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The Cross Section Principle as a Constitutional Right and the Use of Voter Registration Lists as an Administrative Technique to Insure a Defendant Due Process under the Law.

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STATUTORY NOTE

JURIES—THE JURY SELECTION AND SERVICE ACT—THE CROSS SECTION PRINCIPLE AS A CONSTITUTIONAL RIGHT AND THE USE OF VOTER REGISTRATION LISTS AS AN ADMINISTRATIVE TECHNIQUE TO INSURE A DEFENDANT DUE PROCESS UNDER THE LAW. 28 U.S.C. §§ 1861-69 (1970).

Prior to the passage of the Jury Selection and Service Act of 1968,[1] the image of a fair and impartial jury loomed as an elusive spectre in American justice. In theory, the jury has consistently occupied a position of substantial importance in the foundation of our legal system[2] and yet, in practice, the methods for determining its most equitable composition and for insuring its most effective use have remained nebulous and ill defined.[3] The purpose of those entrusted with judicial reform was to dispel that obscurity and to respond with a concrete comprehensive program for the uniform selection of grand and petit jurors in federal courts.[4] In addition, those charged with actually writing the Act sought to delineate objective standards for excluding or excusing prospective jurors[5] while preserving for the districts some degree of flexibility in the final selection process.[6] The Act which became the product of that response declares:

It is the policy of the United States that all litigants in Federal

1 28 U.S.C. §§ 1861-69 (1970) [hereinafter referred to in the text as the Act or the Federal Act].

2 *See* S. REP. No. 891, 90th Cong., 1st Sess. 9 (1967).

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

3 *Id. See also* REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 42 F.R.D. 353, 354-59 (1967).

4 S. REP. No. 891, 90th Cong., 1st Sess. 9 (1967). For judicial interpretation of that purpose, see United States v. Torquato, 308 F. Supp. 288 (W.D. Pa. 1969).

5 28 U.S.C. § 1865(b) (1970) provides that:

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

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

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

(3) is unable to speak the English language;

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

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

6 S. REP. No. 891, 90th Cong., 1st Sess. 9, 15 (1967).

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

To implement this declaration of policy, the Act requires that each United States district court devise and place into operation a written plan subject to the provisions of the legislative draft.[8] To effectuate its purpose, however, the Act incorporates two criteria[9] procedurally and philosophically dependent. The first authorizes the use of voter registration lists or the lists of actual voters as the basic source of juror names[10] and specifies that the district designate which of the two it intends to employ.[11] The second prescribes that voter lists need not perfectly mirror every element in society,[12] but that whenever they do not adequately reflect a cross section of the community, supplementary sources must be consulted.[13] Although these criteria taken separately were not unique in orgin or approach, the assimilation of both into one legislative mandate represented an innovative attempt to define and delimit the inherently vague description of fair and impartial. Nevertheless, the draftsmen of the Act were cognizant of an important "built-in screening element"[14] in this ostensibly objective criteria—the elimination of those who are either unqualified to vote or insufficiently interested in political affairs to do so.[15]

The critical inquiry at this point questions whether the cross section principle can be adequately defined to render it appropriate as a philosophical goal, and second, whether voter registration lists can be effectively applied to render them equitable as an administrative technique. In order to fully evaluate these present issues, it is necessary to review the past.

The conceptual image of the jury as a body truly representive of the community was not a novel idea, but one tracing its genetic origin to the rivalry between the Star Chamber and the grand jury in Tudor

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7 28 U.S.C. § 1861 (1970).

8 *Id.* § 1863(a).

9 S. REP. No. 891, 90th Cong., 1st Sess. 9, 16 (1967).

10 *Id.*

11 *Id.*; 28 U.S.C. § 1863(b)(2) provides in part:

(b) Among other things, such plan shall—

. . . .

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

12 S. REP. No. 891, 90th Cong., 1st Sess. 9, 17 (1967).

13 *Id.* at 17; 28 U.S.C. § 1863(b)(2) (1970).

14 S. REP. No. 891, 90th Cong., 1st Sess. 9, 18 (1967).

15 *Id.* at 18.

England.[16] However, the birth of the phrase, "cross section of the community," did not occur in American jurisprudence until some four centuries later.[17]

The concept was first suggested in *Smith v. Texas*,[18] a case involving alleged discrimination against blacks. During the late 1940's, the suggestion was amplified when Mr. Justice Murphy began to explore the ramifications involved in the application of the cross section principle.[19] Although unsuccessful at that time,[20] his campaign to initiate jury selection reform has since assumed a dual significance; first, because he translated the cross section concept into its simplest terms,[21] and second, because he transferred the emphasis of the court from merely applying the negative belief that no identifiable group be excluded from the jury process[22] to imposing an affirmative obligation that proportional representation be provided on each jury list as a requirement of due process.[23] It was not until 1966 that this question was again raised from its state of constitutional limbo.

In 1966, the Eighty-ninth Congress approved and enacted into law the heavily debated Civil Rights Bill.[24] Aware of the lack of statutory guidelines as to an acceptable system of jury selection,[25] and mindful

[16] 1 W. HOLDSWORTHY, A HISTORY OF ENGLISH LAW 339-47 (7th ed. 1956); Note, *The "Blue-Ribbon" Jury*, 60 HARV. L. REV. 613 (1947).

[17] Thiel v. Southern Pac. Co., 328 U.S. 217, 220, 66 S. Ct. 984, 985, 90 L. Ed. 1181, 1184 (1946); Glasser v. United States, 315 U.S. 60, 86, 62 S. Ct. 457, 472, 86 L. Ed. 680, 707 (1942), *citing* Smith v. Texas, 311 U.S. 128, 130, 61 S. Ct. 164, 165, 85 L. Ed. 84, 86 (1940).

[18] 311 U.S. 128, 130, 61 S. Ct. 164, 165, 85 L.Ed. 84, 85 (1940). The Court declared:

> For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of democratic society and a representative government.

[19] Thiel v. Southern Pac. Co., 328 U.S. 217, 220, 66 S. Ct. 984, 985, 90 L.Ed. 1181, 1184 (1946); Glasser v. United States, 315 U.S. 60, 86, 62 S. Ct. 457, 471, 86 L. Ed. 680, 707 (1942).

[20] *See also* Fay v. New York, 322 U.S. 261, 299, 67 S. Ct. 1613, 1633, 91 L. Ed. 2043, 2066 (1947) (dissenting opinion).

[21] [T]here is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people.

Fay v. New York, 332 U.S. 261, 299, 67 S. Ct. 1613, 1633, 91 L. Ed. 2043, 2066 (1947) (dissenting opinion).

[22] At first, this distinction seems to be purely semantic. However, there is a significant difference between the two as postulates for a constitutional standard. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 477, 74 S. Ct. 667, 670, 98 L. Ed. 866, 869 (1954). This change in emphasis was expressed in United States v. Tillman, 272 F. Supp. 908, 910 (N.D. Ga. 1967).

[23] Fay v. New York, 332 U.S. 261, 299, 67 S. Ct. 1613, 1633, 91 L. Ed. 2043, 2066 (1947). Due process requires that a defendant be tried by an impartial tribunal. *In re* Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942, 946 (1955).

[24] *See Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 3296*, 89th Cong., 2d Sess. 1463 (1966).

[25] For a complete discussion of the opposing arguments involved in the adoption of the

of the defects implicit in the districts' exercise of individual authority,[26] the sponsors of Title I of the Bill recommended that random selection of federal jurors be uniformly enforced and that the much embattled cross section principle be elevated to the stature of a constitutional right.[27]

Similarly, the use of voter registration lists as a medium to secure the effective operation of the jury system was incorporated as a basic feature in the 1966 Bill.[28] The decision to employ voter lists was founded on their already extensive and satisfactory use in many local districts.[29] Moreover, unlike other systems[30] which drew deserving criticism from both jurists[31] and laymen[32] alike, the use of voter registration lists had repeatedly withstood the test of judicial review.[33] The courts qualifiedly approved their use with the label "prima facie legal" less they become a subterfuge to exclude systematically and intentionally members "of any economic, social, religious, racial, political, or geographical class."[34] When the final draft of the Jury Selection and Service Act was completed in 1968, its authors purposefully included the recommendations of Title I as the basis for insuring its success.[35]

The enthusiasm which greeted the adoption of the cross section principle as a constitutional right and the use of voter registration lists

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Civil Rights Bill, see Hart, *The Case for Federal Jury Reform*, 53 A.B.A.J. 129 (1967); Ervin, *Jury Reform Needs More Thought*, 53 A.B.A.J. 132 (1967).

26 Hart, *The Case for Federal Jury Reform*, 53 A.B.A.J. 129 (1967); Ervin, *Jury Reform Needs More Thought*, 53 A.B.A.J. 132 (1967).

27 Hart, *The Case for Federal Jury Reform*, 53 A.B.A.J. 129 (1967); Ervin, *Jury Reform Needs More Thought*, 53 A.B.A.J. 132 (1967).

28 Hart, *The Case for Federal Jury Reform*, 53 A.B.A.J. 129 (1967); Ervin, *Jury Reform Needs More Thought*, 53 A.B.A.J. 132 (1967).

29 Hart, *The Case for Federal Jury Reform*, 53 A.B.A.J. 129, 131 (1967). Voter registration lists were used in Districts of Alaska, Delaware, Kansas, New Jersey and the Virgin Islands, the Northern District of Illinois, the Southern Districts of New York, Ohio, and Texas, the Eastern Districts of Texas and Wisconsin and the Western District of Missouri.

30 The two most widely criticized were the key-man method and the practice of selecting "blue-ribbon" juries. For a complete discussion, *see, e.g.*, Lindquist, *An Analysis of Juror Selection Procedure in United States District Courts*, 41 TEMP. L.Q. 32, 42 (1967).

31 Fay v. New York, 332 U.S. 261, 299, 67 S. Ct. 1613, 1633, 91 L. Ed. 2043, 2066 (1947) (J. Murphy, joined by J.J. Black, Douglas, Rutledge, dissenting).

32 "Denying jury service to any group deprives it of one of the oldest and most precious privileges and duties of free men. It is not only the excluded group which suffers. Courts are denied the justice that flows from impartial juries selected from a cross-section of the community. The people's confidence in justice is eroded." President Lyndon B. Johnson, Message to Congress, April 23, 1968, the text of which is reprinted in *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States*, 89th Cong., 2d Sess., ser. 16, at 1048, 1050 (1966).

33 Kemp v. United States, 415 F.2d 1185 (5th Cir. 1969); Camp v. United States, 413 F.2d 419 (5th Cir. 1969); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969); United States v. Caci, 401 F.2d 664 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310, 89 S. Ct. 1164, 22 L. Ed. 2d 297 (1969); Gorin v. United States, 313 F.2d 641 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963).

34 Venable v. A/S Det Forenede Dampskibsselskab, 275 F. Supp. 591, 603 (E.D. Va. 1967), *rev'd on other grounds*, 399 F.2d 347 (4th Cir. 1968).

35 Hart, *The Case for Federal Jury Reform*, 53 A.B.A.J. 129, 131 (1967).

as the most significant improvement in our nation's federal judicial machinery has, in recent years, substantially declined so that today their combined application is the subject of mounting concern.[36]

One of the three major areas of dissension involves the failure of the Act to specify what constitutes a cross section of the community.[37] Implicitly, the Act supposes that courts will rely on judicial precedent for an accurate description. However, such reliance reveals a multitude of interpretations[38] ranging from not too literal to something less than proportional.[39] Nowhere in the Federal Act and rarely, if ever, in established case law has a successful attempt been made to address the issue in positive, direct, understandable language. Moreover, constitutional principles require that a statute which empowers the government with authority to adjudicate a defendant's rights must lay down reasonably clear standards of decision,[40] and further, that in the absence of such reasonableness and clarity, any attempt to evaluate a particular act is without merit.[41] Consequently, to determine whether a defendant's rights have been secured by a jury selected from the popu-

[36] On April 24, 1972, Judge Wyzanski, speaking for the United States District Court in Massachusetts declared:

> A jury selection system which is fundamentally based upon voters' registration lists in a state in which no one is required to register for voting, and in which it is obvious to anyone who scans the voters' registration lists that the black, those of Oriental origin, those with Spanish surnames, women, young persons, and poor and deprived persons generally tend not to register to vote, in proportions related to their number in the citizenry, and it is obvious to anyone who scans the lists of jurors actually serving that affluent and educated citizens are a smaller percentage of the jurors serving than their percentage in the citizenry, is a *jury system which raises constitutional problems of serious import.*

United States v. Burkett, 342 F. Supp. 1264, 1265 (D. Mass. 1972) (emphasis added). *See generally* Note, *Jury Selection Procedures: A Reform*, 6 SUFF. L. REV. 865 (1972); 6 SUFF. L. REV. 1124 (1972).

[37] An answer to "what is a fair cross-section" is dealt with extensively in United States v. Tillman, 272 F. Supp. 908, 912 (N.D. Ga. 1967); *See also* Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HAST. L.J. 1417, 1441 (1969).

[38] The requirement that a jury reflect a cross section of the community occurs throughout our jurisprudence and arose under the Supreme Court's supervisory power. Thiel v. Southern Pac. Co., 328 U.S. 217, 220, 66 S. Ct. 984, 985, 90 L. Ed. 1181, 1184 (1946); Glasser v. United States, 315 U.S. 60, 85, 62 S. Ct. 457, 471, 86 L. Ed. 680, 707 (1942); Smith v. Texas, 311 U.S. 128, 130, 61 S. Ct. 164, 165, 85 L. Ed. 84, 86 (1940); *accord*, Witherspoon v. Illinois, 391 U.S. 510, 520, 88 S. Ct. 1770, 1776, 20 L. Ed. 2d 776, 784 (1968); Labat v. Bennett, 365 F.2d 698, 722-24 (5th Cir. 1966).

[39] Perfectly proportioned representation is not required. Swain v. Alabama, 380 U.S. 202, 209, 85 S. Ct. 824, 829, 13 L. Ed. 2d 759, 766 (1965); United States v. DiTommaso, 405 F.2d 385, 389 (4th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969); United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950).

[40] A central concern of the Supreme Court has been the elucidation of the void-for-vagueness doctrine. Many statutes otherwise effective are rendered void because they are fraught with opportunities for the play of constitutional standards. *E.g.*, Gelling v. Texas, 343 U.S. 960, 72 S. Ct. 1002, 96 L. Ed. 1359 (1952); Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939); Cline v. Frink Dairy Co., 274 U.S. 445, 47 S. Ct. 681, 71 L. Ed. 1146 (1927). *See generally* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 90 (1960).

[41] *E.g.*, Gelling v. Texas, 343 U.S. 960, 72 S. Ct. 1002, 96 L. Ed. 1359 (1952); Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939); Cline v. Frink Dairy Co., 274 U.S. 445, 47 S. Ct. 681, 71 L. Ed. 1146 (1927).

lation of registered voters becomes an impossible, if not unconstitutional, exercise of power without a reasonable standard for comparison.[42]

The second, and by far the most complicated area of argument, accepts the proposition that case law offers a sufficiently reasonable definition of the cross section principle to avoid constitutional vagueness,[43] but questions the validity of voter registration lists as a procedural device. Critics of the Federal Act point out that because reliance on voter registration lists eliminates those who do not vote,[44] there is discrimination against significant groups in the population, including those which the courts have heretofore sought to protect. Initially, challenges to the composition of federal juries compiled from the lists of actual or registered voters were based on the outright exclusion of specific racial or economic groups.[45] As a matter of proof, the courts at all levels of the federal system required that the groups be "cognizable,"[46] that their exclusion be systematic[47] and willful[48] but that their absence need not be prejudicial to one of the parties.[49] Where racial or economic interests were involved, compliance with this tripartite standard was relatively simple. Moreover, when the number of these challenges began to multiply, the courts disposed of the requirement of intent,[50] and in the presence of prima facie evidence of discrimination transferred the burden of proving otherwise to the prose-

42 *E.g.*, Gelling v. Texas, 343 U.S. 960, 72 S. Ct. 1002, 96 L. Ed. 1359 (1952); Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939); Cline v. Frink Dairy Co., 274 U.S. 445, 47 S. Ct. 681, 71 L. Ed. 1146 (1927).

43 *E.g.*, Gelling v. Texas, 343 U.S. 960, 72 S. Ct. 1002, 96 L. Ed. 1359 (1952); Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939); Cline v. Frink Dairy Co., 274 U.S. 445, 47 S. Ct. 681, 71 L. Ed. 1146 (1927).

44 S. REP. No. 891, 90th Cong., 1st Sess. 9, 18 (1967).

45 *See* Lindquist, *An Analysis of Juror Selection Procedures in the United States District Courts*, 41 TEMP. L. Q. 32 (1967). The author identifies these groups as "overt racial discrimination, and de facto discrimination vis-a-vis many local socio-economic groups resulting from selection of 'blue ribbon' juries." *See also* Thiel v. Southern Pac. Co., 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946); Ballard v. United States, 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed. 181 (1946); Norris v. Alabama, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935).

46 For purposes of jury challenges, a group to be "cognizable" must have a definite composition, must have members who share common attitudes, or ideas or experience, and must have a community of interest which cannot be adequately protected by the rest of the populace. United States v. Guzman, 337 F. Supp. 140, 143 (S.D.N.Y. 1972). *See also* Grimes v. United States, 391 F.2d 709 (5th Cir.), *cert. denied*, 393 U.S. 825 (1968); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).

47 *E.g.*, Hernandez v. Texas, 347 U.S. 475, 482, 74 S. Ct. 667, 673, 98 L. Ed. 866, 872 (1954); United States v. Dangler, 422 F.2d 344, 345 (5th Cir. 1970); Hansen v. United States, 393 F.2d 763, 767 (8th Cir.), *cert. denied*, 393 U.S. 833 (1968).

48 *E.g.*, United States v. Butera, 420 F.2d 564, 568 (1st Cir. 1970); United States v. DiTommaso, 405 F.2d 385, 391 (4th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969).

49 *E.g.*, Ware v. United States, 356 F.2d 787, 790 (D.D.C.), *cert. denied*, 383 U.S. 919 (1966), *quoting* Ballard v. United States, 329 U.S. 187, 195, 67 S. Ct. 261, 265, 91 L. Ed. 181, 186 (1946).

50 Unlawful exclusion may also be unintentional. *E.g.*, United States v. Bryant, 291 F. Supp. 542, 551 (D. Me. 1968), *aff'd*, 420 F.2d 564 (1st Cir. 1970).

cution.[51] Where the challenges involved the more subtle forms of discrimination, however, the courts refused to make these same concessions.[52]

The premise that eligible persons unregistered to vote constitute a political group in the community was first rejected in *Gorin v. United States*.[53]

> In the first place, the group does not include only the politically inert. It includes also the politically alert, who may perhaps have lived for a year or more in the district but not long enough in their ward to be eligible to vote. In the second place, the group has no distinct or definable outlines . . . .[54]

Later in *United States v. Kroncke*,[55] another court held that those who do not register to vote forfeit their right to be selected on either the grand or petit jury.[56] The validity of this argument was strengthened by the provisions of the Federal Act prescribing exclusive reliance on such lists[57] so that, at present, this position remains essentially intact.[58]

On the other hand, opposing forces contend that both the *Gorin-Kroncke* arguments, and the postulates of the Federal Act overlook the reasons why large segments of the population have disassociated themselves from the political process.[59] Even though many of the discriminatory practices in voting have been eliminated,[60] especially since the passage of the Voting Rights Act of 1965,[61] political apathy[62] and social alienation[63] still account for a substantial portion of those who do not

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51 *E.g.*, United States v. Hyde, 448 F.2d 815, 826 (5th Cir. 1971); United States v. Tillman, 272 F. Supp. 908, 914 (N.D. Ga. 1967).

52 United States v. Cohen, 275 F. Supp. 724, 743 (D. Md. 1967); United States v. Duke, 263 F. Supp. 828, 837 (S.D. Ind. 1967).

53 313 F.2d 641 (1st Cir. 1963).

54 *Id.* at 644.

55 321 F. Supp. 913 (D. Minn. 1970).

56 *Id.* at 914.

57 28 U.S.C. § 1863(b)(2) (1970).

58 *See* United States v. Caci, 401 F.2d 664, 671 (2d Cir. 1968); United States v. Kelly, 349 F.2d 720, 778 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); United States v. Anzelmo, 319 F. Supp. 1106, 1112 (E.D. La. 1970); United States v. Gargan, 314 F. Supp. 414, 417 (W.D. Wis. 1970); *cf.* United States v. Camara, 451 F.2d 1122, 1126 (1st Cir. 1971).

59 Projecting from polls, of the 48 million who did not register to vote in 1968, four million were ineligible because they were aliens or inmates of prisons and mental hospitals; 15 million were registered but were disinterested or did not like the candidates; 10 million could have registered but did not vote; seven million were sick or disabled; five million were prevented from voting by residency requirements; three million said they could not leave their jobs; one million failed to obtain absentee ballots. Lindquist, *An Analysis of Juror Selection Procedure in the United States District Courts*, 41 TEMP. L.Q. 32, 47 (1967). *See also* Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HAST. L.J. 1417, 1423 (1969).

60 *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666, 86 S. Ct. 1079, 1081, 16 L. Ed. 2d 169, 172 (1966); U.S. CONST. amend. XXIV (elimination of poll tax).

61 42 U.S.C. §§ 1971-74 (1970).

62 *See* Rosenberg, *Some Determinants of Political Apathy*, 18 PUB. OPINION Q. 349 (1955).

63 Note, *Ghetto Voting and At Large Elections, A Subtle Infringement Upon Minority*

register to vote and who, therefore, are ineligible for jury service. As one sociologist recently observed,

> [T]he primary reason for the difference in registration votes is that low income people in general, and more specifically, the Negro population is more apathetic vis-a-vis the political process. It is a case of having less to gain from the political process . . . .[64]

Paradoxically, this inertia and intimidation are encouraged by the use of voter registration lists as the exclusive source of juror names. Not surprisingly, however, analyses of jury behavior clearly demonstrate that those who have never before participated in the political process have, following the jury experience, become actively absorbed in other phases of government.[65] By eliminating those prospective jurors who would profit most from this grass roots involvement, the potential force of the jury as an instrument of education is destroyed.[66]

Additionally, the use of voter registration lists may have a "chilling effect" on the voting franchise itself.[67] Some persons do not register to vote simply because in their counties such lists are used for tax assessment and other nonvoting purposes.[68] In cases involving wage earners for whom jury service is particularly onerous, those who would have exercised their voting privilege have refrained from doing so because they fear the economic hardship which time spent in the courtroom would necessarily produce.[69] It is precisely for this reason that the President's Commission on Registration and Voting recommended that voter registration lists be employed for electoral purposes only.[70]

A final criticism of the Act focuses on its failure to distinguish those circumstances requiring supplementation of the original source list. The Act itself theorizes that additional names shall be supplied "where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title."[71] The legislative history of the Act refines the statement to include only those situations where such lists deviate

Groups, 58 GEO. L.J. 989 (1970); Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Act of 1966*, 52 VA. L. REV. 1069, 1140 (1966).

64 Record, vol. 1, at 88, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., September 27, 1968) (Assistant Professor Dizard, University of California, Berkeley).

65 *See* Broeder, *University of Chicago Jury Project*, 38 NEB. L. REV. 744, 751-52 (1959).

66 *See* Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 303-15 (1968).

67 Uniform Jury Selection and Service Act. The text of the Act is set forth in McKusick, *Uniform Jury Selection and Service Act*, 8 HARV. J. LEGIS. 280, 292-309 (1971); *see also* Note, *Jury Selection Procedure: A Reform*, 6 SUFF. L. REV. 865, 884-96 (1972).

68 *See also* Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 303 (1968); Mills, *A Statistical Study of Occupations of Jurors in a United States District Court*, 22 MD. L. REV. 205 (1962).

69 *See also* Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 303 (1968); Mills, *A Statistical Study of Occupations of Jurors in a United States District Court*, 22 MD. L. REV. 205 (1962).

70 Note, *Jury Selection Procedures: A Reform*, 6 SUFF. L. REV. 865, 884-96 (1972).

71 28 U.S.C. § 1863(b)(2) (1970).

substantially from an accurate cross section of the community.[72] In an attempt to comply with this provision,[73] the Court of Appeals for the Fifth Circuit initiated a circuit-wide program to study the need for supplementation in its component parts.[74] After a determination that voter registration lists were preferable to lists of actual voters, the court concluded that the disparity (less than 10 per cent) was insignificant and that any further evaluation would involve unnecessary expense.[75] The decision of the court is persuasive, but, because the experiment was limited to overt racial discrimination,[76] the result is inconclusive as to those groups not included in the scope of their research.

Significantly, empirical data[77] reveal that the apathetic, the undereducated, the apolitical, and the disenfranchised although not individually cognizable are composed primarily of those groups which have "a basic similarity in attitudes or ideas or experience"[78] to warrant protection by the courts. The demand for safeguarding the interests of these groups is heightened by the recent adoption of the six-man jury in criminal cases,[79] and the trend toward the six-man panel in some civil cases as well.[80] This development, rendered constitutionally permissible when the Supreme Court held "that the twelve man panel is not a necessary ingredient of 'trial by jury,' "[81] deserves special consideration in any argument advocating federal jury selection reform.

To anticipate that an amalgam of several individuals will ever be entirely free from bias is at best an illusory ideal, but,

> [g]iven that all jurors are biased to some degree it seems that the right to trial by an impartial jury is merely a right to trial by biased jurors who must be chosen in an unbiased non-discriminatory manner.[82]

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72 S. REP. No. 891, 90th Cong., 1st Sess. 9, 17 (1967).

73 28 U.S.C. § 1863(a) (1970).

74 Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349, 363 (1969).

75 *Id.* at 379.

76 *Id.* The Court of Appeals for the Fifth Circuit only considered the variance between the percentage of nonwhite voters in the community, and the percentage of nonwhite voters contained in a random drawing of names.

77 *See* Mills, *A Statistical Study of Occupations of Jurors in a United States District Court*, 22 MD. L. REV. 205 (1962); Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

78 United States v. Guzman, 337 F. Supp. 140, 143 (S.D.N.Y. 1972).

79 *See, e.g.*, Williams v. Florida, 399 U.S. 78, 86, 90 S. Ct. 1893, 1898, 26 L. Ed. 2d 446, 452 (1970).

80 Cooley v. Strickland Transp. Co., 459 F.2d 779 (5th Cir. 1972); Devitt, *The Six Man Jury in the Federal Court*, 53 F.R.D. 273 (1971); Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971).

81 Williams v. Florida, 399 U.S. 78, 86, 90 S. Ct. 1893, 1898, 26 L. Ed. 2d 446, 452 (1970), *overruling* Thompson v. Utah, 170 U.S. 343, 18 S. Ct. 620, 42 L. Ed. 1061 (1898).

82 1970 *Economic Discrimination in Jury Selection, Law and Social Order* 474, at 491.

The inadequacies and inequities in present jury selection procedures, particularly the "de facto" discrimination inherent in the use of voter registration lists as the sole source of juror names, are emphasized by placing physical limitations on the number of persons who may be called upon to try the merits of a given case. Unless selection methods preclude unnecessary prejudice from the outset, the movement toward the six-man jury may seriously impair the application of the cross section principle in the contemporary body politic. Further, it may jeopardize the traditional hope that in selecting federal jurors, individual biases will somehow cancel each other out and that in securing the successful operation of this system, the number twelve was sufficiently large to achieve this balance of interests. Finally, it may increase the potential power that one man may exercise over other jury members now that his sphere of influence has been conveniently reduced.

Because any bias, whatever its source and however secured necessarily affects an outcome which lawyers associate with procedural due process,[83] it is imperative that the source list correspond as closely as possible to the society from which it is derived. The rules governing the federal jury selection system must prohibit the intentional or neglectful exclusion of any group whose presence is vital to the democratic nature of the jury system. Moreover, such rules must prevent the purposeful inclusion of any group whose interests would polarize jury panels simply because they enjoy a similarity in background and experience. Without these precautions, the propriety and efficacy of the jury as an impartial tribunal will be destroyed as well as its ability to administer fairly the rights of a fellow citizen who must submit himself to its judgment.[84] Therefore, the "built-in screening element" which the draftsmen of the Act initially thought to be desirable, may, in the wake of structural change in the jury system itself, prove to be its fatal flaw.

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[83] *See* Fay v. New York, 332 U.S. 261, 294-96, 67 S. Ct. 1613, 1630-31, 91 L. Ed. 2043, 2063-64 (1947).

[84] United States v. Burkett, 342 F. Supp. 1264, 1265 (D. Mass. 1972). The court stated:
> The defendant has a right . . . not to have the pool diminished at the start by the actions or inactions of public officials, nor by the inertia, indifference, or inconvenience of any substantial group or class who do not choose to vote or to serve on juries. . . . In this connection jury duty is an obligation owed to the defendant, not a privilege which at the juror's pleasure the juror may choose to exercise or forego.