JUROR SELECTION: A DISCRIMINATING ART

Introduction

Although trial by impartial jury is basic to our concept of justice, it has frequently been necessary to shield that right from abuse. Considerable controversy exists concerning the nature of that right, particularly in the realm of juror selection. The *impartial jury* concept encompasses two considerations. The more basic of these is the need for a jury free of prejudice. The second and more elusive is a nondiscriminatory selection of citizens from the eligible community. This comment will be confined to the latter and related practices of exclusion.

Discrimination in juror selection procedures has engendered considerable social and legal discontent. While no one can justifiably demand any particular representation on a panel, every individual has the right to an impartially selected jury.[1] Similarly, no individual has a right to serve as a juror. However, each must be given the opportunity to be considered.[2] Certain limitations, however, are required to maintain an essential degree of juror competence. Minimum age, residency, education, character, and personal background requirements[3] are generally recognized as valid. Conversely, limitations based upon social or ethnic background,[4] race,[5] sex,[6] or religion[7] contravene the spirit of the Constitution.[8] Nevertheless, such unlawful discrimination

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1 Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946). "This does not mean, of course, that every jury must contain representatives of all the . . . groups of the community. . . . But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." *Id.*

2 Guvin, *The Jury Selection and Service Act of 1968; Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349, 358 (1969).

3 *See generally* Fay v. New York, 332 U.S. 261 (1947); Strauder v. West Virginia, 100 U.S. 303 (1880). *See also* the particular state statutes concerning qualifications for jury service.

4 Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

5 *See, e.g.*, Reece v. Georgia, 350 U.S. 85 (1955); Hernandez v. Texas, 347 U.S. 475 (1954); Cassell v. Texas, 339 U.S. 282 (1950); Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942); Norris v. Alabama, 294 U.S. 587 (1935); Neal v. Delaware, 103 U.S. 370 (1881); Strauder v. West Virginia, 100 U.S. 303 (1880).

6 Ballard v. United States, 329 U.S. 187 (1946); Glasser v. United States, 315 U.S. 60 (1942).

7 State v. Madison, 240 Md. 265, 213 A.2d 880 (1965); Schowgurow v. State, 240 Md. 121, 213 A.2d 475 (1965).

8 Juror Selection and Service Act of 1968, 82 Stat. 54, 28 U.S.C.A. §§ 1861-69 (Supp. 1970); 2 U.S. Code Cong. & Ad. News 1792 (House Report No. 1076, 1968).

does exist and, whether it is active or passive, it effectively excludes qualified persons from jury service.

A. *Regulation of State's Discriminatory Practices*

> Jurymen should be selected as individuals, on the basis of individual qualifications and not as members of a race.[9]

Historically, the most obvious discrimination in juror selection has been the state's statutory exclusions limiting eligibility to free white men.[10] After the Supreme Court declared these statutes unconstitutional under the equal protection clause,[11] states desiring to perpetuate exclusionary practices resorted to less blatant methods and conferred wide discretion on their jury commissioners regarding the selection process. Vague statutory standards and qualifications, infrequently challenged, permitted the commissioners to successfully eliminate "undesirable" representation. The states contended that the absence of any group resulted from a lack of qualifications rather than from an unlawful discriminatory practice.

In passing upon this method of exclusion, the Supreme Court held that there can be no presumption that individuals or groups of people lack statutory qualifications.[12] "[I]t would be unreasonable to assume where Negroes were totally excluded from venires that this came about because all Negroes were unqualified, unwilling or unable to serve."[13] A claim of general disqualification could not rebut the prima facie case presented by total exclusion. This rule was applied to "any identifiable group in the community which may be the subject of prejudice."[14] The reasoning was also extended to "token inclusion cases"[15] in which one or two "undesirables" placed on the list could not cure the infirmity.

The "rule of exclusion" requires a demonstration of the existence of an identifiable group within the community and an illustration of its continued absence from jury venires.[16] Upon such a showing a

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9 Cassell v. Texas, 339 U.S. 282, 286 (1950).

10 Neal v. Delaware, 103 U.S. 370 (1881); the Constitution of Delaware adopted in 1831 gave the right of suffrage, with few exceptions, to free, white male citizens. A statute (DEL. REV. STAT. §109 (1853)) restricts the selection of jurors to those qualified to vote.

11 Bush v. Kentucky, 107 U.S. 110 (1882); Neal v. Delaware, 103 U.S. 370 (1881); Strauder v. West Virginia, 100 U.S. 303 (1880).

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

13 Swain v. Alabama, 380 U.S. 202, 241 (1965) (dissenting opinion).

14 *Id.* at 205.

15 Avery v. Georgia, 345 U.S. 559 (1953); Akins v. Texas, 325 U.S. 398 (1945); Thomas v. Texas, 212 U.S. 278 (1909).

16 Hill v. Texas, 316 U.S. 400 (1942); Pierce v. Louisiana, 306 U.S. 354 (1939).

prima facie violation of equal protection is established. This shifts the burden to the state to satisfactorily and specifically explain the absence of the excluded group. Realistically, no explanation could justify total exclusion.

Practices of total exclusion have generally been abandoned in favor of less obvious approaches. Significant underrepresentation, when the product of an invidious procedure, may be assailed under the equal protection clause.[17] A disparity between a group's percentage in population and that included on jury lists does not necessarily reflect a discriminatory practice.[18]

Intent to discriminate must be discernible.[19] Demonstrating qualification of the underrepresented group can indicate the necessary intent. Although statistical information is useful, discretionary or subjective standards,[20] which do not lend themselves to historical recordation, are difficult to express in this manner. Statistical analyses may be best utilized to illustrate the rate of disqualification, and thus, indirectly, qualification.[21] However, there is no assurance that this procedure would be acceptable to the courts. Add the difficulty and expense of accumulating sufficient data to the uncertainty of its acceptance and complainant is faced with an incredible burden.

The more conspicuous the discriminatory practice, the less demanding the requirements of proof. Conversely, the more subtle the discriminatory practice, the greater the difficulty in overcoming the presumption of validity.[22] For example, use of a segregated tax digest as a

17 *See* Whitus v. Georgia, 385 U.S. 545 (1967); Brown v. Allen, 344 U.S. 443 (1952); Cassell v. Texas, 339 U.S. 282 (1950); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967); United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), *cert. denied*, 372 U.S. 924 (1963); Mitchell v. Johnson, 250 F.Supp. 117 (M.D. Ala. 1966). *See also* Swain v. Alabama, 380 U.S. 202 (1965); United States v. Tillman, 272 F.Supp. 908 (N.D.Ga. 1967).

18 Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). "[The jury must be] drawn from a cross-section of the community." *Id.* at 220. This does not mean that the jury must mirror the community. Proportionate representation of all the various groups is mandated neither by the Constitution nor by the federal law. Swain v. Alabama, 380 U.S. 202, 204-209 (1965).

19 Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) (complaint must show a "systematic and intentional exclusion").

20 An example of a subjective standard is:

> Qualifications of persons on jury roll. The jury commissioners shall place on the jury roll and in the jury box the names of all male citizens of the county *who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment* . . . . (Emphasis added.) ALA. CODE tit. 30, § 21 (1958).

21 Finkelstein, *The Application of Statistical Decision Theory To the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 359-65 (1966-67).

22 Martin v. Texas, 200 U.S. 316 (1906). The burden of proving illegal discrimination or exclusion is upon the complainant; *see* Whitus v. Georgia, 385 U.S. 545, 550 (1967); Glasser v. United States, 315 U.S. 60, 87 (1942).

source which results in a substantial disparity between those eligible and those placed on the panels, indicates a discriminatory practice.[23] However, a greater disparity through random selection of voter registrants is not a violation of equal protection, since no showing of opportunity to discriminate is illustrated.[24] Thus a distinction must be made between active and passive discrimination even though both may result in equal exclusion. Active discrimination intimates a systematic or intentional exclusion through steps taken in the selection procedure. Passive practices depend only upon an unrepresentative source list impartially selected.

Active discrimination can be virtually eliminated through the adoption of certain precautionary measures. The opportunity to discriminate will be reduced by the abolition of subjective criteria. These discretionary qualifications serve no purpose but to limit participation and render the system suspect. Selection procedures should be equitable, not only in fact but in appearance as well.

Other procedures inhibiting unlawful discrimination are also available. For instance, cataloging the extent of participation of the various groups within the source list could accomplish two things. Jury commissioners may gain insight into participation within the source list, psychologically curbing discriminatory selection. Secondly, the availability of the data could effectively lessen the financial burden of the complainant. Though troublesome, tabulation of this data should be the responsibility of the jury commissioners since they are in a position to develop meaningful and accurate statistical information.[25] This responsibility should include the explanation arising upon a showing of a consistent, significant disparity between proportions in populations and those on jury panels. These measures have little effect on passive discrimination since the present interpretation of the equal protection clause imposes only negative duties upon the states. In short, this approach protects only against active practices of exclusion. Passive discrimination is not dependent upon a discriminatory *procedure*. Its success hinges on utilization of an unrepresentative source list which, to the point of exclusion, is an internal affair of the state. Though the Supreme Court has instituted the requirement in federal courts that the source reflect a fair cross-section of the community,[26] the rule has

23 Whitus v. Georgia, 385 U.S. 545 (1967).

24 State v. Smith, 102 N.J. Super. 325, 344-57, 246 A.2d 35, 45-52 (L.Div. 1968). In this case the court found that 17% of the county was Negro while comprising only 8.36% of the jury list; if defendant's statistics were used, 25% of the population was Negro. The court used the 1960 census while the defendant used a projected figure which would reflect the population percentage at the time of the drawing of the particular panels.

25 Comment, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 326 (1966).

26 Fay v. New York, 322 U.S. 261 (1947); Thiel v. Southern Pacific Co., 238 U.S. 217

never been imposed on the states. Although some states have adopted the federal standard,[27] most have ignored it.

B. *The Federal Standard*

> The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a *cross-section of the community*.[28] (Emphasis added.)

The cross-section rule necessarily imposes an affirmative duty upon the jury commissioners to be familiar with the community and to insure fair representation of all groups; solicitation and intentional inclusion may be necessary to secure that representation.[29] Consequently, the practice of passive discrimination can be avoided. The cross-section requirement recognizes that those eligible for jury exist in every stratum of society,[30] and that they be considered.

Fair representation does not mean proportional participation. Neither the Constitution nor the Supreme Court require a statistical mirror of the community.[31] Contentions that the cross-section rule demands approximately proportionate representation have been summarily dismissed.[32] Proportionate representation may be the ideal, but it could never be achieved as to all classifications.[33]

These viewpoints, developed by the federal courts in the era of the "key-man"[34] referral system, are still valid even though that system has been abolished. The procedure depended upon certain "key-men" submitting lists of names to the jury commissioners for consideration. Because of the nature of the system, the resulting source did not always reflect a *good* cross-section. The federal courts concluded that, absent intentional exclusion, federal juries which contain a substantial representation of the various elements in the community satisfy the cross-section requirement. Substantial representation, in turn, is considered

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(1946); United States v. DiTommaso, 405 F.2d 385 (4th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969); Dow v. Carnegie-Illinois Steel Corp., 224 F.2d 414 (3rd Cir. 1955), *cert. denied*, 350 U.S. 971 (1956).

27 State v. Ferraro, 146 Conn. 59, 147 A.2d 478 (1958); Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965); State v. Stewart, 2 N.J. Super. 15, 64 A.2d 372 (App. Div. 1949); GA. CODE ANN. §59-1 *et seq.* (1969).

28 Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946).

29 Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967); Juror Selection and Service Act of 1968, 82 Stat. 54, 28 U.S.C.A. 1863 (b) (2) (Supp. IV 1968).

30 Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946).

31 Cases cited note 18 *supra*.

32 *Id.*; United States v. DiTommaso, 405 F.2d 385 (4th Cir. 1968).

33 *Id.* at 390.

34 *See* Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).

as a "fair sample."[35] All identifiable groups should have more than a mere token chance to influence jury verdicts.[36] A demonstration that a panel may have been unrepresentative does not of itself show constitutional fault.[37] However, if a fair cross-section is consistently absent, then, without more, it is established that the commissioners have failed in their duty to insure fair representation of all groups.[38]

The key-man system was abolished in the federal courts by the enactment of the Juror Selection and Service Act of 1968.[39] This Act removes discretion in the selection procedure and imposes uniform qualifications, exclusions and standards of competence.[40] Federal juries are now selected primarily from voter registration and actual voter lists.[41] If this source does not produce a fair cross-section, the Statute mandates others be used in order to insure fair representation to all groups.[42] Voter lists were chosen as the primary source for two reasons. Theoretically, by registering to vote, all eligible citizens have the opportunity to participate.[43] Realistically, it is the best single source available. Though voter lists may be unrepresentative for various reasons, the Voting Rights Act of 1965[44] will aid in enhancing their representative nature.

The passage of this Act may initiate a reassessment of representation requirements in the federal court system. Certainly proportionate representation will never be required. However, advocates of approximately proportionate representation are now more persuasive. The extent of representation achieved will undoubtedly affect the standards courts will demand in the future. The intent of Congress was evidently to increase the representation of underrepresented groups. The courts should enforce the concept.

The Federal Act is not applicable to the states since Congress has no desire to interfere with internal state procedure. The House version of the proposed Civil Rights Act of 1966, Title II,[45] contemplated certain general provisions as applicable to the states, however, these were

35 United States v. Flynn, 216 F.2d 354, 388 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955); United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

36 United States v. Bryant, 291 F.Supp. 542, 549 (S.D. Me. 1968).

37 Christian v. Maine, 404 F.2d 205, 206 (1st Cir. 1968).

38 Rabinowitz v. United States, 366 F.2d 34, 58 (5th Cir. 1966).

39 28 U.S.C.A. §§1861 *et seq.* (Supp. 1970).

40 28 U.S.C.A. §§1862,63,65 (Supp. 1970).

41 28 U.S.C.A. §1863 (b)(2) (Supp. 1970).

42 28 U.S.C.A. §1861 (Supp. 1970).

43 28 U.S.C.A. §1861 (Supp. 1970).

See also S. Rep. No. 891, 90th Cong., 1st Sess. 17 (1967).

44 79 Stat. 437; 42 U.S.C. §1973 (1965).

45 *See*, H.R. 14765, 89th Cong., 2d Sess. (1966); S. 3296, 89th Cong., 2d Sess. (1966).

not incorporated into the Juror Act of 1968 when passed. Though the Attorney General may institute an action in federal court to rid a state procedure of a discriminatory practice,[46] these suits are not common. Thus the task of implementing necessary remedial procedures falls upon the courts and individual state legislatures.

C. *Progress in the Fifth Circuit*

The federal courts of the Fifth Circuit have diminished the effect of passive discrimination in some states. In 1964, the Circuit Court of Appeals held that intentional inclusion of minority groups on jury lists violated the equal protection clause.[47] Since the Constitution is color blind, the court reasoned that any distinction based upon race is unlawful. This holding was reversed in *Brooks v. Beto*.[48] Considering a state procedure, the court observed, "[i]t is a constitutional imperative that the jury, grand or trial, fairly represent the community. . . .[49] They [jury commissioners] must uncover the source of competent jury prospects from all significantly identifiable elements of the community."[50] Mechanically proportionate representation was condemned, however, the need for a "conscious recognition" of components within the community was deemed an integral part of attaining a *cross-section*. This should be distinguished from familiarity with the community to prevent exclusion. The former imposes an affirmative duty, while the latter enforces a negative precaution. It should be noted that in *Brooks* the court merely condoned action already voluntarily taken by the jury commissioners.

The cross-section requirement was imposed on a Louisiana procedure in *Labat v. Bennett*.[51] Daily wage earners were summarily ex-

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46 White v. Crook, 251 F.Supp. 401 (M.D. Ala. 1966).

47 Collins v. Walker, 335 F.2d 417 (5th Cir. 1964), *cert. denied*, 379 U.S. 901 (1964); overruled by Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966). *See also* Comment, *The Defendant's Challenge To A Racial Criterion In Jury Selection: A Study In Standing, Due Process And Equal Protection*, 74 YALE L.J. 919 (1965).

48 Brooks v. Beto, 366 F. 2d 1 (5th Cir. 1966).

49 *Id.* at 11; *but see* Swain v. Alabama, 380 U.S. 208-209 (1965).

> We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%.

See also Raiford v. Dillon, 297 F. Supp. 1307 (S.D. Miss. 1969) where underrepresentation of Negroes by 12% was not considered indicative of discrimination; Love v. McGee, 297 F. Supp. 1314 (S.D. Miss. 1969), where a disparity of 46% was deemed to constitute prima facie evidence of systematic exclusion; State v. Smith, 102 N.J. Super. 325, 246 A.2d 35 (L.Div. 1968), where 6% were listed on the panel though 17% (25% by complainant's data) were adult Negroes in the community.

50 366 F.2d at 12.

51 365 F.2d 698 (5th Cir. 1966).

cused from jury service on the ground of hardship. The court observed that, though the practice was not discriminatory per se, the result was a systematic exclusion of Negroes, since they comprised the major portion of the wage earner category. This exclusion deprived the panels of reflecting a cross-section of the community and was held to violate the due process and equal protection clauses of the Constitution. That the excluded groups do not complain, and may, in fact, delight at their dismissal has no bearing on the defect. The cross-section requirement cannot be circumvented because some people or groups do not wish to serve. Perhaps methods of making jury duty more attractive and less an imposition could be devised.[52] The cross-section rule, however, is not dependent on that possibility.

Though generally accepted as a valid source, voter registration lists do not necessarily reflect a fair cross-section of the community.[53] In *King v. Cook*[54] the federal district court considered voter lists in this perspective. In this case both the master and petit jury lists were compiled from voter registration rolls, no other source being authorized by the statute.[55] All impediments, both administrative and legal, were removed to facilitate and encourage Negro registration. The response was not overwhelming. Though some 56% of the eligible population were Negroes, they comprised only 21% of the list. The court observed that in that particular county Negroes had faced "the awesome combination of literacy tests, poll tax, statutorily required publication of registration applicant's names, active repression of registration by whites of Negro registration, and fear . . . for their jobs and places of abode,"[56] and hence were generally hesitant to apply for voter registration until at least mid-1965. The racial imbalance in voter registration continued. In view of the variance between representation on the source list and that within the community, the commissioners had the duty to supplement that list with another source which would eliminate, as nearly as possible, that disparity. The voter registration rolls

> remained unconstitutionally tainted by the . . . state-sanctioned discriminatory voter registration procedure, the effect of which was to

52 Kuhn, *Jury Discrimination: The Next Phase*, 41 So. CAL. L. REV. 235, 303-24 (1968).

53 *See* U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 174: *Voting and Registration in the Election of November 1966*, at 18-31 (1968). As a general proposition the lower a person is on the economic scale and the less education he has had, the greater are the chances that he does not participate in the electoral process.

54 298 F. Supp. 584 (N.D. Miss. 1969).

55 MISS. CODE ANN. §§1762-03, 3212.7 (1942).

56 298 F.Supp. at 587.

> prevent adequate representation of Negroes. . . . While representation of the races in precise proportion to that of the adult population is not required, there may not be validly used a jury selection system which cannot produce a fair relationship to the community.[57]

In *King*, though the present underrepresentation was a product of past discrimination, the mandate was premised upon the necessity of fair representation and the cross-section requirement. The cause of underrepresentation should not be determinative; substantial underrepresentation alone should prompt remedial action.

D. *Conclusion*

There is justification for the reluctance of the courts to initiate action upon a mere showing of underrepresentation.

> [W]here the demonstrable imbalance amounts to no more than a possibly good faith imperfection in the selection system which by its nature seems unlikely to control the outcome of any given case, it is difficult to justify the delay, expense and disruption inherent in either a reversal or an order that the selection system be revamped.[58]

Though the position is pragmatic it ignores the concept of right to trial by a jury composed of one's peers.

Certain irregularities inhere in any system. To afford fair representation to some classifications, it may be necessary to sacrifice proportionate representation in other less important categories such as arbitrary age and geographical classes.[59] This should be considered legally insignificant. The responsibility of the courts encountering a "good faith" significant disparity is unclear because of a possible disruption of justice. It should be noted, however, that a constitutional right does exist to the cross-section requirement.

The Supreme Court considers the right to trial by jury so fundamental that it cannot be left to local custom. But that right, however, is a hollow one where subtlety can defeat its basic tenet. Without the imposition of the cross-section requirement, distorted representation is a certainty. This distortion will magnify as prospective jurors approach actual service. Statutory exclusions and exemptions,[60] individual hardships, challenges for cause and the totally discretionary peremptory

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57 *Id.* at 588.

58 Note, *The Congress, The Court and Jury Selection: A Critique Of Titles I and II Of The Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1139 (1966).

59 United States v. DiTommaso, 405 F.2d 385, 391 (4th Cir. 1968).

60 Qualifications generally include citizenship, age, ability to read and write the English language, free of criminal history, etc. *See* 28 U.S.C.A. §1865 (Supp. 1970).

challenge[61] serve to further diminish representation. Consequently, a source list which contains fair representation is all important. This can only be developed by an insistence that the jury commissioners be familiar with the community and that they not only guard against exclusion but rather insure fair representation. At first glance this compensatory selection[62] scheme appears discriminatory[63] but such a practice is clearly necessary.[64] Though any preference is at odds with random selection, selection by chance is not an end in itself. Random selection from inadequate source lists can be as undesirable in some instances as an invidious practice.

Any compensatory procedure must be considered in terms of qualifications. "A selection system which is economically and racially unbalanced by the application of juror quality tests can produce representative panels if a larger percentage of those population segments which tend to fail the tests is considered for jury service so that a fair proportion of their members survive the selection process."[65] Many methods are available to "compensate" for underrepresentation and frequency of disqualification. Utilization of a combination of sources, more concentrated mailing efforts and intentional inclusion can assure fair representation. These methods have been ignored because of the absence of effective regulation over state procedures and the failure to impose the cross-section requirement.

Participation in the jury process is the chief governmental function performed by a lay citizen.[66] "When large classes of people are denied a role in their legal process—even if that denial is wholly unintentional or inadvertent—there is bound to be a sense of alienation from the legal order."[67] Only the imposition of the cross-section requirements can insure fair representation to all groups within the community. The Supreme Court could impose a duty akin to that mandated on the desegregation or reapportionment issues, but it has not. Understandably, the Court is reluctant to interfere with state procedure unless active discrimination is evident. Congress also has chosen to abstain from imposing a particular procedure upon the States.

Exemptions and exclusions include severe hardship, and inconvenience, and occupational exemptions. *See* 28 U.S.C.A. §1863(b) (5,6,7) (Supp. 1970).

61 Swain v. Alabama, 380 U.S. 202, 209-28 (1965).

62 Kuhn, *supra* note 52, at 315-22.

63 *See* Collins v. Walker, 335 F.2d 417 (5th Cir. 1964).

64 *See* Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966).

65 Kuhn, *supra* note 52, at 315.

66 JOINER, CIVIL JUSTICE AND THE JURY 77 (1962).

67 J.R. Kaufman, *A Fair Jury—The Essence of Justice*, March-April, 1968, TRIAL LAWYERS FORUM 9, 20.

The primary responsibility lies on each state legislature to promulgate prospective legislation.[68] It is submitted that state legislation should be patterned after the Federal Juror Selection and Service Act of 1968.[69] All subjective qualifications would be eliminated, voter rolls would be instituted as the primary source, and most importantly, the duty of insuring fair representation would be imposed. Regulation of each county commission should be accomplished through a state control board rather than the courts. This regulatory body should be in a position to guide the courts in judging a selection procedure when a motion to quash the venire is instituted. These methods will insure fairness in fact and in appearance as well.

Law derives its greatest strength from the respect of the society which it regulates. Universal regulation does not inspire respect when elements of society are precluded from participation. Any discriminatory practice, be it active or passive, has the same consequence—exclusion. Irrespective of cause, society should no longer tolerate this result. Without the imposition of the cross-section requirement and more efficient regulation of the selection system there can be no effective means to counteract passive discrimination.

Alfred J. Luciani

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68 GA. CODE ANN., §59-1, *et seq.* (1969).

69 28 U.S.C.A. §1861, *et seq.* (Supp. 1970).