat to kill him. "Mr. Washington" had a reputation for helping Indians in need, according to white and Indian friends. The state produced no other witnesses to the slaying. "Mr. Washington" and his relatives were jury selectors for his township. The jury decided on acquittal.

The jury also decided on acquittal in the first-degree manslaughter case, involving an Indian laborer with a reputation as a good worker, who "didn't booze around." We'll call him "Mr. Arrow." He was accused of stabbing to death his wife's uncle, who allegedly had been drinking and who had allegedly called the defendant outside for a knife fight in the night. There were witnesses who saw the injured man stagger from the scene, but the fight was shrouded in darkness.

"Mr. Washington" hired three attorneys, while "Mr. Arrow" declared he was indigent. Legal Aid Services furnished counsel for "Mr. Arrow."

Jurors who tried both cases were interviewed in this study. They reflected that circumstances surrounding both cases appeared

remarkably similar in that one underlying reason for their decision to acquit was the belief that the accused in both instances were acting in self-defense. Court records and interviews following the trials also indicate that after acquittal, both men were advised--the rancher by the sheriff and the laborer by the justice of the peace--to move out of the area for their personal safety.

The Coroner's Juries

The coroner's inquests and the subsequent jury trials took place in a town of about 600 population which we will call "Outpost," the county seat of "Frontier County." "Outpost's" pharmacist was the coroner and was present during both coroner's inquests. He was white and Republican.

On the coroner's jury for the manslaughter case (Case B) were two Republicans and two Democrats. One of the Democrats was a part-Indian rancher. The other Democrat was a white cafe operator in "Outpost" and in 1971 served as town marshal. The marshal's son was on the "Outpost" City Council in 1971 and 1972. The marshal's daughter-in-law--the councilman's wife--was on the 1969 jury panel of 73 names. The final member was an "Outpost" City Council member, white and Republican. They decided the stabbing death was feloneously caused.

On the coroner's jury in the shooting death also was a part-Indian rancher, also Democrat. He ranched about 25 miles away, but made his home in "Outpost" and served on the city council. His son, approximately a year following the trial, became a town marshal.

Another member of the coroner's jury was a business man who also was serving on the "Outpost" City Council. He was white and Republican, having served as "Frontier County" Republican chairman years ago. His son was serving as county Republican chairman at the time of the incidents. Court transcripts and other records show that this member of the coroner's jury had known "Mr. Washington" for about 30 years. Another member of the panel was a retired rancher who operated a business in "Outpost" and was a city council member. He also was a white Republican. This group decided the shooting death was "non-feloneous."

Two members of the coroner's inquest in the shooting death and another in the stabbing death were listed as defendants in a class action suit filed in 1969 before either trial. This is because as councilmen they were members of the board of jury selectors for "Outpost" (a criminal case from the same county, using the same jury lists, resulted in the reversal of a forgery conviction by the State Supreme Court). The class action in a civilly initiated case resulted in a decree by a federal judge which ordered a wider selection of Indians for jury service (1970).

Both coroner's juries were assembled by the sheriff, a white Democrat, who was re-elected in 1970 and who in 1972 changed his registration to Republican during the primary and won re-election.

The 1969 Jury Pool

The four juries--those finally selected for forgery, manslaughter, murder and forgery trials--were taken from the May term circuit court jury panel of 73 jurors drawn by lot by the "Frontier" County clerk of courts when the names of the cases were announced and the circuit judge requested jurors. The 73 names requested by the presiding state circuit judge were drawn from a master jury list of 150 names. The 150 names had earlier been drawn for the May 1969 term of court (running from November 1, 1969, to April 30, 1970). No jury cases were tried in the November term. The 150 names were drawn from a jury requisition list of 300 names, ordered a year earlier (in 1968) by the judge. The 300 names were submitted by jury selection boards (made up of township and town boards and county commissioners) on a population prorated basis.

Four out of the 73 names drawn were identified by the clerk as Indian, but three were eliminated from service by the voir dire or pre-trial interrogation. Nine other white jurors on the panel of 73 were later named as defendants in a civil rights case over alleged exclusion of Indians as jurors. In addition, names on the master jury list included: A county commissioner, the wife of the state's attorney, the wife of a city councilman, the 1968 Democratic county chairman, the man who became the Republican county chairman in 1970, the wife of the county commissioner, a minister and his wife, a deputy county treasurer and the wife of the justice of the peace.

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Thirty-eight names listed on the May 1969 jury panel were identified as women, the remaining 25 as men. Forty persons were identified from a 1972 voter registration list as Republicans, 21 were registered Democrats (those not positively identified because of questions over names were not included in these totals--for example, a woman using her first name on one list and her husband's on another). The county had a one-third population of Indians in 1960 and again in 1970, according to the U. S. Census Reports.

The Screening Process

Jurors, before they are sworn to try a case, go through a screening examination, called a voir dire, to assure litigants that 12 persons will be selected who will give "true and fair consideration" to the case. According to the "Handbook for Jurors," prepared by the State Bar of South Dakota, this is begun by the clerk drawing names from a box (containing in this case the 70 names drawn for the May, 1969, jury panel). The clerk tells 12 prospective jurors whose names have been drawn out of the box to move to the jury box in the courtroom. These 12 persons are then given an oath to answer questions concerning their qualifications to be a juror. The lawyers for both parties to the lawsuit give a general statement of what the case is about and then proceed to determine whether or not any of the prospective jurors know anything about it and to determine whether or not the jurors meet qualifications spelled out in state statute or reflect prejudices for which the attorneys may excuse them. If any of the 12

examined do not meet the qualifications, more names may be drawn by the clerk from the box containing the names of the jury panel (Case A--one of the forgery cases--had three extra names drawn from the master jury list over the initial 70 names requested for the May jury panel by the judge. The three sat on the case).

After the voir dire procedure, either the defense attorney or the prosecution may arbitrarily remove a prospective juror without any cause whatsoever (called a peremptory challenge). According to the 1967 South Dakota Compiled Laws (Titles 22 to 24 in Volume 8), in criminal cases when the offense is punishable by death or imprisonment for life, each party is entitled to 20 peremptory challenges, in other criminal cases 10 are allowed. In addition, if any of the prospective jurors has shown some disability (such as bad eyesight, hearing defect, language difficulty, felony record, bias, etc.) he may be challenged for cause. If the judge finds the cause sufficient, the juror will be excused from service on the case.

Eventually, 12 jurors are selected and agreed upon by both parties. If agreeable to all parties, it may even be fewer in civil cases. These 12 jurors then take an oath to try the case and this is where the actual trial begins.

Who Served on What Cases

Interviews were conducted only with jurors who either served on the murder case or on both the murder and manslaughter cases--the thought being that the more serious the potential penalty, the more

serious the "soul-searching" and therefore a better portrayal of "community conscience." (For reference, see cluster diagrams on pages 16 and 17--jurors interviewed included: 8, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23).

Actually, only 11 jurors, including those who served on both trials, were interviewed. Interviews required approximately 2,400 miles of travel. The 12th juror made some comments but refused to be interviewed.

Figure 1. Sexual, Political, Racial and Caseload Profile of Jurors in Cases A and B.

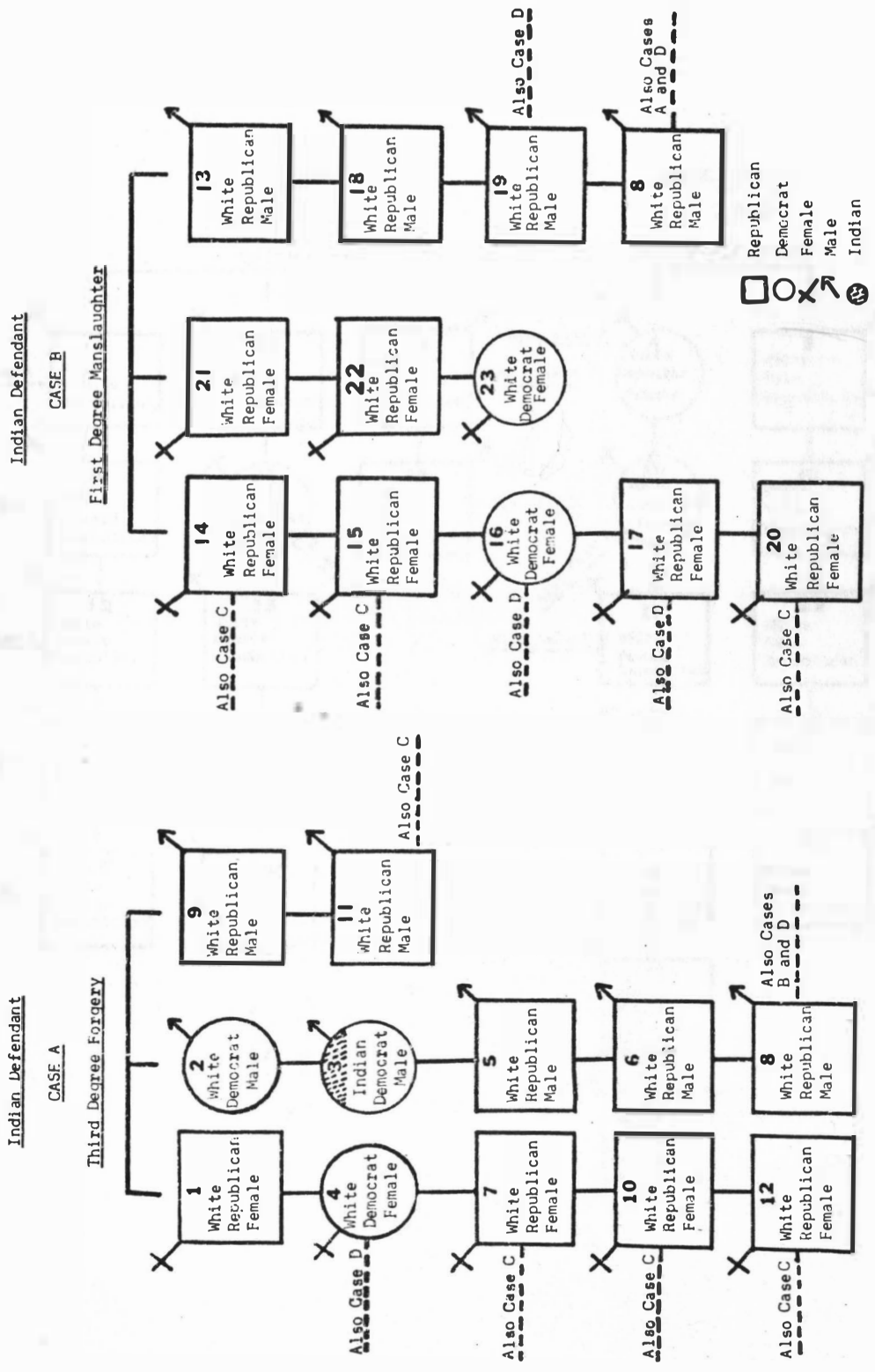
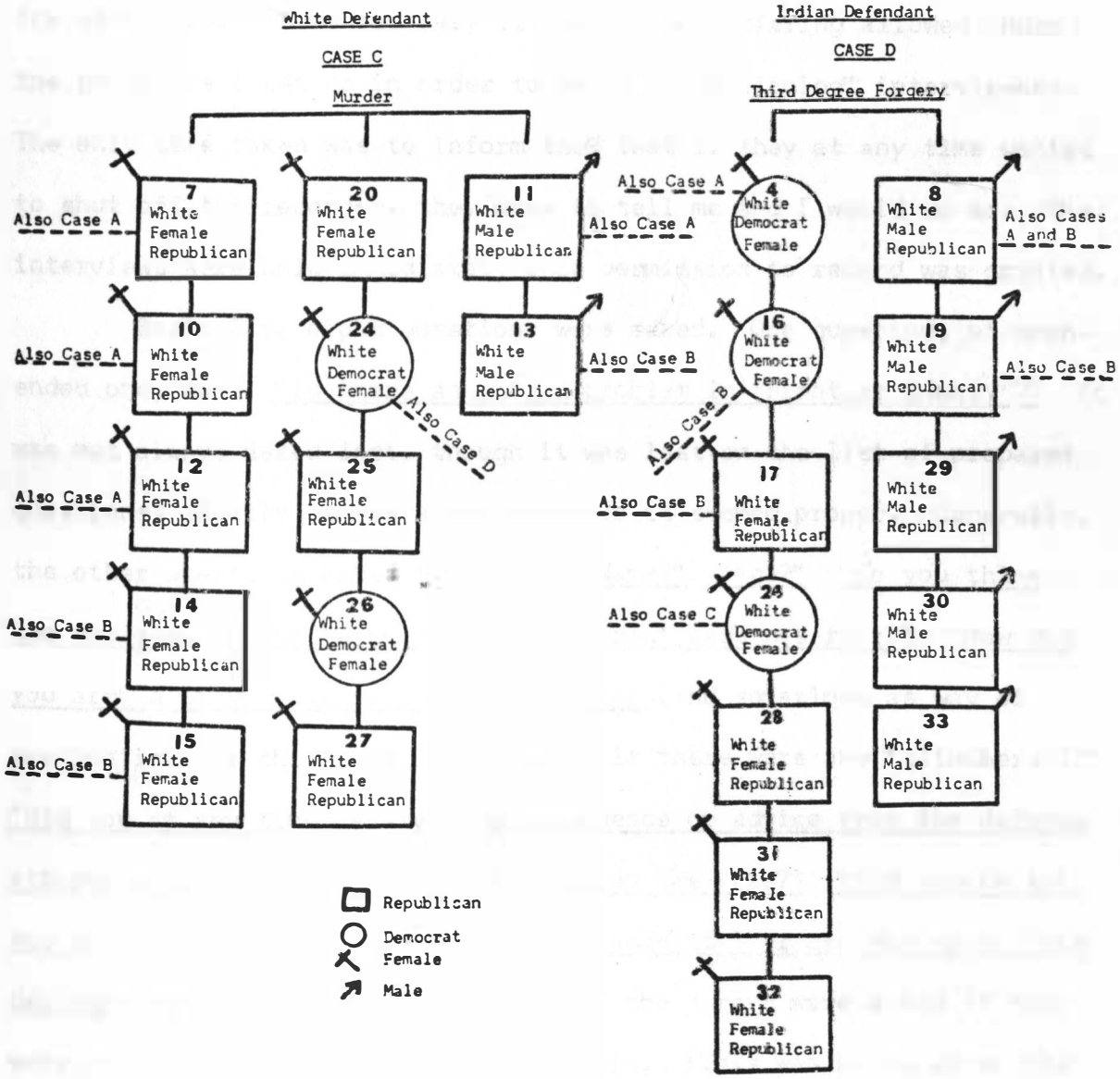


Figure 2. Sexual, Political, Racial and Caseload Profile of Jurors in Cases C and D.



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Procedure-- After introducing myself, giving my name and address, and then announcing that I hoped to gather information on the judicial process for a master's thesis in journalism, I asked them for attitudes. There was very little advance briefing allowed under the procedure I set up in order to avoid "conditioning" interviewees. The only time taken was to inform them that if they at any time wanted to shut off the recorder, they were to tell me and I would do so. The interviews were held immediately once permission to record was granted.

Basically, eight questions were asked. One question, an open-ended one, was: "Is there an Indian problem in 'Frontier County'?" It was not always asked last, though it was last on the list of prepared questions; usually it was asked whenever it seemed proper. Generally, the other questions asked included: "Name?" "Age?" "Do you think the decision in the 'Washington' or 'Arrow' case was fair?" "How did you arrive at your decision for acquittal (and sometimes as way of explanation for this question, I asked if there were any 'clinchers')?" "Did you at any time receive correspondence or advice from the defense attorneys or law enforcement officials on the case?" "Did anyone tell you anything 'good' or 'bad' about the acquittal or ask you about your decision for acquittal?" About half of the jurors were asked if they were related to law enforcement officials. (This was begun after the interviewer became aware that there was a possible trend concerning this possibility).

Only one of the jurors, whom we will call "Mrs. Ida," refused to be interviewed. She told me to come back another day, because she had a hair appointment. A few days later when I called on her, she informed me that she had seen her attorney and that she did not wish to discuss the case--thus there was no recording.

"Mr. Emery's" interview was probably the least relaxed because it was interrupted by questions from a woman who appeared to be his mother. "Mrs. Georgia" was not asked the "Indian problem" question, but instead was asked if there were "other factors that may have crossed your mind?"

All of the jurors apparently were convinced of the fairness of the trials and expressed firm convictions about their decisions for acquittal. None of the jurors interviewed said he or she had received correspondence or advice from attorneys on the case before the trial.

Profiles and Responses

"MR. EMERY"

The first juror, a man we will call "Mr. Emery," was named jury foreman for the "Washington" murder trial. He ranches northeast of "Outpost" and at 23 was the youngest of the jurors. About a week earlier, he also had heard the "Arrow" manslaughter case.

Interviewer--Do you think there's an Indian problem in "Frontier County?"

Juror--What do you mean by "an Indian problem" for sure?

Interviewer--I don't know. I just asked.

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> Juror--Well, I don't [think there's an Indian problem]. I wouldn't say that there was an Indian problem that I know of. There's [pause]. Oh, I don't know. I don't doubt there's individual prejudism [sic], like there is in anything. It's the other way, too, I think.

In recalling the two trials (about two years had elapsed since he had sat on them), he felt that they were "pretty much the same kind of deal" in that "a man was defending himself [on his home grounds] and had no other alternative." There were no arguments about the decision among the jurors, according to "Mr. Emery."

He answered that he did not believe the attempt to introduce a drug as a possible cause influenced his attitude on the character of the man who was shot. "It was just more of the circumstances . . . what had happened before . . . the fatal shooting."

"Mr. Emery" said he was not related to law enforcement officials or attorneys "that I know of." No one discussed either case with him after the trials, he said.

"MRS. BEULAH"

The second juror, a woman we will call "Mrs. Beulah," was a white Republican and 54. She was married to a farmer who lived near a town we will call "Railhead." She also served on the "Arrow" case. She stated she did not know the defendant, but that her older brother (who had worked for the rancher when he was young) had told her after the trial that "Washington" was "a real nice guy . . . a real nice fellow to work for." She also recalled, "He ['Mr. Washington'] did quite a bit for my folks when my dad was killed."

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Interviewer--Do you think they have an Indian problem in "Frontier County?"

Juror--Yeah! I feel there is a problem. I feel that they are giving them too much, and not making them work enough on their own! You know, I've had several to report to me when I try to get them to work, you know. They'd say, "We don't have to work, all we have to do is go to [name of town where Indian agency is located] and talk. We get what we want. Don't have to work. I think they give them too much!

Interviewer--But this didn't enter in on your consideration of the case?

Juror--Oh no! No. Hunh uh. No.

In recalling the two trials, "Mrs. Beulah" saw similarities. The man on trial for the stabbing death was "trying to defend his wife from getting hurt . . . and I have no doubt that 'Mr. Washington' was definitely defending himself, because I've lived with Indians too long to know." The rancher was "on his own property and where this fellow followed him, you know, several times and shot at him. And 'Mrs. Washington' was always good to them and I couldn't see no reason, you know, just that [voice trailed off, incomplete statement] . . ."

"Mrs. Beulah" said she did not feel the attempt to introduce a drug, used in ceremonies of a particular Indian church, as the possible basis for irrational action by the Indian assailant who had been shot, had any influence on her final decision. She said she felt by watching the witnesses and defendants she could, "right off hand" tell who was lying and who wasn't. She could not pinpoint any determining factors for her decision; instead, "I just went more by how they

talked and, you know, they [pause]. I don't know, it's just something I can't explain, you know. The prosecution brought out everything they could," she said. "He ['Mr. Washington'] answered quickly and he was alert and it was just composure and poise on the witness stand that I was sure he was telling the truth."

She knew of no jurors in either case related to law enforcement officials or the defendants and had received no correspondence or advice from the defense attorneys or the sheriff, she said.

In answer to the question about after-trial comment or criticism, she said, "No, I haven't had no Indians to say anything to me about it. I think, if I remember right, there was a couple of white guys said something."

Interviewer--Were they residents?

Juror--No, just like I run into somebody in town. I don't even remember who it was. Just all he said was that my life was at stake, if you know, if me helping set "Washington" free, why the Indians would probably . . .

Interviewer--Yeah? You don't know if they were people from within the state or somebody from way out of the state, do you?

Juror--No. They were local people.

"MRS. CAROLINE"

A third juror, a woman we will call "Mrs. Caroline," was a white Republican who lives on a ranch near "Railhead," but who is a temporary resident of "Victor," where she works with Indians in one of the federal education programs for children. She was 49 when she

served on both the "Washington" and "Arrow" cases. Her son's playmates are Indian children, she says. Her husband, as a member of a township board in "Frontier County," was listed as a defendant in the class action in federal district court which later resulted in wider selection of Indians on jury panels.

Interviewer--Would you think that there is an Indian problem in "Frontier County?" Is there a social problem, a cultural problem?

Juror--You mean between the whites and Indians mixing?

Interviewer--Oh, whites and Indians, not necessarily the whites and Indians mixing. What I'm looking for is solutions.

Juror--My children have gone to school with Indian children. In fact, when they were going to school in /name of town in a neighboring county/ one or two of my boys' best playmates, or one of the kids they played with the most, was an Indian boy.

"Mrs. Caroline" said she felt there were problems, but did not care to be quoted on specifics. (Tape was turned off and the conversation was informal for a few minutes, until she allowed me to return to taping).

Juror--As far as the Indians or whites, I don't know. I work with Indians. I mean, I think the white man's trying to /pause/. Well, I think maybe in certain ways that the white man is trying to push their culture onto the Indians in some ways. And the Indians, ah, well, /they/ naturally, want to preserve their own culture and their culture is just simply different than white man's and I think that's where part of the trouble, /that's/ where we are running into trouble.

"Mrs. Caroline" said she didn't remember enough about the two trials to draw any similarities between them, although she felt the

key point in the murder trial of "Mr. Washington" was that the man who had been shot was on the rancher's property and the way the pathologist said he was coming at the old man "in a crouched position."

She said she wasn't related to law enforcement officials or attorneys. After the cases, she said no one criticized her for the decision, "but I was kind of glad to get out of town. It made you just a little 'spooky,' when the verdict was to come in. . . . I think they expected some uprising because all of the law enforcement officials that were around there. And we just didn't know what was going to take place."

"MRS. DELPHINE"

The fourth juror, an "Outpost" area rancher's wife who appears to be in her 60's, we will call "Mrs. Delphine." She is the wife of a Republican state legislator. She stated she and her husband did not know "Mr. Washington" personally, but had been at cattle sales that the defendant had attended. "Mrs. Delphine" also served on the "Arrow" manslaughter case. Her husband, as a member of a township board in "Frontier County," also was listed as a defendant in the class action in federal court involving jury selections.

Interviewer--Would you say that there was an Indian problem in "Frontier County?"

Juror--Uh huh [yes]. Well, I think wherever you have Indians that you have an Indian problem because there's always a few that are agitators, but you have a lot who are pretty good Indians. We rent land from Indians all the time and as long as we have lived here and we've lived here all our lives, we have never once had trouble with the Indians. But there are people who drink and

who will give drinks to the Indians and things which definitely start trouble and cause trouble, that's all.

She said the population of the county is pretty much the same as it was 60 years ago. "It's pretty much the same and it's pretty much the descendants of the same people who have lived here all the time /both Indian and non-Indian/."

"Mrs. Delphine's" husband, the legislator, also added his thoughts while his wife nodded occasionally in agreement:

Juror's Husband--I had one Indian . . . that worked for me that was a real fine boy, and he left and went out there /to another part of the country/ and when he came back here to visit, you would say that he's just like the best non-Indian you ever met. He drives a swell car. They are dressed up, just as good as anybody, but they've got to get away from these Indians here. This is what ruins an Indian. When he makes a success /pause/, I don't know whether you know it, but an Indian believes what that /other/ Indian has got is mine, too. And he's got to share it with me. Well, if an Indian does well and stays here, he has all the parasites in to eat up what he has made. And when he goes away from here and gets to living in a white settlement, then he doesn't have that problem. And they do well.

"Mrs. Delphine" did not draw parallels between the two cases, but did reflect later that the Indian, "Mr. Arrow," the defendant in the manslaughter case, had lived in "Outpost." She added, "We knew that he /'Mr. Arrow'/ was an Indian that was trying to do the right thing, but the rest of these agitating Indians just absolutely wouldn't let him alone. That's all."

Juror continues--And we knew that he was trying to do the right thing and everything and it was the same thing with "Mr. Washington." He's a man that has ranched here all of his life and never in all our whole

> life have I ever heard of one bad thing against the man. . . . We didn't visit personally . . . but we did know of him and we knew of so many things that he had done for the Indians. It was just fantastic. He was helping them all the time. And he didn't have any children of his own and he took Indian children and put them through school and things like that.

She said no one approached her about the outcome of the trials, although on the last day of the second trial, the "Washington" murder trial, the jury was aware of the tension that had built up because they had police officers at every door of the courthouse "to keep people away."

There was no one thing that firmed her decision on either case, she said. "Not just one thing or two things, but the whole thing led up to this, so that you really didn't have any doubt in your mind," she recalled. The suggestion of the possibility of drugs in the murder case did weigh some in her decision, she said.

"MR. EDWARD"

The fifth juror, whom we will call "Mr. Edward," is a Republican farmer who lives near "Railhead." He was 26 at the time of the trial. He also served on the first forgery case, Case A. As a member of a township board in "Frontier County," he too was listed as a defendant in the federal class action concerning Indians on jury panels.

Interviewer--Do you think there was an Indian problem in "Frontier County?"

Juror--No. There's a liquor problem in "Frontier County."

Interviewer--And who happens to be involved in a liquor problem most often?

Juror--That I couldn't say. I don't use the stuff.

Interviewer--Oh? You think Indians have a liquor problem?

Juror--Some of them do. There's a great number of white people that have a liquor problem.

"Mr. Edwards" said he felt the decision in the murder trial was fair because "the state had the burden of proof of guilt and I couldn't see where they proved anything." He added that he could not see "what more the prosecution could have done." He saw no reason for the defense attorney's suggestion of drugs as a factor.

"Mr. Edwards" commented, "If somebody were to threaten me on my property, I would be willing to protect myself anyway I could. This is what was claimed by 'Mr. Washington' and there was never any proof to the contrary."

"MRS. FEDORA"

The sixth juror, whom we will call "Mrs. Fedora," was a Republican and was married to an about-to-retire chairman of the "Frontier County" Agricultural Stabilization and Conservation Board. She lived across the street from the county jail. She was later identified as the sister-in-law of one of the members of the coroner's jury in the "Washington" case. Her son, a few months after the trial, ran for "Frontier County" sheriff on the Republican ticket, but was defeated by the incumbent Democrat sheriff, elected in 1968. In 1972,

when the incumbent Democrat sheriff switched parties and ran on the Republican side, her son switched to the Democrat side and ran for sheriff in the primaries. The incumbent sheriff won the office again in November, 1972, with his new party label. "Mrs. Fedora" also served on the first forgery case, Case A. Another son, also Republican, according to local sources, served on the second forgery case (Case D). Her daughter-in-law was called for the November, 1969, jury panel, but no criminal cases were tried during that term of court.

> Juror--/After the trial/ we were told that it /the trial/ was unfair because we were an all-white jury, but to me, an Indian is a person, the same as . . .

"Mrs. Fedora" said the evidence convinced her that the dead man "was after 'Mr. Washington'." Though "Mrs. Fedora" said the suggestion of drugs did not influence her decision, she later reflected, "Well it did, because I'm sure they have used that in--the Indians always use that in their . . . religious ceremonies, you know. But I have never saw it, never saw how they reacted to it."

She said there were no "clinchers" in the trial. "No, there wasn't. No. No, 'cause, ah, it just seemed like it was a fair trial, that all of the evidence that they brought out for us, and it wasn't because he was Indian, either."

"MRS. GEORGIA"

The seventh juror, whom we will call "Mrs. Georgia," was Democrat and principal of "Outpost High School." Reliable sources said

that she originally was the wife of a "Frontier County" sheriff, who served in that capacity in the late 1940's or early 1950's. She remarried to a tradesman. The man named as her first husband also at one time served as a local brand inspector, hired by a statewide livestock organization with which "Mr. Washington" also had been affiliated. "Mrs. Georgia" served on both the "Washington" case and the second forgery case (Case D).

"Mrs. Georgia" said there were no other factors about the murder case other than the facts presented to influence her decision. The attempt to introduce drugs as a causal effect for the Indian's alleged attack on the white man had no influence on her decision, "whatsoever."

"I kept a complete written record of the entire court case and when I weighed the one against the other, it was far, ah, well, the weight of the "Washington" side was far heavier than that of [the dead man's]."

She felt that it was a matter of self-defense, she said. "After we went into the jury room, we discussed the entire case. We went through the whole case and there were no dissenting votes." The decision took between an hour and a half and two hours, she said.

A former justice of the peace of "Frontier County" said the militant American Indian Movement held a protest session a year later on Indian land across the road from "Outpost" (on land not under state jurisdiction) and accused the local school of discrimination,

among other allegations. Later, a mixed citizen's group was formed to investigate grievances.

"MRS. HERSHEY"

The eighth juror, we will call "Mrs. Hershey," was an "Outpost" Democrat and a weekly newspaper correspondent as well as a full-time employee of the "Frontier County" ASCS office. She was the sister of a deputy sheriff of a neighboring county which had more than 60 per cent Indian population. Her mother, "Mrs. Jenks," also served on the "Washington" case. "Mrs. Hershey's" husband was a State Highway Department employee, but county residents said in earlier years he had worked for the man on the coroner's jury in the "Washington" case who once had been the Republican county chairman (already described). "Mrs. Hershey's" brother-in-law also was listed as a defendant in the class action which took place in federal court over Indian and non-Indian jury selection ratios.

"Mrs. Hershey" said she felt that white people may put undue pressures on Indians to live like white people and that she didn't think an Indian could be re-shaped into another society.

> Juror--You might could take an Indian baby and take him completely out of here and he's going to be fine, but even then, if you bring him back here and let him get a taste of reservation living, you are going to lose him. We see it happen all the time, people that we went to school with and go away, get a college education, a good job. But just let him come back and it isn't long before they are drinking and boozing around and teepee hopping. And we've had it happen, time and time again. . . . The Indians that were here resented "Mr. Arrow" /the defendant in the manslaughter case/ because he was

an 'outside Indian' and because he kind of held himself above the other Indians. He didn't drink and booze around. He kind of tried to make something of himself. There was a lot of antagonism toward "Mr. Arrow."

He wasn't a Sioux Indian /another source, plus a trial transcript identified the man as a Choctaw/ and came from another state /California/. After the trial, his wife's own uncles and brothers /the slain man was his wife's uncle/ and people like that, were causing a lot of trouble. They just harassed him so bad that some people got money enough together to get him . . . down to Missouri or some place there right afterward. . . . The Indian is the hardest on the other as anybody.

"Mrs. Hershey" also sat on the "Washington" murder trial. She said she thought of the Indian coming on the rancher's place and threatening him.

Juror--I thought "Mr. Washington" had every right to protect his property. In the trial, the prosecutor made quite a thing out of the fact that "Mr. Washington" could have run for help, but . . . he wouldn't have stood a ghost of a chance. . . . He couldn't have run 10 feet.

I think, basically, a man has the right to protect his own home and I think that was the thing I felt. I mean I felt "Mr. Washington" had been harassed and harried and picked on by this man and when he came on his place and you have to know the two individuals--I mean, poor, frail, old fellow and this Indian . . . he weighed around 200 pounds. . . . If we get to the point where a man can't protect his own property and especially somebody like "Mr. Washington" who had worked out in this country since 1904 or something like that, I think if he doesn't have a right to protect his own property, then we've had it.

"Mrs. Hershey" added, "I don't think any of us were too influenced by this peyote thing."

She was negatively influenced by the testimony of the Indian stepmother of the slain man in the "Washington" trial. "She was very,

very bitter and vindictive, and just the way she presented things, you couldn't help but get the feeling that she was lying."

> Juror--I felt very, very sorry for the /Indian/ grandmother, the old lady who had raised /the man who was shot/. She'd lived out there all her life, and "Mrs. Washington," like most white ranchers, you get to the point where you kind of adopt these certain Indian families that you live neighbors to. They kind of adopt you. They come to look upon you as kind of a protector. I think any of us that have ever been in ranching have certain Indian families that kind of come to you for advice and sympathy and money, and I think this grandmother felt very, very badly /about the tragedy/ because "Mr. Washington" had always treated her family, you know, helped her in different ways and had always rented her land and this and that. I think she /and the slain Indian's father/ felt very, very badly.

"Mrs. Hershey" said there were two minor incidents after the trial in which Indian men had attempted to deride her about the decisions, but that she had lent a sympathetic ear to one and he'd left her alone. The other man was "very, very drunk," so she called the town marshal and he put the man in jail to "sleep it off" overnight, she said.

"MRS. IDA"

The ninth juror, whom we will call "Mrs. Ida," was a young "Outpost" Republican and the adopted daughter of a former Republican sheriff, who had served as "Frontier County" lawman in the early 1960's. She also worked in an "Outpost" business firm. "Mrs. Ida" served on both the "Washington" murder case and the first forgery case (Case A).

> Juror--I don't want to talk to you. I've seen my attorney and he advised me not to say anything. He said I didn't have to.

(Frontier County--33)

"MRS. JENKS"

The 10th juror on the "Washington" murder case, a person we will call "Mrs. Jenks," was a 65-year-old "Outpost" widow who had worked as a waitress in town. She said she had retired recently. She was the mother of "Mrs. Hershey," one of the other jurors, and also mother of the neighboring county's deputy sheriff.

Interviewer--Do you think that there is an Indian problem?

Juror--What do you mean?

Interviewer--I mean is there a problem with them drinking and lack of working?

Juror--Well, there's a lot of drinking and dope and things like that, but I never paid any attention. It don't bother me one way or another.

Interviewer--Is there dope on the reservation? What kind of dope? Marijuana?

Juror--Oh, farther on in there around /name of town/ and through there, they've had several cases of it and they had some here, but they never . . .

Interviewer--Is that marijuana or is that peyote?

Juror--I don't know. It's marijuana or something. /She departed from the subject, but then returned/ but this younger bunch /of Indians/. I just, I don't want them near me and I don't go near them. I just can't stand that kind of just drinking and lately they've been coming here trying to sell their "commodities" /surplus food the federal government gives needy families/ and you can't be decent to them or in they come.

Interviewer--Did you feel that any of that may have influenced your decision at all? Or was that pretty much clear conscience?

Juror--No. I never. I wasn't against the Indian. I just never give it a thought. There's some really

nice Indians and I don't believe in that drinking and stuff. No, I . . . it was just what I heard, just the testimony. I'm telling you, they--I couldn't see where they couldn't say he /the slain man/ was over there, that he was in the intention of getting "Washington" all right. You could see that.

Interviewer--Yeah?

Juror--That's what I went on more than anything. They did bring up about them having those peyote parties over there and the old . . . well, there's two sides to everything and I didn't even go over to the big hearing they had first or anything. I didn't know anything about it and they just called me and I went up. I was just working over here for /named employee/ and I didn't pay any attention to any of it.

Interviewer--You have neighbors that are Indian?

Juror--Oh, yeah. There are two families of Indians that live right down here now. No. It's not the color of their skin or anything. I just don't believe in drinking and that slopping around. They don't try to work. You can't get them to work for you. They work for maybe a few hours and get a dime and they'll promise to be back and that's the last you see of them. They talk about these "starving Indians!" They come in here with those "commodities" and just hound you to death. . . . That one, though, kept coming around here and I, and he'd make out that he knew my son real well. . . . He'd start in about /her son/ this and /her son/ that. And then he wants to sell and he'd come in, see. . . . /my son/ was deputy down at /name of town/ at that time, but that fellow would usually come here and would talk like he knew /my son/ and would want to sell something.

Interviewer--Oh, I see.

Juror--When they want to sell their "commodities," they'll always start out about /son's name/.

Interviewer--Oh. An old friend, yeah?

Juror--Yeah. Old friend! My husband, he was kind of a rodeo guy when he got killed at /town/ there at a rodeo. They'd always start in about their old friend. Never ask them in and I don't

> but sometimes they'd all just come on in. That one, especially that /named Indian man/, he's been in here several times, lately. He's bound he's going to sell some of that /"commodities"/ and I'm just, bound he's not. Because if they get that to eat, I ask him, can't you use that? And he said, we do some, and he said we like to go out and hunt and things like that. Just anything to get that 50 cents or a dollar for a little wine and they take off and get that and they are right back.

Earlier in the interview, "Mrs. Jenks" had been asked if she was related to any law enforcement officials or court officials and she had replied, "No."

In answering how she arrived at a decision for acquittal in the murder trial, she commented, "Oh, we all went in there the jury room and talked together. I don't know. You know the different things they had there. We just come to a conclusion, I guess."

The evening after the trial at about 11 p.m., she said the stepmother of the man who had been shot and killed came to her door and asked her the way down town. "I showed her the way down town, but she didn't say anything to me."

Commenting on the murder defendant, "Well, 'Mr. Washington' was good to these Indians. This dad even to that boy (the slain man) told them that he'd worked there and he didn't seem to want to say much at all, because he knew that 'Mr. Washington' had kept them."

"MRS. KELLER"

The 11th juror, whom we will call "Mrs. Keller," was 28. She was a Republican rancher's wife, living northeast of "Railhead." Her brother, who was studying law at the State Law School, later

graduated and joined one of the law firms defending "Mr. Washington" in the case. He witnessed the interview of his sister for this article. Their father, as a member of a township board in "Frontier County," was listed as a defendant in the class action in the federal court which later resulted in a wider selection of Indians on jury panels. "Mrs. Keller" also served on the first forgery case on the docket.

Interviewer--Do you think that there is an Indian problem in "Frontier County?"

Juror--I don't know what you mean by Indian problem.

Interviewer--Well, what I have been perceiving is that there are quite a few Indian arrests. Do you think that there is a reason?

Juror--Well, I definitely think that there is a problem. I don't know whether you'd call it an Indian problem or not. A lot of these people have an alcoholism problem and probably aren't able to manage their own affairs and it gets them into a lot of trouble.

Interviewer--Were there any other things about the /"Washington"/ case that intrigued you, that stuck out in your mind, for example?

Juror--Well, we hear so much about Indians not being able to serve on the jury. And so many times the people on the--the township officials--have been criticised for not putting Indian names on the jury list and this day they picked the jury /both for the first forgery case and the murder case/ they had Indian after Indian that made excuses that they didn't want to be on that jury and I knew that some of those excuses were not so. They said they were related and different things like that, so they wouldn't have to serve on that jury. And they gave the court no choice but to excuse them. And I don't like this kind of criticism when I know that they do have a chance to serve, but they made excuses. . . That day I did see that these people /Indian/, with the exception of one person, that they interviewed made excuses, which I didn't think were valid.

(Frontier County--37)

In making her decision for acquittal on the murder case, "Mrs. Keller" said, "I think I tried to keep an open mind and listen to the story on both sides." The introduction of peyote had no influence on her decision, she said.

Interviewer--I was wondering how a juror would be able to decide who was lying and who wasn't.

Juror--Well, I've lived in this country a long time and I think I know the people around here pretty well and just from the attorneys' questioning and so on and their ability to answer the questions, freely without thought. There were several times that I felt the witnesses /Indian/ couldn't come up with a straight answer and I felt that they were lying or trying to figure out what was best to say.

Interviewer--You mean /the slain man's/ side was lying?

Juror--Right. Some of their stories didn't jibe. . . . /The stepmother/ couldn't keep her story straight.

"Mrs. Keller" said she thought the investigation by the state was very thorough. "Mrs. Keller" said she was never criticized about the decision following the trial, but that "some of the jurors were a little bit afraid that they would be criticized or bothered in some way, but I never was."

Juror--/The attorneys for the prosecution/ asked us to think about the question that maybe he /"Mr. Washington"/ could have hid in the grain bin. And I'm not going to hide in the grain bin if somebody comes around to harm me! . . . That just went against everything that I've ever been taught to believe. That your own home grounds is your ground and nobody better come around bothering you. . . . In making the comparison, if "Mr. Washington" hadn't protected himself, he might have ended up like Mr. Yeado /murdered/.

(Frontier County--38)

"MRS. LEVINA"

The 12th juror, whom we will call "Mrs. Levina," was the wife of the "Outpost" justice of the peace who a few years earlier had served as deputy sheriff. Both she and her husband were Republicans and worked at the newspaper which they owned.

Their retained attorney was the county's only attorney--the state's attorney who assisted in the prosecution of both the "Washington" and "Arrow" cases. The two families were on card-playing terms, she said. The justice of the peace allegedly issued the original warrant for "Mr. Washington's" arrest once the widow demanded the state's attorney to try the case, but stepped aside from the case when the question of bonding arose, because he said, "I felt it was too big a case for a justice of the peace to handle." A county district judge was secured for the preliminary hearing. "Mrs. Levina's" husband, however, held the preliminary hearings on the manslaughter and the forgery cases.

The state's attorney also played a subdued role in the "Washington" trial when he explained to the circuit judge at the beginning of the trial that he and the defendant were holders of an undivided interest in real estate. He explained, "We weren't in any kind of business venture together or any kind of business arrangement." Most of the burden for trying the murder case went to the assistant attorney general, who was new to the area.

(Frontier County--39)

The assistant attorney general said, "I did [he examined] the jurors."

"Mrs. Levina" said, "I was shocked" when she learned that she had not been removed from the jury for cause; however, when asked if she thought she could be an impartial juror, she said, "Yes," so she served.

Another interesting fact was that her son was a key witness in the "Arrow" stabbing case. The incident occurred across the street from their home. The "Levina" boy testified that he saw the slain man run from the yard next door holding his stomach. Just as interesting, perhaps, was the fact that two teen-age sons of a juror on the first forgery case (Case D) also were witnesses in the manslaughter case. The three boys were playmates and had played basketball with the manslaughter defendant. (Another short article, entitled, "No Simple Matter--J. P. Averts 'Out-of-Court' Settlement; Collects Money for Safe Exit Out of Town," details the circumstances too complicated to insert in this portion of the series).

During their 13 years in "Outpost," the "Levinas' opened their home to eight foster children, six of them Indian.

Interviewer--Would you say that there is an Indian problem in "Frontier County?"

Juror--Definitely!

Interviewer--What kind of a problem?

(Frontier County--40)

> Juror--Well, I don't know, really. I think it's a little of both sides. I can't say all Indians are bad, because I know they are not. There's lots of good Indians. It's the same faction all the time that's in trouble. They get thrown in jail or up in court, always the same bunch.

"Mrs. Levina" was so incensed about a letter to the editor of a daily newspaper from a reader critical of the decision on the "Washington" trial that she wrote an answer defending the jury's decision, commenting at one point, "/The dead man's/ father, a witness for the prosecution, testified he knew of no reason other than self-defense that 'Washington' would have shot his son."

She also asked why doesn't the newspaper print a big story on the case that occurred before "Washington's," the one on "Mr. Arrow," charged with first-degree manslaughter? They never write a big story about two Indians, she said. "Only when white and Indian /are involved/, do they make big stories about it, leaving out half the facts and reflecting what they want people to hear--half truths." "Mrs. Levina" charged, "They can't yell discrimination or unfair treatment with no white involved. . . . There certainly is a group of them /Indians/ who are continually in and out of court and jail and unless you live here and watch what goes on, you have no idea how bad it is at times, especially the first week of the month when the government checks come in."

During the thesis interview about the jury, "Mrs. Levina" observed, "They always claim that the Indian is always found guilty--well, 'Arrow' wasn't."

(Frontier County--41)

Interviewer--After the trial, were you told anything 'good' or 'bad' about "Mr. Washington?" . . . For example, did an Indian ever approach you and give you a bad time?

Juror--For two weeks, everytime I came out of a store or walked up the street, there would be the old stepmother [of the man who had been shot] . . . . She was right on our backs. . . . Like if I'd come out of the drugstore, she'd be setting there in a car. If I went down to the shop . . . and you'd look out the window and there she'd be, parked out in front.

I think everybody on that jury was a little leery. I mean, you know, because the hallway was so full of these people, you know. After you live around them, you kind of get the feeling when they are thinking, boy you'd better watch out!

"Mrs. Levina" at one point commented, "I never could understand why I was on that jury!"

Interviewer--Yeah?

Juror--Because the circuit judge wouldn't even let me come up [as a juror]. . . . he'd just excuse me from every other case because my husband was on all the preliminary hearings. And that day, you know, they asked some of them--"Do you know the prosecuting attorney?" "Do you know_____?" And, of course, [my husband] had a lot to do with the [state's attorney], he was our attorney. . . . Their lawyers . . . I knew them all . . . but they never asked me if [the state's attorney] had ever done business for us. And he was our retained attorney.

Juror's Husband--But only, they did know who you was! And everybody in town knew who she was!

Interviewer--I asked [the state's attorney was named], "Did you realize that one member of the jury was the wife of the administering justice of the peace?" And he went like this [placing hand on forehead and waiting 8½ seconds before replying], "No. I didn't."

(Frontier County--42)

Juror--Is that right?

Interviewer--Yeah

Juror--Well, he knew it. They knew it. . . . I mean /the state's attorney's first name/ and /the state's attorney's wife's first name/ were good friends of ours and he was our attorney, but see, they never asked me. . . . and I was just shocked when I, well afterwards, when I went home that day /the day of the jury selection/. I just couldn't believe it, because I figured they'll just boot me right now. And when they called my name for the jury, I could have fainted. I would have never thought I'd ever be up there in that jury!

Juror's Husband--And I told them, their attorneys, I let it be known. I said, now you understand you got her on the jury and I'm justice and when I did, /the assistant attorney general/ said, "Well, she's a fair juror, isn't she?" Or, "She'd be a fair juror?" And I said, "Yes, it wouldn't make any difference to her." . . . Also, I told the judge, because I thought, you know, I don't want them to come back some time and say, "Well, hell, this thing was all put up," you know.

Juror--Because that day when we walked in /to the clerk of court's office with the other jurors to ask if I had to serve/ and . . . I said, "Well, I'm sure excused!"

And he /the judge/ said, "No. You're not! You're all coming in."

She said in all the previous cases, she had gone in with the prospective jurors and asked, "Do you want me to stay?" Always before, she said, the judge would ask her if her husband had held the preliminary hearing. "When I'd say, 'yeah,' he'd /the judge/ would say, 'No. You're excused." But I wasn't this time, she said.

"Mr. and Mrs. Levina" may not have been aware that it is not the duty of the judge to pre-empt a juror unless there is an objection by either side. In this case there were no objections by either side

and when she said she would be "fair" there was no basis to remove her.

What's Happened Since 1969

The court actions which occurred in South Dakota since the 1969 trials seem to have assured more widespread Indian representation on circuit court juries in "Frontier County"; however, there are indications from the clerk of courts and other court officials that Indians are reluctant to serve and sometimes do not show up for jury duty. The change in the jury selection law also may have some changing influence on the "conscience" of the jury in the future as this minority race is brought into the decision-making portion of the American system of justice; however, some of the patterns described in the 1969 juries appear barely affected.

The county has made an effort to comply with the 1970 order of the federal judge to put more Indians on the master jury panel and to use the voter registration list as the source for listing prospective jurors. There were more Indian names and the selection of the May 1971 jury panel seems to be a truly random sample of the county-wide voter registration list: (1) Out of 150 names on the master jury list, 41 were Indians and 109 were non-Indians; (2) There were 75 men and 75 women drawn; and (3) Sixty-three persons were identified as Republicans and 56 as Democrats [the others were uncertain or unregistered].

Where the Change Occurs

The May, 1971, jury panel, requested by the circuit judge, contained 35 names, about 15 of which were Indian. During the voir dire process, the clerk of courts was instructed to draw eight additional names. None of the new names were Indian. All of the eight non-Indian names drawn later served on the two-day trial.

The 12-member jury heard the trial of a white man (married to an Indian woman). The man was charged with indecent molestation of a child (his own). The jury returned a guilty verdict. On the jury were 8 men and 4 women; 7 Republicans and 5 Democrats; 11 non-Indians and 1 Indian, a female.

Only a fleeting examination of the records to compare the inter-linkages of the jury with elected officials reveals that the court system appears to have failed to eliminate the close ties of jurors: (1) Two of the jurors were "Frontier" City Councilmen. (2) Another woman juror was the wife of one of the township board members named as a defendant in the federal action on jury selection (1969-1970). (3) Another male juror was a retired postmaster from "Railhead." (4) The Indian woman was an employee of the local nursing home, run by the mayor.

The 1971 jurors were not interviewed nor was there an effort to investigate relationships any further. This could be done in a future study.

No Simple Matter-- STORY NUMBER 2

J. P. AVERTS 'OUT-OF-COURT' SETTLEMENT;

COLLECTS MONEY FOR SAFE EXIT OUT OF TOWN

A "Frontier County" justice of the peace helped prevent an "out-of-court" settlement for a Choctaw Indian man acquitted by an all-white jury of manslaughter charges.

The justice of the peace, who had employed both the dead man and the man who was released, said he helped collect money from business men and townspeople in "Outpost" to see that "Mr. Arrow," the acquitted man, and his wife got safely out of town and home to Missouri. The justice of the peace was fearful that relatives of the slain man, a Sioux Indian, were going to "even the score," although the court had acquitted "Mr. Arrow."

The justice of the peace had employed the slain man for about a year and a half before he was killed. When the justice of the peace heard about the threats on "Mr. Arrow's" life following the trial, he said he hired "Mr. Arrow" and kept him and his wife in his home under protective custody for more than a week.

"Mr. Arrow" had been tried for stabbing to death his wife's uncle. The dead man had allegedly been drinking and had called "Mr. Arrow" out into the night for a knife fight and lost. Jurors, who were interviewed, felt "Mr. Arrow" had been defending himself and his family.

(No Simple Matter--2)

Witnesses who saw the mortally wounded man run away from the "Arrow" yard clutching his stomach were the 17-year-old son of the justice of the peace and his playmates, a boy, 16, and another boy, 13. The slaying occurred across the street from the justice of the peace's home. The justice of the peace held the preliminary hearing on the manslaughter case and bound the case over to circuit court.

A blood relative of the slain man with the same last name moved in with the justice of the peace, later. This young Indian man (not involved with the others), whom the justice of the peace and his wife described as a "good kid," went on to college. He plans to return home to the reservation and help his people, said the justice of the peace.

The wife of the justice of the peace served as a juror in a murder case in the same court about a week following the manslaughter case.

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If No Objections, 'JP's' Wife OK-- STORY NUMBER 3

JUDGE, ATTORNEYS IN MURDER CASE SEE
NO IRREGULARITIES IN JURY SELECTION

Law school-trained participants in the 1969 murder trial in "Frontier County" saw nothing unusual about the composition of the jury, felt the "Washington" murder case was hard-fought and declare the verdict for acquittal was fair on the basis of the evidence presented.

Responses to questions about the lineup of jurors and their linkages with relatives who were law enforcement officials, jury selectors and elected officials seem to be, "Now, why would the other guy do that?"

Responses of State's Attorney

The state's attorney said from the beginning, "It was my opinion as state's attorney that 'Mr. Washington' was defending his person and property when he committed the slaying." Legal Aid attorneys, representing the wife of the slain man, indicated they had pressed the attorney general's office and the state's attorney for a trial on the charge of murder.

The "Frontier County" state's attorney said that he felt completely satisfied with the investigation in the murder case and that the matter "was investigated probably as thoroughly as it could have been."

(If No Objections, 'JP's' Wife OK--2)

In response to the relationships of the jurors, the state's attorney said, "It's up to counsel [defense attorneys] to eliminate members from the jury and if counsel failed to make the proper investigation . . . why? Of course, there sure could be exceptions to that. I wouldn't want to see a relative of the defendant or any of the litigating partners on the jury."

When asked about the mother and daughter serving on the same jury, the state's attorney replied, "I see nothing wrong with that."

Like many of the jurors in the case, the state's attorney felt there was a parallel to the "Washington" murder trial and the "Arrow" manslaughter trial in that both of the decedants were in some respects trespassers and the slayers were protecting themselves.

Chief Prosecutor's Responses

The assistant attorney general of South Dakota, the chief prosecutor in the murder trial who challenged and interviewed the jurors for the state, said there was never any attempt on the part of the prosecution to quash the jury because state statute "does not permit the state to change to another jury."

The assistant attorney general said, "I had thought I had what was a pretty decent case" until the murder defendant took the stand. "And when he was done testifying, I told [an associate], I said to him, we just don't have a ghost of a chance in hell." The chief prosecutor described the defendant: "This guy was convincing. He appeared to be just terribly, terribly honest."

(If No Objections, 'JP's' Wife OK--3)

"When you get right down to it, they had a good case. We just didn't have enough convincing evidence," said the chief prosecutor. He added, "I think if we would have taken it into another bailiwick, you know, another jurisdiction, I still don't think we'd have won." The attorney declared, "We gave it everything we had!"

His answers to questions about the inter-relationships of the jurors to public officials included: "What difference does that make?" "Comme-ci, Comme-ca!" "Did I know that?"

He said the relationships to law enforcement officials should be an advantage to the prosecution. "I leave law enforcement families on most of the time on criminal juries. . . . If you want to win in a criminal case, you want law and order types on the jury," he said.

The assistant attorney general described the 1969 jury as "a cross-section of that community. That's about all you can get out there, isn't it? The only thing it did not have on it was Indian people," he said.

Responses by an Attorney for the Defense

One of "Mr. Washington's" three attorneys said he felt that the prosecution put up a strong case. He said, "I think they did, as far as what they had to work with." He said the case was grasped by the news media and other people. "I think a lot of people had the impression that the state had a very solid case against 'Mr. Washington'," he said. The defense attorney's complaint was that the news media failed to publish all of the circumstances surrounding

(If No Objections, 'JP's' Wife OK--4)

the case. "There were so many of these facts that were not published," he said.

The defense attorney also said, "I think there was very little prejudice on the part of the jury."

He added that a week or two before the murder trial, the same jury panel tried "Mr. Arrow," "who was part white," for manslaughter and acquitted him. He said, "They [his Legal Aid attorneys] thought they had virtually no chance, very little chance of getting him off because it was a drunken knife fight. And another Indian was killed."

When the defense attorney in the murder case was asked if it wasn't unusual that the wife of the justice of the peace was on the murder trial jury, he answered, "Well, very possibly was. I don't know why the state left her on there, except that the 'Levinas' are good people that have raised about six, five or six, Indian children, foster children. These people have actually helped some of them go through college. And I think that they are very sympathetic with the Indian people, although they're not, perhaps as far as law enforcement, but I think that the state probably assumed that she would be a very fair juror, because of their close contacts with the Indian people there."

Responses from Presiding Circuit Judge

The circuit court judge who presided over the murder case commented, "It's my judgment that the jury made the proper judgment based on the evidence that was presented to them. And at the same time

(If No Objections, 'JP's' Wife OK--5)

I think that we've got to say that our system wasn't perfect then and isn't perfect now. There's changes, there have been changes that have come about since the 'Washington' trial. There'll be changes that will come about in the future."

When asked if there aren't inherent dangers in selecting a jury from a sparsely populated county--that people know each other too well or are related--he answered: "When you say danger, this to me is one of the strengths of the system, that 12 people serving on a jury are able to decide some of these cases on the basis of their knowledge of the circumstances and their ability to intervene between, for example, the over-zealous system officials who may have some personal bias against the persons in court."

The circuit judge said, "The jury becomes the conscience of the community. The jury can determine whether, not only whether the man is guilty, but whether he should be punished further. . . . The jury can keep the system from becoming oppressive and I think it can be if you don't have some group such as a jury."

Asked why the court would allow the wife of the justice of the peace to serve on the murder case, the judge answered, "Normally, a defendant would object, be pre-empted off. If they aren't off sooner, the law enforcement attorney picks them off. Now what the circumstances would be to cause the defendant or counsel to not object in this case, I don't really know."

(If No Objections, 'JP's' Wife OK--6)

Though the wife of the justice of the peace who served on the jury was concerned that the public might feel it was improper for her to serve on the jury, there was nothing the judge could do about it as long as the litigants did not object. It would not be the duty of the judge to pre-empt a juror unless there is an objection.

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Gut Feelings of Judges-- STORY NUMBER 4

HOW JUDGES FEEL RACE, SEX

MAY INFLUENCE JURY DECISIONS

A young attorney trying his first cases in our adversary court system soon realizes that there is more to winning than merely presenting the facts. There are a number of maneuvers that an experienced attorney will attempt in order to seat the jurors whom he thinks will favor his side of the case.

Judges and attorneys admit that under the adversary system there are strategies in the voir dire or pre-trial jury screening process that will enhance or hinder their chances for getting the verdict they want.

Federal Chief Judge Fred Nichol, Sioux Falls, U.S. District Court of the District of South Dakota, said, "We've found that Negroes in the District of Columbia are often harder on their own kind. Indians would be harder on their own kind. Being around juries for a long time, I find women are much harder on women litigants whether they are criminal defendants or whether they are just suing. Women are more apt to be charitable towards men than they are to their own kind."

Judge Nichol has served as judge for over 13 years--first as a circuit court judge in South Dakota, then as a federal judge.

(Gut Feelings of Judges--2)

Before that, he served as assistant U. S. attorney on the prosecution side where several of the defendants were Indian.

Judge Nichol said that he was state's attorney when South Dakota first permitted women to serve on juries in 1947. "We found that in criminal cases, especially, the women would rely quite often [on their emotions]. They made just as good jurors, they were just as intelligent as men anytime, but they are inclined to be governed a little bit more by their emotions and they would be more reluctant to convict a man when they knew that the man would have to go to the penitentiary, than would another man."

Judge Nichol said the emotions of laymen temper the law. "Some people have said a jury is the conscience of the community. That's why it's important to have juries."

A good case in point in his estimation is the possession of marijuana. "I'm not talking about pushers, but I think more and more people are beginning to realize that possession of marijuana is not as serious as they had once thought it was. Just the possession and use of it." He said, "Several juries right here in Sioux Falls have turned people loose who were charged with simple possession."

Both Judge Nichol and Circuit Judge D. G. Grieves, Winner, who represents the 10th Judicial Circuit, observed that a greater proportion of Indians are sentenced for criminal offenses, but they get lighter sentences. Judge Nichol said, "I have the feeling that in spite of the Indian's complaining about the white man's court that

(Gut Feelings of Judges--3)

most white judges take the view, even though it may be easier to convict the Indian before the jury, that actually most white judges are more lenient with the Indians for the simple reason that they realize their problems."

Circuit Judge Grieves said, "Educated Indians, from my observations as far as judging their own people, when it comes to criminal matters, are much more harsh on their own people than they are on the white people. And, consequently, most defense lawyers, if they have an Indian, they are not particularly anxious to have another Indian sit on that jury."

Circuit Judge John B. Jones, Presho, who also serves the 10th Judicial Circuit, on the other hand, doesn't feel that Indian jurors provide harsher judgments than the non-Indian. He said, "I don't think so. At least I haven't seen any evidence of this. There's never been in my knowledge any in-depth study of the attitudes of Indian jurors versus the attitudes of non-Indian jurors.

"My personal attitude, and I don't have a thing to back it up, is that the Indian juror might have a different attitude, depending on the type of case. I don't think, for example, that they have the same feeling towards forgery or check charges that maybe the white merchants have. I think the white merchant feels that writing bad checks is a lot more serious than the Indian people do."

Judge Grieves said, "The majority of the Indians are not the lawless type. Their difficulty, or the reason they get into

(Gut Feelings of Judges--4)

difficulty, is their drinking. Nine out of 10 Indians who are sent to the state penitentiary commit no violent crimes, but asinine crimes, really--passing forged checks /knowing they are forged/ just to get another bottle of booze--that's the problem. If they break in some place, if they break into your home right now, there might be $15 lying there and a quart of whiskey and what do they take? The quart of whiskey, if they're drunk. They do the same thing when they break into a liquor store. They break in there to steal cigarettes and whiskey. They don't look for money, particularly."

William F. Day, Jr., Winner, who has been a trial lawyer and state's attorney, also served as judge in the Rosebud Sioux Tribal Court for seven years. He feels that there aren't as many prejudices in state courts as people sometimes seem to think. He admits that perhaps in the court system in the areas of significant Indian populations that an Indian would be convicted sooner than a white man, "but his sentence will be substantially less than what a white man would get."

The reason, he said, "The courts and the judges take into consideration the fact that these people have not had a lot of education, have not had a lot of opportunity for jobs and of course there's a lot of Aid to Dependent Children cases; a lot of them don't work too hard. We don't have industry and I think they take that into

(Gut Feelings of Judges--5)

consideration in sentencing them. They still commit the crimes, but I don't think they get as harsh a treatment as the white man committing the same crime."

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Initial Decision-- STORY NUMBER 5

NEW JURY SELECTION LAW EVOLVED
FROM INDIAN APPEAL ON CHECK CHARGE

Few South Dakotans will recall that on August 29, 1968, a Sioux Indian named Adolph Plenty Horse cashed a check at a Wood, South Dakota, service station and that he was later arrested, charged, tried and found guilty by a jury in circuit court of third degree forgery.

What they may remember is what came of it--the random jury selection system in South Dakota.

With the help of Legal Aid Attorneys William J. Janklow, William J. Srstka Jr. and William J. Brauer, Rosebud, Plenty Horse moved to quash the jury panel on the basis that members of his race had been systematically excluded from the jury list.

Plenty Horse was successful in getting the conviction reversed on March 3, 1971. On that date, S.D. Supreme Court Judge Charles Hanson held that, "Prima facie case of racial discrimination in the selection of Indians for jury duty in the county in which the defendant, an American Indian, was tried for the crime of forgery in the third degree was not overcome by testimony to the effect that town and township officials were not familiar with the qualifications of Indians to act as jurors; thus the new panel or special venire, should have been ordered on the defendant's motion to quash the jury panel." Presiding Judge Alex Rentto concurred specially and filed an opinion in which Judge Fred Biegelmeier joined.

(Initial Decision--2)

Judge Rentto said he concurred in the motion, but did not subscribe to a rule of law that read jury selectors would have to become personally acquainted with all the eligible jurors in their respective districts. "This, I think, would place an unrealistic burden on them in our larger cities," he said.

Judge Hanson said, "It appeared from evidence introduced at the hearing that only token numbers of their race have ever appeared on jury lists."

He outlined the procedure under state law for selecting and drawing jury lists: "In summary, a jury list is required for each county from which all grand and petit jurors are drawn. The number of names to be placed on the jury list is designated annually by order of the circuit court. Each organized city, town, township, and the combined unorganized townships constitutes a jury district within a county. Each jury district is entitled to pro rata representation on the master county jury list as computed by the clerk of courts according to the total vote cast for governor at the last general election. The boards of jury selectors are the governing board of each city or town, the board of supervisors of each organized township and the board of county commissioners for the combined unorganized district. Each year the clerk of courts is required to requisition the jury selectors of each district to select and return a list of the names and addresses of persons deemed eligible and suitable for jury service. The number requisitioned from each district is twice the

number apportioned. After the district jury lists are returned, a board consisting of the county auditor, treasurer and sheriff draws from each jury district list the number of names apportioned to each district. The names so drawn constitute the county jury list from which all jury panels are drawn as needed and ordered."

Judge Hanson said, "A defendant's constitutional right to the equal protection of the law is violated by the deliberate or purposeful exclusion of, or discrimination against, members of his race in the jury selection process" and that it was "immaterial whether the discrimination is caused or created by the legislature, the courts or by administrative officials involved in the jury selecting process."

He also stated, "The right to be free from discrimination does not entitle a defendant in a criminal case "to demand a proportionate number of his race on the jury which tries him nor the venire or jury roll from which petit jurors are drawn. Neither the jury roll nor the venire need be perfect mirrors of the community or accurately reflect the proportionate strength of every identifiable group." Citing another case, Judge Hanson declared, "All a defendant can demand is to be indicted by a grand jury or tried by a petit jury from which members of his race have not been intentionally excluded because of race or color."

In the Plenty Horse appeal, evidence was presented that indicated there were no Indian names certified from 18 of the 23 jury districts in 1967, none from 19 districts in 1968 and none from

(Initial Decision--4)

20 of the districts in 1969. One township which had 60 per cent Indian population had no person of Indian descent on its jury list during the last 10 years and another similarly populated township had only one in 10 years.

Long Warrior Versus Peacock Civil Action

Though the criminal appeal was set in motion earlier, a civil class action, begun August 14, 1969, brought change sooner. The Legal Aid attorneys from Rosebud, representing Asa Long Warrior, Ansel Wooden Knife, Donald Good Shield, Franklin Iyotte and Calvin Peneaux, used the same basic foundation--the jury lists--used in the Plenty Horse case in a class action brought to the U.S. District Court of South Dakota. Naming 100 persons as defendants, including the state's attorney, county commissioners and township board members, the Indians brought action to have proportionate representation on the jury lists. In Long Warrior versus Peacock (Civil No. 69-122 W.D.S.D., filed August 14, 1969), the Indian plaintiffs charged that the defendants deliberately and systematically used procedures and methods which resulted in their exclusion.

The result was a consent decree, signed May 20, 1970, and filed August 5, 1970, by U.S. Federal District Judge Fred Nichol, which directed all jury selectors to cease from "engaging in any act or practice which involves or results in discrimination by reason of race, color or origin in the selection of juries for jury service in Mellette County and to take all necessary steps to ensure that the jury rolls

and jury boxes reflect a truly representative cross-section of the adult population of Mellette County, South Dakota."

The federal judge ordered all jury boxes emptied after the end of the May, 1970, term of circuit court and to compile new jury rolls. The jury selectors from each district were told to obtain a complete list of registered voters in the jury district for which they were responsible from the county auditor. The jury selectors would supplement this list with additional names of residents of the jury district known to be qualified for jury duty. Then they would file a copy with the county auditor indicating who were Indian or white. From the jury registration list as supplemented, the local jury selectors were then instructed to make a random selection of the number of names of persons who were qualified for jury duty requested by the clerk of courts. The list was to be prepared to indicate the race of persons whose names are selected and they were to be a close approximation of the composition by race of the adult population of the jury district. Accompanying the list was to be a list of names of all persons rejected by the jury selectors for jury service, together with a statement of their reasons for each rejection. This information was to be submitted to the federal clerk of courts and to be on file in the county clerk of courts office for public inspection. Two jury lists were selected in this fashion.

(Initial Decision--6)

New Jury Selection Law

The next stage in the evolution that led to the statewide change in the jury selection process in South Dakota was House Bill 552, a bill introduced by State Representative Harold Sieh (Republican), Gregory, during the 1972 state legislative session.

Representative Sieh that winter indicated that he wanted to introduce a bill for random selection of jurors because the Gregory County clerk of courts was becoming concerned about the same people from the townships showing up for jury duty, year after year.

"The township boards weren't doing their job in providing a cross-section of jurors," said William J. Srstka, Jr., the Legal Aid attorney from Rosebud who was involved in the original jury discrimination cases.

Srstka by 1971 had become assistant attorney general. As a Legal Aid attorney, he had drawn up the basic bill at Rosebud during the Plenty Horse appeal and after the consent decree had been finalized. He carried the rough draft to Pierre with him. The revision in the state law was patterned after the "Revised Plan for the Random Selection of Grand and Petit Jurors in the U.S. District Court for the District of South Dakota," which federal courts began using in the state in 1968.

Srstka's father, William Srstka, Sr., is the federal clerk of courts in Sioux Falls and had been working with the federal random selection system since 1968.

(Initial Decision--7)

William J. Brauer, Legal Aid attorney from Rosebud, who was involved as an attorney in the Plenty Horse brief, also drafted the consent decree, according to the young Srstka. He also assisted the assistant attorney general on the original version of House Bill 552. Michael Ortner and Phillip Colir of the Legislative Research Council were shown the bill and this is where the connection was made with Representative Sieh, according to Srstka.

Attorney Srstka said that the new state jury selection law abolishes all the old jury districts and makes each election precinct a jury district. Where the two court cases affected only one county, the random selection system for juries now affects every county in the state.

The discretionary powers also were taken away from the local jury selectors under the new law. "Now it's a mechanical process. All they do is draw names at random," explained Srstka. "Only if the person on the list has been on the jury within the last four years, may he be removed," he said.

Something else that's new in the law is a new section which states: "No citizen shall be excluded from service as a grand or petit juror in the courts of this state on account of race, color, religion, sex, national origin or economic status."

The board of jury selectors for the county includes the clerk of the circuit court, the chairman of the board of county commissioners and the county auditor. They prepare the prospective juror list from the

(Initial Decision--8)

voter registration list. Each jury district or voting precinct shall be entitled to prorata representation on the master jury list to be computed by the clerk of courts on the basis of the total vote cast for governor at the last general election. The board of jury selectors then randomly selects the prospective jury list, which should total twice the number of jurors to be selected from the county (the court usually orders 300 in smaller counties and 700 in counties with municipal courts or cities of 5,000 population or more). The board of jury selectors uses a formula to compute the number of names to be selected for each jury district, then draws the number decided by random selection, using a quotient number.

Mrs. Erma R. Spawn, Brookings County clerk of courts, described the way she determines random numbers for the Brookings County voting precincts in this fashion:

$$\frac{\text{(Number of Persons in the Precinct Who Voted for Governor in the Last Election)} \text{ TIMES } \text{(Number of Names Judge Requests for Master Jury List)}}{\text{(Number That Voted in the County Last Time for Governor)}} = N \times 2$$

When the board of jury selectors pull names of prospective jurors out of the box, they will list each name which coincides with the random number they have determined. For example, if the random

number they calculate is 3, each third name drawn--3, 6, 9, 12, and so on throughout the registration list--will be placed on the prospective county-wide jury list.

Another group, consisting of the register of deeds, county treasurer and the sheriff, are responsible for drawing the master jury list from the prospective jury list. They draw the master jury list by placing the names of the prospective jurors in a drawing box or jury wheel and drawing the number of names apportioned to each jury district until they have enough for the master jury list. This usually is a minimum of 150 names and a maximum of 350 names. The master jury list then serves as the basis for the jury panel for a particular term of court. When the judge requests a panel--usually from 30 to 70 names--the clerk of courts, register of deeds, county treasurer and sheriff--meet at the clerk of courts' office. At this time the jury panel will be drawn. The final procedure, including the seating of the jurors and the voir dire examination by the attorneys and judge, remains as it was before the new law.

New Developments

One of the problems arising as a result of the new random jury selection law was confusion of clerks of court over the instructions on how to develop a quotient or number to use in each voting precinct for randomly selecting names, according to Milton Schwartz, Huron, who was a member of the Legislative Research Council.

(Initial Decision--10)

Thus, proposed amendments of the new law, designed primarily to simplify the language, were examined this summer by the Interim Judiciary Committee and the Legislative Research Council. The amendments will be brought before the 1973 Legislature; however, the random selection process is unchanged from the 1972 act, according to Srstka.

If passed, because of a standard emergency clause, the law would take effect immediately upon the signature of the governor.

Essentially, what the new proposals attempt is to simplify the language instructing the board of jury selectors in applying the formula for random number.

The proposal for the 1973 Legislative Session also calls for an existing Judicial Conference to watch over the selection process. The proposal declares that the Judicial Conference would be authorized by rule to "see to it that the random selection process is properly enforced in every county in the state."

South Dakota Compiled Laws; 1967 Annotated, Volume 7, Title 16-14-1 of the 1964 Session Law, defines the Judicial Conference as:

> A conference for the improvement of the administration of justice is hereby established to be known as the Judicial Conference of the State of South Dakota composed of the judges of the Supreme Court and circuit courts as members.

Another new proposed section would put the senior circuit judge of each circuit in charge of the random jury selection provision. This proposal states, "Such judge may vary the terms of the random

(Initial Decision--11)

selection process to meet local conditions in any county in his circuit, provided that such changes are generally consistent with the terms of this chapter. Such changes must be reduced to writing, approved by the Judicial Conference . . . and filed with the clerk of court in the county affected by the changes."

Another feature of the 1973 bill is that in odd-numbered years, the random selection process will run through the names from A to Z, and in the even-numbered years from Z to A. Srstka said, "This is to insure that each and every person on the precinct registration list will not be passed over because of possible vagaries of the random selection system."

He said it was possible, but of course not probable, that in any one precinct the random number selected could lead to a situation where only the first part of the list would be used every year. This would necessarily happen, according to Srstka, if the number selected was a low number year after year. "By switching from the beginning to the end of the list every other year, the possibilities of this freakish occurrence are minimized," he said.

The new bill also covers another situation that might occur--what to do if the precinct registration list is exhausted and the full quota of names has not been reached. In this situation, the 1973 provision asks the board of jury selectors to return to the beginning of the list and start over, passing over those names that have already been chosen.

(Initial Decision--12)

Another section repeals the qualifications provision of the old law for persons who may serve on grand and petit juries within their respective counties. What the proposal would insert includes:

(1) That a juror is qualified to serve if he is registered to vote. This would replace the phrase in the 1972 law, which qualifies "all citizens of the state, having the qualifications of electors."

(2) That a juror would be qualified to serve if he is at least 18 and not more than 70 years old. This would replace the phrase, "and being 18 years of age or older and under the age of 70 years." In other words, 70-year-olds would be allowed to serve.

The other provisions of the proposal remain essentially the same as the 1972 law. These include the provisions that jurors be of sound mind, be able to read, write and understand the English language, and not have any bodily infirmity amounting to disability.

Another section in the 1973 proposal lists who would not be competent to serve as a grand or petit juror. The proposal lists licensed attorneys engaged in practice, a judge or clerk of any court of record, a justice of the peace or police magistrate, a holder of any county office, a judge or clerk of any court of the United States, a holder of a state or federal elective office, a jailer and/or a person who has been convicted of a felony and not restored to civil rights. It also contains a "catchall" provision stating that the court will disqualify a person "who is subject to liability by the commission of any

(Initial Decision--13)

offense which by special provision of the law does or shall disqualify him."

Basically, this section is not too different from the pre-1972 law. Under the earlier provisions, judges would disqualify persons who were over the age of 70, persons convicted of a felony, who were illiterate in the English language, who were judges or clerks of the Supreme, Circuit, District County or Municipal Courts, or who were holders of county office, licensed attorneys or engaged in practice, or jailers.

The challenge for cause section was overlooked in the 1972 act. The 1973 provision provides a piece of "clean-up" legislation for this. Under the 1972 act, the board of jury selectors can strike the name of any person who served within four years. The new challenge for cause amendment would bring the law into line with present law and practice, according to Srstka.

Persons wishing to claim exemptions must make application to the presiding judge under the new proposal before the jury is sworn for voir dire examination. Those listed in the new proposal who can claim exemptions include: Clergymen, physicians, members of any regularly organized and acting fire company or department and policemen or other law enforcement officials. Srstka said the proposed four classes of exemptions contain basically three present classes and one new class. The new exemption listed in the 1973 proposal includes law enforcement officials. The tentative proposal

(Initial Decision--14)

for voluntary exemptions struck off surgeons or dentists, licensed morticians, employees of the U.S. Postal Service, teachers during a school term, mothers of children who are of pre-school age and members of the National Guard.

Naturally, all of the proposals are subject to change by the 1973 State Legislature, said Srstka.

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New System Okay-- STORY NUMBER 6

FEDERAL COURT OF APPEALS DECIDES

RANDOM SELECTION GIVES FAIR JURY

The Eighth Circuit Court of Appeals of the Unites States in Kansas City, Missouri, on February 9, 1972, upheld a challenge to the fairness of the random selection system for juries in an appeal on a bank robbery verdict.

The opinion holds significance for South Dakota in that the new state jury selection law, which became effective in 1973, was patterned after the federal random selection law, implemented in 1968.

The man appealing the case, Kenneth Lowell Gordon, a Kansas City Negro convicted of aiding in a bank robbery on November 15, 1970, contended that he was denied a fair trial and due process because there were only two blacks on the panel of 36 from which the jury was selected. Kansas City has a large Negro population.

At the conclusion of the voir dire examination for the robbery case, Gordon's attorney challenged the panel and moved that new jurors be summoned.

The trial judge, Judge Becker, denied the motion. His reason was, "We don't hand pick jurors. It was to insure a random selection and a proportionate number of all ethnic backgrounds that Congress passed the Jury Selection and Service Act of 1968, pursuant to which the jury plan for this district was adopted and implemented.

(New System Okay--2)

It specifically provided in the rationale of the jury plan that no one has a right to any particular kind of jury but only a jury which is drawn by random selection from a cross-section of the community.

"This jury is drawn by random selection in at least three steps. First, there is a random selection from the voting lists or registration records, carefully designed to see that no one is hand selected. Then, many thousands of names so selected are placed in a master jury wheel, and by drawing in a lottery the numbers are drawn out and those jurors are drawn by chance. Then, after the qualification questionnaires are sent out, those that are qualified are placed in a qualified jury wheel where it is spun again and the names are drawn out. And then they are recorded in the order they are drawn and they are called in the order they are drawn."

Chief Judge Matthes of the court of appeals, denied Gordon's appeal and affirmed the conviction on the grounds that, "A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn (Swain versus Alabama, 380, U.S. 202, 208: 1965).

Judge Matthes declared, "We are familiar with the plan under which juries are selected in the Western District of Missouri, and in every district in the Eighth Circuit." He said the Western District plan was comprehensive and it fully comports with the requirements of the 1968 Random Jury Act." In Judge Matthes'

(New System Okay--3)

judgment, "The Constitution does not require that every class, subclass or identifiable group must be represented on every jury list, but only that no systematical, intentional or other unlawful exclusion of persons or groups exist."

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How Indians Regard Courts-- STORY NUMBER 7

FEDERAL JUDGE FINDS MISTRUST OF WHITE COURTS,
BUT THEY LOOK TO U.S. MARSHAL AS 'PROTECTOR'

Minority groups tend to distrust state laws.

At least this is the observation of a federal district judge in South Dakota.

Federal Chief Judge Fred Nichol, Sioux Falls, U.S. District Court of the District of South Dakota, says, "Let's face it, I don't think very many Indians have very much respect for the white man. Generally speaking, they don't like them and they particularly don't like white law enforcement officers. They don't like white attorneys and they don't like white judges."

Judge Nichol was explaining the militant activism on the part of Indians, Negroes and other minorities toward the court system in this country.

The federal judge added, "On the other hand, Indians are a little more inclined to favor the white U.S. attorneys or the white federal judges because they have the feeling that the federal government is supposed to treat them as guardians. In other words, the Indians are wards of the federal government; not of the state, but of the federal government."

Judge Nichol, who also served for several years as a circuit court judge in South Dakota, explained, "I know, I used to be an assistant U.S. attorney and many an Indian that I was prosecuting

would come to me and say, well now after all, you're my protector. You're supposed to help me out and to some extent, the U.S. attorney does try to help them out."

Judge Nichol, who also has presided over federal proceedings in other states and in Puerto Rico, expressed concern about minority representation on juries.

For example, he tried a case in Minneapolis in October, 1971, where Indians were charged with having occupied the Twin Cities Naval Air Force Base. He said he found only one Negro on the whole panel of some 35 jurors from which he picked his jury.

Judge Nichol said he knew there were Indian people in the Minneapolis area and that there "certainly was a rather heavy Negro population in Minneapolis." He asked why there were so few Negroes or Indians. The answer he received was, "They don't register to vote." Voter registration lists are where the federal clerks of court get the initial list. They weren't on the federal jury list because they weren't registering to vote, he said.

The federal judge found that, "Many of the Negroes and Indians there feel that the system is so bad that they don't even want to support it by registering to vote." He added, "Now not all of them, of course, obviously feel that way, but there are a lot, especially those in the ghettos that just feel that they don't want to have anything to do with the system and that extends to the point of not registering."

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Judge Nichol admitted that their attitudes could be different than the attitudes of Indians in South Dakota. In the ghettos, their situation is pretty bad and "they say it can never be any worse and so they are just against the system."

He said, "One of the reasons why Indians might not register to vote in South Dakota, might not be that, it may be that many of them don't have any rather permanent place of abode. They move from one car body to another or one Indian shack to another. They never stay in one area long enough to bother to register."

The judge also commented on a recent case in the Eighth Circuit Court of Appeals in Kansas City, Missouri, which on February 9, 1972, upheld the federal random selection system. The court ruled that it was not the court's duty to hand-pick jurors, but to make sure minorities are not excluded from the selection process. The Negro, convicted of bank robbery, had appealed his conviction on the grounds that he was improperly tried because there were only two blacks on the panel of 36 from which the jury was selected.

Judge Nichol said the Kansas City area has a large black population and it seems reasonable that more blacks could have been called. One of the reasons they may not have been was that the black population could have had more criminal records than the whites, "that is, out of proportion to their population." If a potential juror has a criminal record, he's disqualified, according to Judge Nichol.

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In washington, D. C., where most of the litigants are black, he said, "We were lucky if we had two white people on a jury." At the time he was there the black population was about 49 per cent, he said.

The judge also observed that often jurors selected from minority races are harder on defendants of their own race than of other races.

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Not Enough People, Lawyers-- STORY NUMBER 8

MOST S.D. COUNTIES FAIL TO OBEY LAW
WHEN SELECTING CIRCUIT COURT JURIES

Less than 50 per cent of the counties in South Dakota obey the state law for selection of circuit court juries. This is because only 32 out of the 67 counties in the state have large enough populations to fulfill requirements set by state statute. Another problem is that some counties don't have enough attorneys.

The state jury selection law states that "the number of names placed on a master jury list for each county shall be designated by order of the circuit court to be made each year before May 15th and shall not be less than 2 per cent nor more than 5 per cent of the total vote cast for governor at the last election. In counties having a municipal court, the list shall contain the names of not less than 350 persons and in other counties not less than 150 persons," South Dakota Compiled Laws; 1967 Annotated, Volume 8, as amended, 1972, pages 38 and 39.

If the courts were to follow the law to the letter, which they don't, it would mean that counties selecting jurors should contain at least 3,000 persons of voting age.

Thirty-three of the 64 counties that regularly hold court have less than 3,000 persons between the ages of 21 and 69 (which is the age group eligible for jury duty in 1972). Of the three additional unorganized counties which normally do not hold circuit court, two--

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Washabaugh and Todd Counties--had too few persons of jury age in 1972. There were only 618 persons of this age group in Washabaugh County and 2,754 in Todd County, according to the 1970 U. S. Census Report. The other unorganized county--Shannon County--would have qualified with 3,325 persons of the potential jury age of 21 to 69. As a matter of practice, jurors are not picked from unorganized counties to serve in circuit court nor is circuit court held in these counties.

Even when the voting age drops to 18 and the 18-to-69-age bracket becomes eligible under state statute in 1973 for jury duty, there won't be a substantial change. Only five new counties would pass the potential jury mark of 3,000. All of the computations are based on the assumption, of course, that everyone in the potential jury-age bracket will register to vote.

The lowest potential jury population (in the 21-to-69-year-age bracket) was in Buffalo County where there were only 721 persons of this age group in the 1970, U.S. Census Report.

The average number of persons clustered in the 21-to-69-year-old age bracket of potential jurors among the 33 counties was 1,867. Five of the organized counties had a potential jury population of 999 persons or less in this age group (Buffalo--721; Harding--976; Jackson--797; Jones--967; and Ziebach--968). Eleven organized counties fell in the 1,000 to 1,999 category of eligible jurors between the ages of 21 and 69. The remaining 17 organized counties with too few persons

for jury duty had jury populations of between 2,000 and 2,999 citizens of this age group. (See tables and map).

There were only two circuit court districts out of the 10 districts in South Dakota--Districts 2 and 5--where all of the counties had enough potential jurors in either the 21-to-69-age bracket or the 18-to-69-age bracket (1973 requirements) to adhere to the voter registration requirements of 3,000 persons. Here is how they looked: (For graphic presentation, see map and tables).

District 1 (southeast border counties)--Only one county out of six--Douglas--has too few voters to fulfill the population requirements for either the 21-to-69 or 18-to-69-age brackets.

District 2 (eastern and south border counties)--All five counties qualify under either age bracket.

District 3 (eastern central border counties)--Three counties out of six--Clark, Hamlin and Deuel--do not have adequate jury populations to adhere to the minimum requirement of 3,000 voters in the 21 to 69 age bracket; however, two--Clark and Deuel--would adhere in 1973 with the 18-to-69-age grouping.

District 4 (eastern lower central counties)--Five counties out of eight--Brule, Aurora, Sanborn, Miner and Hanson--do not have adequate jury populations to adhere to the minimum requirement of 3,000 voters in the 21-to-69-age bracket; however, one--Brule--would qualify with over 3,000 potential voters in 1973 with the 18-to-69-age grouping.

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District 5 (northeastern counties)--All five counties qualify under either age bracket.

District 6 (western and north central)--Six counties out of eight--Haakon, Stanley, Sully, Potter, Campbell and McPherson--do not have adequate jury populations to adhere to minimum requirement of 3,000 voters in the 21-to-69-age bracket or the 18-to-69-age bracket.

District 7 (southwestern)--One county out of three--Custer--does not have enough jury population to adhere to the minimum requirement of 3,000 voters in either age bracket. Jurors do not normally come from Shannon County, which is unorganized and attached to Fall River County, but it would have adequate numbers to adhere to both age groupings.

District 8 (northwestern)--Five counties out of eight--Harding, Perkins, Corson, Ziebach and Dewey--do not have adequate jury populations to adhere to the minimum requirement of 3,000 voters in either the 21-to-69 or 18-to-69-age groupings.

District 9 (eastern upper central)--Six counties out of eight--Edmunds, Faulk, Hyde, Hand, Buffalo and Jerauld--do not have adequate jury populations to adhere to the minimum requirement of 3,000 voters in the 21-to-69-age bracket; however, one--Hand--would qualify in 1973 with the 18-to-69-age grouping.

District 10 (western south central)--Seven counties out of nine--Jackson-Washabaugh, Jones, Mellette, Lyman, Bennett and Todd--do not have adequate jury populations to adhere to the minimum

requirement of 3,000 voters in the 21-to-69 or 18-to-69-age brackets (Todd County would have qualified in the 18-to-69-age bracket, but it is unorganized and attached to Tripp County and no jurors are chosen from it, although cases from Todd County are tried in Tripp County). Washabaugh County also is unorganized and attached to Jackson County, but both counties have potential jury populations of less than 999 in both age groupings.

Not Enough Attorneys Either

William J. Janklow, a Pierre attorney who served as Legal Aid Service attorney for five years on the Rosebud Reservation, says there are not enough lawyers in some areas, either.

He feels the solution in low population areas is to consolidate.

Janklow said he represented a non-Indian client in Jones County, a man who was posing as a doctor who had at least 38 felony counts against him. "When we went to trial, he'd had two previous trials in Jones County," said Janklow.

It was next to impossible to get an unbiased jury. "Eliminating the people that disqualified themselves, eliminating all the people that had previously been called for jury duty, and eliminating those people that either the state or the defense could show actual bias on--because of the doctor-patient relationship or something else--there were only 113 people left who could possibly serve on the jury for him," said the attorney. "Those 113 people were subpoenad

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for this case and the judge felt so strongly that it would be so hard to get a jury that he was not going to allow the attorneys to examine the jury on voir dire. He was going to personally examine the jury in order to try to get an impartial jury, but that's contrary to state law," according to Janklow.

The former Legal Aid attorney, who is now in private practice in Pierre, declared, "As those counties get smaller and smaller, that's just going to happen. The answer is to consolidate."

It was illegal for Legal Aid officers, funded by the Office of Economic Opportunity, to represent people in criminal cases since 1967, he said. "So why did we end up with all the criminal defense work out here?" he asked. "It's because there's no one else to appoint," he said. "As licensed attorneys in South Dakota, we have our obligations to the Bar of South Dakota and our ethical duties."

Janklow elaborated, "There are two lawyers in Bennett County west of us--one's the prosecutor, another is a man who seldom goes into the courtroom in a contested case. The county north of Bennett County is Jackson County. It has one lawyer--he's the prosecutor. In Jones County there's one lawyer--he's the prosecutor. Mellette County has one lawyer--he's the prosecutor. Lyman County has three lawyers--two of them are prosecutors (one's a prosecutor and the other is his partner). The other two seldom go to court. The only two counties in the entire 10th Judicial Circuit of eight or nine counties--Gregory and

(Not Enough People, Lawyers--6)

Tripp Counties--have any number of lawyers. Tripp County has five or six and Gregory County has six attorneys."

Janklow said the South Dakota Supreme Court held in the spring of 1971 that from "henceforth they would look with a long eye in the future" on the practice of appointing a state's attorney to represent defendants in neighboring counties. The reason, he said, was that a state's attorney could easily find himself representing both sides of a question of law.

"For example," he said, "take the drunk driving law--somebody is challenging the constitutionality of the law and the state's attorney is defending it in court. He could be asked to go into the next county on a similar case and challenge the law as a defense attorney, the same way the other attorney was challenging it in his county. So he finds himself on both sides of the question. It could come to a point in time where he's willing to let one of those cases fail in order to win the other case, because if he pushed too hard and wins the challenge in one county, that same judge is going to rule what he's defending in his home county is unconstitutional."

Janklow said the Supreme Court ruling advised judges to quit appointing state's attorneys to defend people. "Now all of a sudden the one lawyer in Mellette County, the one lawyer in Jackson County, the lawyer in Bennett County can't do criminal defense work. Who in the _ _ _ _ _ is going to do it? It's a fiction to think that a Rapid

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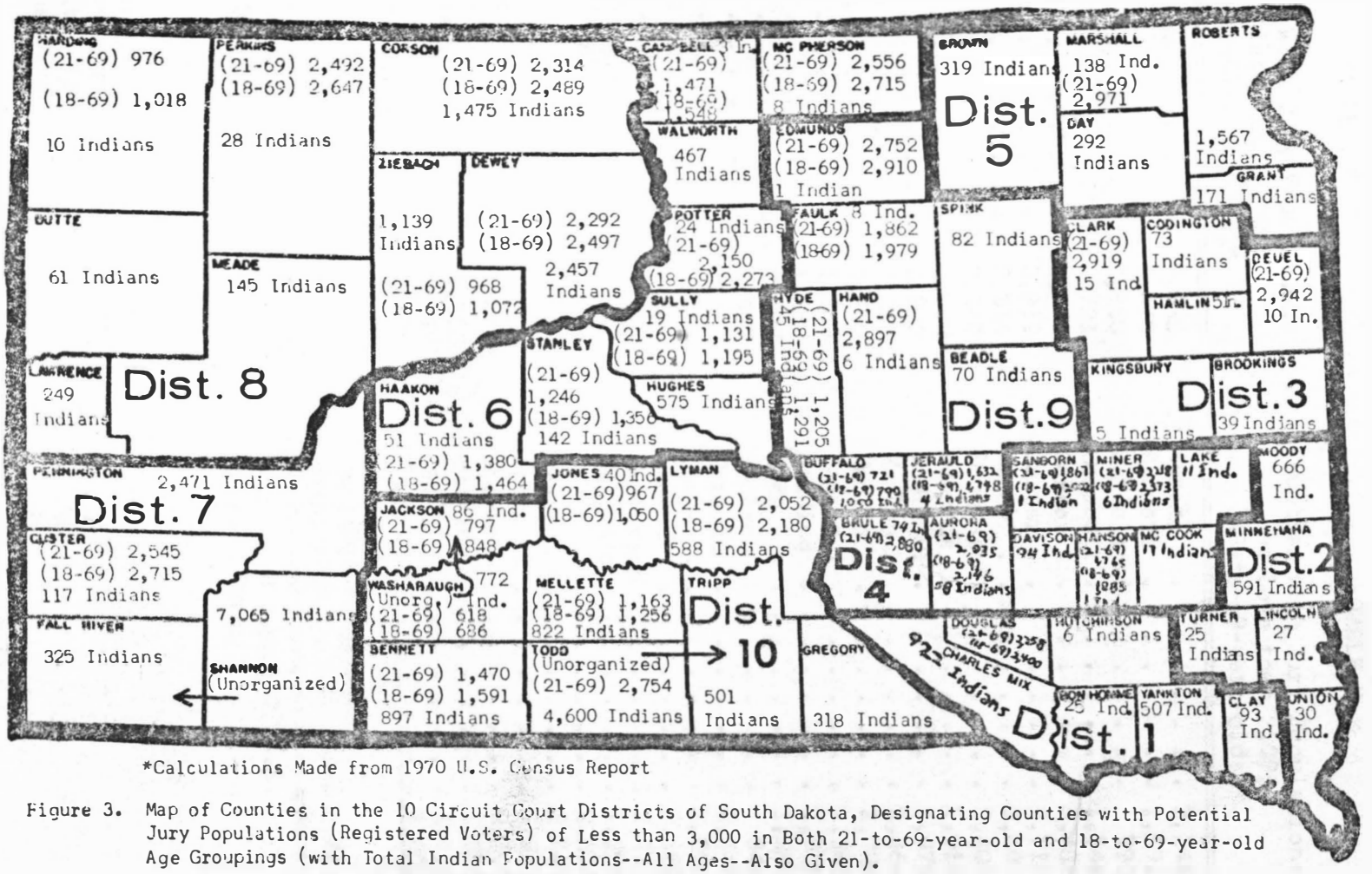
City lawyer is going to take an appointment to come out here 200 miles away," declared Janklow.

There is at least one county in South Dakota where a county circuit jury is picked, but where there is no state's attorney. That's Buffalo County, according to Gordon Rose, Extension public affairs specialist at South Dakota State University. Circuit Court is held in a neighboring county.



*Calculations Made from 1970 U.S. Census Report

Figure 3. Map of Counties in the 10 Circuit Court Districts of South Dakota, Designating Counties with Potential Jury Populations (Registered Voters) of Less than 3,000 in Both 21-to-69-year-old and 18-to-69-year-old Age Groupings (with Total Indian Populations--All Ages--Also Given).

TABLE 1

Counties with Jury Populations of Less than 3,000 (21-to-69-year-olds)*

Aurora	2,035
Bennett	1,470
Brule	2,880
Buffalo	721
Campbell	1,471
Clark	2,919
Corson	2,314
Custer	2,545
Deuel	2,942
Dewey	2,292
Douglas	2,258
Edmunds	2,752
Faulk	1,862
Haakon	1,380
Hamlin	2,597
Hand	2,897
Hanson	1,765
Harding	976
Hyde	1,205
Jackson	797
Jerauld	1,632
Jones	967
Lyman	2,052
McPherson	2,556
Marshall	2,971
Mellette	1,163
Miner	2,218
Perkins	2,492
Potter	2,150
Sanborn	1,867
Stanley	1,246
Sully	1,131
Ziebach	968

Unorganized Counties

Todd	2,754
Washabaugh	618

*Computed from 1970 U.S. Census Data.

TABLE 2

Counties with Jury Populations of Less than 3,000 (18-to-69-year-olds)*

Aurora	2,146
Bennett	1,591
Buffalo	790
Campbell	1,548
Corson	2,489
Custer	2,715
Dewey	2,497
Douglas	2,400
Edmunds	2,910
Faulk	1,979
Haakon	1,464
Hamlin	2,738
Hanson	1,883
Harding	1,018
Hyde	1,291
Jackson	848
Jerauld	1,748
Jones	1,050
Lyman	2,180
McPherson	2,715
Mellette	1,256
Miner	2,373
Perkins	2,647
Potter	2,273
Sanborn	2,002
Stanley	1,356
Sully	1,195
Ziebach	1,072

Unorganized Counties

Washabaugh	686

*Computed from 1970 U.S. Census Data.

TABLE 3

Counties Which Passed the 3,000 Mark of Eligible Jurors with the Lowered Voting Age Requirement in 1973 (18-to-69-year-olds)*

Brule	3,049
Clark	3,087
Deuel	3,119
Hand	3,070
Marshall	3,148
Unorganized Counties	
Todd	3,066

*Computed from 1970 U.S. Census Data.

TABLE 4

Counties with Jury Populations of More than 3,000 (21-to-60-year-olds)*

Beadle
Bon Homme
Brookings
Brown
Butte
Charles Mix
Clay
Codington
Davison
Day
Fall River
Grant
Gregory
Hughes
Hutchinson
Kingsbury
Lake
Lawrence
Lincoln
McCook
Meade
Minnehaha
Moody
Pennington
Roberts
Spink
Tripp
Turner
Union
Walworth
Yankton

Unorganized Counties
Shannon

*Computed from 1970 U.S. Census Data.

Separate but Equal? STORY NUMBER 9

WHITE MAN SUING IN TRIBAL COURT
MAY FIND NO WHITE JURORS LISTENING

Indian and non-Indian citizens in South Dakota, accused of committing a crime on Indian land, will be treated under two different sets of laws--the Indian under tribal and federal laws, and the non-Indian under state law.

What's more, non-Indians arrested for violation of state law in unorganized counties and taken to circuit court will not have a jury selected from their home county nor will they be tried in their home county (except in rare instances).

It is a unique situation, based on treaties and court contests, where a white man in a civil action on the Indian reservation may ask for a jury trial, but when he gets it he won't find anyone of his own race hearing the case.

Marvin S. Talbott, Winner, district county judge, explains the jurisdictional question this way: "It is well recognized now that the state of South Dakota does not have criminal jurisdiction over Indian people on the closed portion of any Indian reservation (Todd County, for example). In the open portions of the reservation (Mellette, Tripp and the western portion of Gregory Counties) there are two kinds of land--patented and unpatented. The unpatented land--trust land held in the name of the United States of America for the

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Indian--is land where the state has no jurisdiction over the Indian. The state does have jurisdiction on patened land on the open reservation. Patented land is land that's been sold by the United States to a patentee and where the government title to the land has been abolished."

Webster Two Hawk, Rosebud Sioux Tribal chairman, points out, however, that every law man employed by the state or town is cross-deputized by the Rosebud Sioux Tribe. He said they can come in and arrest on Indian land, but they have to turn them over to proper authorities.

Judge Talbott explained that in Todd County (the closed portion of the reservation), "If an Indian is involved in a major crime--it's under federal jurisdiction. For example, if a white person killed an Indian person, if an Indian person killed a white person, or an Indian person killed an Indian person on Indian land, it's a federal crime. Now, if a white man killed a white man, it would be handled in state court."

Judge Talbott also declared that "some," not all state peace officers, hold appointments made through the Bureau of Indian Affairs as special deputy officers, enabling them to make arrests of Indians on the reservation. He also pointed out that county law enforcement officers are hesitant about cross-deputizing Indian police because state law makes all county officers (including sheriffs) responsible for the acts of their deputies.

(Separate but Equal?--3)

Sound confusing? It is. In fact, even judges and attorneys are not certain about a number of the jurisdictional questions.

Circuit Judge John B. Jones, Presho, says, "The whole question of jurisdiction is in a state of flux in these areas." He feels some of the questions on civil matters on the reservation will have a greater impact on Indian people than the question of whether or not they are exempt, for example, on the jury selection.

William F. Day, Jr., Winner, a former Tripp County state's attorney and the lawyer who was hired by the Rosebud Sioux Tribe to set up their court system and draw up their law and order code in 1964, said, "You've got to think of the closed portion of the reservation as a country within a country."

He explained, "If an Indian person commits an offense on fee simple land (patented or non-Indian land out of Indian country) or in a city or a town, he can be prosecuted under state law, but if he commits an offense on trust land (on Indian land in the closed portion of a reservation), he would have to be either prosecuted by the tribal court or, if it was one of the 10 major crimes, he would be prosecuted in federal court."

Two Hawk sees an inequity in this. "When a non-Indian comes on the reservation, the tribe has no jurisdiction over him, but when our Indian people go off the reservation, the state has jurisdiction. Why can't it work in a reciprocal manner?"

Judge Talbott says Two Hawk's comment about an inequity

reflects a common misunderstanding as to the nature of the origin of the tribal governments and the tribal authority.

The county district court judge said, "In the most basic of terms, the Indians were given the power to control their own tribal affairs, not authority to govern or control the activities of non-Indians. Some of the Indians on Pine Ridge Reservation and on the Rosebud Reservation see an inequity in the fact that their courts cannot commit Indian individuals to state facilities, such as the South Dakota Training School and the South Dakota State Penitentiary."

Judge Talbott, referred to a document entitled, Federal Indian Law, U.S. Department of the Interior (1958, page 451), which states:

> Attempts of tribes to exercise jurisdiction over non-Indians, although permitted in certain early treaties, have been generally condemned by the federal courts since the end of the treaty making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody.

In fact last summer the writ of habeas corpus was exercised when Pine Ridge tribal officials held a white man in their jail, charged with a violation of their tribal code. A Rapid City attorney was successful in securing his release through a writ of habeas corpus.

Attorney Day also pointed out that he set up a procedure for tribal court where a white person could come to the tribal court and file or sue an Indian person, "but nobody has done it."

On the other hand, said Day, "We have had some problems in that the Rosebud Sioux Tribal Court does not have any jurisdiction over a white person. About the only thing that we could do with a

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white man that causes a disturbance out on Indian land is remove him from the reservation. Even on the closed portion of the reservation, a white man can be prosecuted under state law in a state court."

Though Day pointed out problems in tribal court concerning civil matters, he said, "I think the system is working well on the criminal part of the code."

The problem with civil matters, he said, is that nobody has tried them out. For example, said Day, "If you are in an automobile accident on the reservation with an Indian, it's strictly a tribal court matter. The federal court has no jurisdiction over it and the state court doesn't have jurisdiction. They've got to come into tribal court and everybody is afraid of this. I mean you are afraid to sue out there and you are afraid to defend out there because nobody has done it." Day said he felt that "eventually the tribal court system will come into its own," however.

Judge Talbott said, "Recently a fairly large damage suit was brought in the Rosebud Tribal Court in a civil action [this was several months following the interviews with Day and Mick Grossenburg, Winner state's attorney for Tripp and Todd Counties] and a substantial judgment was obtained. The 'real' defendant was an insuracne company who did not participate in the defense in the tribal court action. An attempt is now being made to enforce this tribal judgment against the insurance company."

Attorney Day said white people know they will have to face a

six-man Indian jury in tribal court. "You take an insurance company lawyer that's defending or a white man that's suing an Indian, they don't know what to expect. I know of at least two or three cases that have been settled out of court because nobody wanted to go out in tribal court and get his feet wet," he said.

Mick Grossenburg, Winner, state's attorney for Tripp and Todd Counties, who succeeded Day as tribal judge in Rosebud, pointed out another complicated jurisdictional question that the dual systems pose.

"There's a bond problem," he said. "The reservation is a short distance away and the state doesn't have jurisdiction there. So, in effect, although the law isn't clear on it, the reservation is a hideaway. It's a haven. We can't extradite misdemeanors on the reservation. If we have an Indian who is charged with drunken driving in Tripp County and we release him on recognizance bond or self bond and he goes on the reservation, it isn't clear whether or not the sheriff [of Tripp County] has jurisdiction to arrest him on a bench warrant."

Grossenburg said the Tripp County sheriff "has 30 warrants for misdemeanors, including driving violations, no driver's license, and so on, and all are for Indians who have gone back to the reservation."

John Simpson, Winner, former state's attorney for Tripp and Todd Counties, takes another position. He says the state can, indeed, extradite persons to be tried for misdemeanors from Indian country.

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Judge Talbott commented, "At best, I can say that we are in a present area of extreme uncertainty as to the status of the law in this regard. . . . It appears that the sheriff and his legal advisor /the state's attorney/ are presently unwilling to attempt an actual arrest on the Indian reservation with subsequent return to state jurisdiction for they know that they will be challenged as to the legality of the arrest and the state's attorney seems to be presently unwilling to risk the development of such a law suit."

Again, Judge Talbott referred to Federal Indian Law (page 450): " . . . An Indian tribe may exercise a complete jurisdiction over its members and within the limits of the reservation, subordinate only to the expressed limitations of federal law."

He added, "Tribes do not now have a power of rendition or extradition. In exercising the power of expulsion, they may turn a fugitive over to a tribe occupying contiguous territory. Ex parte Morgan expressly held that there can be no extradition to an Indian reservation on the request of tribal authorities, because an Indian reservation is neither a state nor a territory. . . . This does not operate, of course, to prevent tribal authorities from delivering offenders to state or federal officers."

The Rosebud Sioux Tribe's law and order code spells out a relatively simple jury selection system:

> A list of eligible jurors shall be prepared from the Rosebud Tribal Census rolls by the Tribal Council, or a committee, thereof, each year.

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> Jurors: Shall be an adult member of the Rosebud Sioux Tribe; Shall be unbiased; Shall not have any direct interest in the case; Shall be able to talk and understand both the English and Indian language and Shall not be convicted of a felony within the past five years, or within one year past of a misdemeanor in the courts of the state, county, federal or tribal.

The tribal code further states that, "in any case, a jury shall consist of six members of the reservation drawn from the list of eligible jurors by some disinterested person or persons appointed by the judge. Any party to the case may exercise not more than three peremptory challenges."

The code says, "The judge shall instruct the jury in the law governing the case and the jury shall bring in a verdict for the complainant or the defendant. The judge shall render judgment in accordance with the verdict and existing law. In a criminal case the verdict of the jury must be unanimous; however, in civil cases the verdict of the jury may be rendered by a five-sixth majority vote."

Federal law (USDC, Title 18, Indians, § 1153) under "Crimes and Criminal Procedure," lists 13 major crimes over which the federal court assumes jurisdiction in Indian matters within the territory of Indian tribes.

The crimes listed include: (1) Murder; (2) Manslaughter; (3) Rape; (4) Carnal knowledge of any female, not his wife, who has not attained the age of 16 years; (5) Assault with intent to commit rape; (6) Incest; (7) Assault with intent to kill; (8) Assault with a dangerous weapon; (9) Assault resulting in serious bodily injury;

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(10) Arson; (11) Burglary; (12) Robbery; and (13) Larceny within the Indian country.

When the Indian defendant is arrested for a major crime and gets to federal district court, he may not find an Indian on the jury if he should ask for a jury trial, even with the random selection system. According to the 1970 U.S. Census Report, out of a state population of 666,257, there are only 32,365 Indians. This makes an Indian's chances of getting an Indian on a 12-man jury about 1 in 20. The voir dire examination substantially increases the odds against that chance.

In the meantime, the status of Indian jurisdiction seems to be causing unrest. Judge Talbott says, "The new decision causing all of the present unrest is that of the City of New Town, North Dakota, versus The United States, January 17, 1972, U.S. Court of Appeals, Eighth District Circuit."

He explained, "This particular case holds that the City of New Town, North Dakota [situated similarly as is Winner or Gregory] was still within the boundaries of the Indian reservation, notwithinstanding the opening of the area of settlement by homesteading. The decision held that the boundaries of the Fort Berthold Indian Reservation as specified in 1891 statutes were not changed by the 1910 acts opening the Reservation for settlement by homesteading. The effect of this decision is to shatter the previously developed concept of 'open' and 'closed' portions of Indian reservations, with the 'open' portions

being those parts of a reservation being made subject to the various homesteading acts."

Since this decision, Tilden Louis Condon, Eagle Butte, convicted of rape by state court, appealed to federal court and on June 27, 1972, Chief Judge Fred J. Nichol of the U.S. District Court of South Dakota held that the locale of Eagle Butte was unaffected by the homesteading acts in 1910 and was still a part of the original reservation and hence within "Indian Country." "Thus," explained Judge Talbott, "the state of South Dakota did not have jurisdiction."

Another case in the Supreme Court of South Dakota (July 19, 1972) held that the city of McLaughlin in Corson County was still within the original boundaries of the Standing Rock Indian Reservation and that the jurisdictional limits of the reservation were not affected by the congressional act of 1913 opening up that area for homesteading /State of South Dakota versus Joe Molash/.

Presently in the Southern Division of U.S. District Court in South Dakota there is a declaratory proceeding brought by the Rosebud Sioux Tribe against the governor of South Dakota, its attorney general and the counties of Mellette, Lyman, Tripp and Gregory. The declaratory action seeks to have it determined that the boundaries of the original Rosebud Indian Reservation has never been diminished by any of the several homestead acts affecting this area and that all land lying within the original limits of the Rosebud Indian Reservation is still "Indian Country" and that, hence the

(Separate but Equal?--11)

State of South Dakota has no jurisdiction whatever over any Indian within the original boundaries of the reservation. The several counties named as defendants have engaged William F. Day, Jr., as their attorney for defending their interests in this case. The State of South Dakota is defending through the attorney general's office.

Some of the white residents of the area are fearful that the tribe will impose a tribal sales tax on the white residents of Gregory, Todd, Tripp, Mellette and Lyman Counties.

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One Passes, Another Flunks-- STORY NUMBER 10

MAN STABBED TO DEATH, TWO CONFESS,

BUT NOBODY HAS TO GO TO TRIAL

One of the problems on Indian reservations is that personnel from the daily newspapers, wire services, radio and television aren't on the scene all of the time, so the public doesn't hear about Indian crimes as much as they do in more populous, predominantly white communities where news reporting is more thorough and there are less obstacles in the way for examining court records.

Here is a case in point. Bernice Spotted War Bonnett, St. Francis, South Dakota, was the chief suspect in the fatal stabbing of Andrew Eastman on January 16, 1968. She was arrested by federal authorities who handle major criminal matters on Indian land and was encouraged to confess to the crime.

As an indigent, she requested an attorney, who on January 29, 1968, submitted her to a voluntary polygraph examination in Sioux Falls. During that test she was asked if she knew who stabbed the dead man; if she stabbed him; if she saw the knife that the man was stabbed with; and if she was lying. The analyst concluded that the woman was telling the truth when she answered "No" to all four questions.

The attorney representing her, John Simpson of Winner, bided his time, waiting until his chief suspect became drunk. On February 13, 1968, the male Indian suspect, who had been drinking, was persuaded to fly to Sioux Falls with an attorney for a voluntary

polygraph test. The suspect flunked the test. Upon being shown the results of the polygraph examination, the Indian male admitted he stabbed the man, but that it was not his intention to kill him.

Bernice Spotted War Bonnet was never brought to trial. Neither was the man who confessed after the polygraph test.

Simpson, who is critical of law enforcement training in South Dakota, said he thought it was because the Federal Bureau of Investigation was "too embarrassed to admit that they'd got a confession from the wrong person."

The former state's attorney and former assistant attorney general sees an urgent need to establish a thorough training curriculum or a police academy system for law enforcement officers, including elected sheriffs.

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Editorial--

FINAL ARTICLE

WHY NOT ESTABLISH A CITIZEN'S JURY COMMISSION TO IMPROVE THE SYSTEM?

There are two directions a jury selection system can take--one is to hand pick a "blue ribbon" jury (the federal courts tried this and moved away from it in favor of the random selection system). The other direction is the random system that was initiated to bring into the jury system the broadest possible cross-section of the community.

The random selection system which this state will be using in 1973 appears to favor the broad cross-section. It is an unbiased system in the sense that no member of the population has any more chance of being selected than any other member. This impersonal random selection system, which relies on voting precincts to send names of registered voters to the county clerks of court is probably better than the system which was temporarily imposed on one South Dakota county. The local jury selection boards were ordered to provide Indian and non-Indian names on a ratio according to population. At least with the random system the courts rise above looking at an Indian as an Indian and a white man as a white man and look at both as people.

South Dakota should welcome the challenge to broaden the cross-section in such a democratic process as jury duty. After all, America is a country that has prided itself on being the melting pot

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that welcomes people from other countries to come and give democracy new vigor and vitality.

Chief Judge Fred J. Nichol of the U.S. District Court of South Dakota, said the original English concept of the right of a person to a jury of "your peers," or equals, meant that you were entitled to a jury composed of people who knew you in your community.

"Now, generally speaking," he said, "anybody who knows the defendant or knows the attorneys for either side [or at least knows them very well] is disqualified, either by way of peremptory challenge or even by a challenge for cause, simply because he does know the participants."

The judge added, "In this sense the American court system has gone 180 degrees from the original concept to the point where we think that we need a jury of people that would be impartial to the extent they would know nothing about any of the parties or any of the facts in the case."

The problem encountered in one South Dakota county was termed de facto discrimination by the courts, but part of the responsibility also should lie, we think, with the vague language of the notice of apportionment and requisition for jurors sent to local governing boards who were asked to submit names of prospective jurors. The form asked them to use their discretion to decide who was "legally qualified and eligible and of upright character and of such intelli-

gence, information and discretion that they would render honest and efficient service as jurors."

The changes in courts today seem to move toward the impersonal, which we may find a mixed blessing. The concern some have is that the changes are court-initiated or initiated by test cases of criminals or as a result of maneuvers by attorneys, while the law-abiding citizen and the weak watch, often apprehensively while the judges and lawyers fashion the courts, which after all belong to the citizen in the first place. Why should the changes come only after the wrongs are brought to court? It seems to be a case of the "tail wagging the dog." Why couldn't South Dakota citizens do as well as Wisconsin's and begin court reform by setting down the criteria for an "ideal system" of delivering speedy, equal justice in all parts of the state?

A proposed amendment to the new random jury selection law in South Dakota asks a Judicial Conference "to see to it that the random selection process is properly enforced in every county in the state." In addition, it gives the judges on the Judicial Conference the power to vary the terms of the random selection process to meet local conditions. This seems to us a relinquishment of more power by the citizens to the courts which have more and more influence over our lives.

Because of these concerns, it is our recommendation that a jury commission be established in this state, composed of laymen, attorneys and judges, to investigate complaints in jury selection and

to recommend changes that will improve our court system. The major power on this commission should reside in the hands of the laymen--not the lawyers, nor the judges. These laymen should represent a significant cross-section of racial groups and political persuasion and include a balance of men and women. This would put some citizen leadership into the court system.

The three-way blend is needed because part of the problem is the difficulty of local government groups to see themselves as indifferent or negligent.

Safeguards should also be built in so that counties do not totally give up local autonomy, for if it was unfair to exclude minorities from juries within a jury district before, it would be equally unfair for some outside group to come in and pass judgment without opportunity for local residents to have their say.

The jury commission should not only serve as a watchdog to see that the random jury selection system is used as it was intended, but they also should carefully scrutinize from time to time whether the juries are vulnerable to special interests. If such be the case, it would be their responsibility to disclose the problem and then to show the people how to restructure the institution so it shows no favoritism.

One of the first recommendations that we would make to the jury commission would be to study the feasibility of drawing jurors from a wider population than a single county--perhaps from the entire

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circuit court district, especially in those areas where potential jury populations are less than 3,000 voters (or from a group smaller than prescribed under present state law). If the population in which the random selection is made is too small, all the effort is a futile exercise that will not accomplish the full intent of the law.

The federal District of South Dakota consists of one judicial circuit comprising four divisions. Master jury lists are drawn for the four divisions from the several counties within the respective federal divisions, so there is an already established precedent to investigate before making any rash moves with the circuit court jury districts. In addition, the decision of the U.S. Court of Appeals for the Eighth District, which upheld the federal random selection system recently, seems to place the concept on sound constitutional ground.

It may be healthy for even a large metropolitan district, such as Minnehaha County, to select more jurors from surrounding rural counties to hear circuit court cases. Certainly, in the sparsely-populated counties where it is difficult to draw an adequate number of jurors and where there is a scarcity of attorneys, broader selection would break up the tight interrelationships to elected officials and law enforcement people that seemed evident in our jury study.

Judge Nichol has said that the random selection system should do much to solve the problems of minority representation on juries. He had no answers, however, for people who refuse to register to vote. This is a responsibility of a citizen in a democratic form of government. If

there are no oppressive barriers to his participation as a voter (entitling him to serve as a juror), in our opinion, it is nobody's fault but his own if he avoids the opportunity to serve on juries.

Judge Nichol commented, "I have sat on the bench for 13 years and I think that juries under this random jury selection are every bit as good as the so-called 'blue ribbon' juries that were picked before."

One of the problems in South Dakota may be that of selecting a jury from a population large enough to avoid over-familiarity and yet aware enough to weigh the case fairly in light of local circumstances. Circuit Judge John B. Jones, Presho, put it this way: "There should be a happy medium of getting a jury that's local, yet one that's unbiased and at the same time one that will decide on the evidence."

Another severe problem seems to be lack of attorneys to serve sparsely-populated areas of South Dakota. That's a problem for the courts and State Bar Association to ponder for now.

Another recommendation we would make to the jury commission would be to look hard at broadening the restrictions which prohibit elected officials from serving on jury panels to include their spouses.

Presently, judges will automatically disqualify persons who are over the age of 69, who are illiterate in the English language, who are judges or clerks of the Supreme, Circuit, District County or Municipal Courts, or who are holders of county office, licensed attorneys engaged in practice or jailers.

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Persons may voluntarily exempt themselves if they are ministers, physicians, pharmacists, surgeons, dentist, licensed embalmers, postmasters, mail carriers, educational officials, members of fire companies, members and ex-members of the National Guard. This group may also choose to serve if they wish and state that they will try the case fairly.

Another area that the jury commission could study is the voir dire examination which appears to dilute and sometimes even cancel out the random selection concept. Irwin Ross, who writes in major publications on such subjects as labor, industry, politics and crime, seems to think the American court system is cumbersome in comparison to the English system and that it dwells too much on peremptory challenges. Writing in the November, 1972, Rotarian, he suggests that "the interrogation should be entrusted solely to the judge with the lawyers limited to making suggestions to him." This would even the advantage of local lawyers over out-of-town lawyers in knowing the potential biases of the jurors. In federal United States courts, the judge, not the lawyers, ask questions of the prospective jurors to determine whether or not jurors will be impartial.

Another area of study, we think, would be to establish a citizen's liaison with tribal officials to come to terms with the problems between tribal courts and jurisdiction and state courts and jurisdiction. It's apparent by now that both systems will be around

for a long while. The give-and-take of a citizen's group might be what is needed to come up with a conciliatory settlement to the unanswered questions.

Another area for improvement, suggested by Samuel Masten, Canton, South Dakota, attorney who has battled for court revision since 1954, is to establish a unified court system and to drop the idea of two or three terms of court per year. "Why not have one term of court," he suggests. "If we have six cases ready to try in July, why should we wait until November to try them? If there is work to be done, get it done. Have a master jury list always available. They can be called in at any time to hear a case."

It is our opinion that now that the judicial amendment has been passed (during the November 7, 1972, general election in South Dakota), there is no better opportunity to unify and improve the court system in this state.

With it, according to John Simpson, Winner, South Dakota, attorney, should come a careful citizen's look at the jury system, because the citizen is the only significant check on the immense powers that citizens have entrusted to the courts, including judges.

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Day, William F., Jr. Winner, former Tripp County state's attorney and former Rosebud Sioux Tribal Court judge, now in private practice (tape recorded).

Didier, Mrs. Carole. White River, one of the five members of the Governor's Commission on Human Relations, a group which deals with discrimination problems (tape recorded).

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