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## **Juries—Selection of Federal Jurors—Exclusion of Economic Class**

William E. Snead

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## COMMENTS

## JURIES—SELECTION OF FEDERAL JURORS—EXCLUSION OF ECONOMIC CLASS\*

Unlike the majority of state statutes regulating jury selection,<sup>1</sup> federal stat-

\* *Padgett v. Buxton-Smith Mercantile Co.*, 283 F.2d 597 (10th Cir. 1960), cert. denied 81 S.Ct. 713 (1961).

1. In at least 23 states the jury selecting officials are required to choose prospective jurors strictly from the voting lists, poll lists, tax rolls, or other general lists of the people in the counties. Alaska Comp. Laws Ann. § 55-7-32 (1949) (jury drawn from list of voters in last election); Ariz. Rev. Stat. Ann. §§ 21-301, 21-302 (1956) (board of supervisors compiles list of all qualified jurors in the county and all are put in the jury box); California (no specific statutory requirement); but see *Jury Selection in California*, 5 Stan. L. Rev. 247, 253 (1953); Ga. Code Ann. § 59-106 (Supp. 1958) (commissioners select from books of tax receivers); Idaho Code Ann. § 2-302 (1947) (county commissioners choose from poll lists of counties); Ind. Ann. Stat. § 4-3304 (Supp. 1960) (selected from tax rolls); Iowa Code Ann §§ 608.2, 609.1 (1946) (selection made from voters as shown by poll books from last election); Kan. Gen. Stat. Ann § 43-102 (1949) (selected from county assessment rolls); Ky. Rev. Stat § 29.075 (1955) (selected from current voting register and latest tax rolls); Md. Ann. Code art. 51 § 6 (1957), § 8 (Supp. 1960) (selected from tax rolls of county); Mich. Stat. Ann. §§ 27.276, 27.403 (1938) (selected from tax rolls except in upper peninsula where selection is made from various poll lists); Mont. Rev. Codes Ann. § 93-1401 (Supp. 1959) § 93-1402 (1947) (selected from county assessment rolls); Neb. Rev. Stat. §§ 25-1627, 25-1627.01 (1956), § 25.1628 (Supp. 1959) (selection register or poll book used in conjunction with a key number system); N.M. Stat. Ann. § 19-1-3 (1953) (selection from list of all voters who voted at the last election prepared by the county clerk); N.D. Rev. Code §§ 27-09-07, -09 (1960) (jurors residing outside organized townships are selected from the last annual tax list of the county. Other jurors are selected from names of resident taxpayers); Ohio Rev. Code Ann. §§ 2313.06, 2313.08 (1954) (list of all electors shown on poll books or registration lists used in conjunction with key number system); Okla. Stat. Ann. tit. 38 § 18 (1958) (selected from tax lists); Ore. Rev. Stat. §§ 10.110, 10.120 (1959) (selected by lot from latest tax rolls or registration lists or both); R.I. Gen. Laws Ann. §§ 9-9-14 (Supp. 1960), R.I. Gen. Laws Ann. 9-9-15, -16, -23 (1956) (each city submits list of all qualified voters. In towns, town clerk keeps list of qualified male electors and makes public drawing from these. Jury commissioner then makes investigation); S.C. Code § 38-52 (1952) (selection made from official enrollment of male electors between the ages of 21 and 65); Utah Code Ann. §§ 78-46-13, -17 (1953) (selection from assessment rolls); Wash. Rev. Code § 2.36.060 (1951) (selection made from city registration files as well as original registration files in county seat); Wyo. Stat. Ann. § 1-831 (1957) (selected from assessment roll).

In at least 5 states the statutes require the selectors to make partial use of these lists; i.e., use the lists in conjunction with "other groups," or make the lists accessible to the selecting officials. Colo. Rev. Stat. Ann. § 78-2-1 (1953) (county commissioners select from lists made by county treasurer or assessor and "other groups"); N.J. Rev. Stat. §§ 2A: 70-1 (Supp. 1959), 2A: 70-4 (1952) (access given jury commissioners to tax and election records); N.C. Gen. Stat. § 9-1 (1953) (each county selects from two lists, one composed of taxpayers and the other of other persons over 21 years of age); Tenn. Code Ann. § 22-228 (Supp. 1960) (from tax records, permanent registration records or other available and reliable records); Vt. Stat. Ann. tit. 12, ch. 1401, 1403 (1958) (lists may be considered by commissioners).

In at least 4 other states the statutes require the jury selectors to use the lists in at least the more populous, metropolitan counties of the state. Ill. Ann. Stat. ch. 78, §§ 24-25 (Smith-Hurd Supp. 1960) (counties having population of more than 140,000); Mo. Rev. Stat. §§ 496.030 (1949) (counties of 200,000-450,000 population), § 497.130 (Supp. 1960) (450,000-800,000 population); N.Y. Judiciary §§ 501, 502 (Supp. 1960) (counties of less than 100,000 population where the citizens so elect to use system); Pa. Stat. Ann. tit.

utes allow the selectors broad discretion in the selection of jurors.<sup>2</sup> Some few limits have been imposed. It is well established that juries must be representative of the community<sup>3</sup> and be drawn from a cross-section of the community.<sup>4</sup> Regardless of the method used, federal selectors may not systematically exclude

17, §§ 1251, 1252 (Supp. 1960) (first class counties); Tex. Civ. Stats. § 2094 (Supp. 1960) (counties over 20,000 population).

Four other states have provisions requiring the officials to use the lists as a guide in making their selections. Code Ala. Recomp. tit. 30, § 24 (1958) (clerk of county must scan registration lists, tax assessor's list, city directories, telephone directories, and other sources); Del. Code Ann. tit. 10, § 4504 (1953) (persons qualified to vote at the general election are liable for service), § 4505 (commissioners from each county select at least 50 people from those liable for jury service); Fla. Stat. Ann. § 40.10 (Supp. 1960) (counties exceeding 120,000 population, commissioners may examine all documents in office of clerk of circuit court and any list containing names of electors of county); Miss. Code Ann. § 1766 (1942) (voting list used as guide).

Only seven states and the District of Columbia have no provisions placing limitations on the sources from which the jury selecting officials may obtain the lists of prospective jurors. Ark. Stat. §§ 39-201, 39-206 (1947), § 39-208 (Supp. 1959) (selected from electors of county); D.C. Code Ann. § 11-1401 (Supp. 1960) (no specific requirements. Must obtain as nearly as possible from the different parts of the district); Hawaii Rev. Laws § 7-221-10 (Supp. 1957); La. Rev. Stat. § 179 (Supp. 1959) (general venire list made from persons qualified to serve as jurors); Mass. Ann. Laws ch. 234 §§ 1,4 (1956) (selection made from persons qualified to vote for state representative whether or not registered); Minn. Stat. Ann. § 593.13 (Supp. 1959) (selection made from qualified voters); Nev. Rev. Stat. § 6.050 (1959) (selection from voters whether or not registered); Wis. Stat. Ann. § 255.04 (1957) (no specific method provided).

Only three states use anything similar to the key-man system used in the New Mexico Federal District Court. Conn. Gen. Stat. Rev. § 51-221 (1958), § 51-223 (Supp. 1959) (clerk of superior court of county and two appointed electors select from lists sent them by the jury commissioners in each town); Me. Rev. Stat. Ann. ch. 116 § 1 (1954) (appointed officials from each county obtain lists from municipal officials and use these and personal knowledge); N.H. Rev. Stat. Ann. § 500:1 (1955) (selected men of each town make a list of such men and women as they deem best qualified to serve).

2. A survey of former federal legislation shows an increasing amount of discretion being placed in the hands of the officials charged with selection of jurors. In 1879 the applicable statute provided that the federal courts were to select only those jurors who were qualified under state law to serve in the highest court in that state, and state methods of selection were to be used insofar as practicable. Act of June 30, 1879, Ch. 52, § 2, 21 Stat. 43. In 1957 the mandatory use of state standards for qualification of federal jurors was abolished. 28 U.S.C. 1861 (1957). The standard minimum qualifications for federal jurors now are that the person must (1) be a citizen (2) be 21 years of age (3) have resided in the judicial district for one year (4) not have been convicted of a crime punishable by imprisonment for more than one year, unless his civil rights have been restored by pardon or amnesty (5) be able to read, write, speak, and understand the English language (6) not be incapable, by reason of mental or physical infirmities to render efficient jury service. There are no required methods for making the selections. The methods of selection are left to the discretion of the clerk of the court and the court appointed jury commissioner. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946); *Glasser v. United States*, 315 U.S. 60 (1942). For a review of the early federal statutes see Frankfurter, Powers of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1098-1100 (1924).

3. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940); See also *Glasser v. United States*, 315 U.S. 60 (1942).

4. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

any cognizable class or group.<sup>5</sup> Daily wage earners constitute one cognizable class,<sup>6</sup> and their systematic exclusion constitutes a valid ground for quashing a jury.<sup>7</sup> In the only two cases sustaining a motion to quash on this ground the decisions were based on the supervisory power of the appellate court, and not on constitutional grounds.<sup>8</sup> It may be, however, that a party to a suit or proceeding has been denied due process of law if members of his economic class were systematically excluded from the jury.<sup>9</sup>

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5. *Hernandez v. Texas*, 347 U.S. 475 (1954) (exclusion of Mexicans); *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1945) (exclusion of daily wage earners); *Ballard v. United States*, 329 U.S. 187 (1946) (exclusion of women); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (exclusion of Negroes); *International Longshoremen's Union v. Ackerman*, 82 F. Supp. 65 (1949) rev'd on other grounds, 187 F.2d 860 (9th Cir.) cert. denied, 342 U.S. 859 (1951) (exclusion of Filipinos and wage earners).

6. *Thiel v. Southern Pac. Co.*, supra note 5; *International Longshoremen's Union v. Ackerman*, supra note 5.

7. *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946) (challenge to the jury panel); *International Longshoremen's Union v. Ackerman*, 82 F. Supp. 65 (1949) (challenge to the grand jury).

8. In *Thiel v. Southern Pac. Co.*, supra note 7, the Court said: "we cannot sanction the method by which the jury panel was formed in this case. The trial court should have granted petitioner's motion to strike the panel. That conclusion requires us to reverse the judgment below in *the exercise of our power of supervision over the administration of justice in the federal courts.*" *Id.* at 225 (Emphasis supplied) *Accord*, *International Longshoremen's Union v. Ackerman*, supra note 7.

9. In *Ackerman*, note 7 supra, the Hawaii District Court seemed to be aware of the question whether acts so discriminatory as to be violative of the due process or equal protection clauses of the 14th amendment if committed by a state, would be violative of the due process clause of the 5th amendment if committed by the federal government. The question has been answered in *Bolling v. Sharpe*, 347 U.S. 497 (1954), wherein the Court stated:

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. *Id.* at 499.

*Bolling* assumes importance in another aspect when we realize that it marked an end to a prior line of analogous decisions resting on a somewhat questionable foundation of sound judicial supervision and public policy. *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946) (quashing a jury array through the exercise of power of judicial supervision); *Hurd v. Hodge*, 334 U.S. 24 (1948) (judicial endorsement of restrictive covenant against Negroes in the District of Columbia held contrary to public policy and corrected by the use of the Supreme Court's supervisory powers); *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944) (exclusive bargaining representative under federal statute bound not to discriminate based on race under duty of fair representation). After *Bolling*, one would not be guilty of stretching an analogy by proposing that the proper modern foundation for the *Thiel* and *Ackerman* cases should be a constitutional one. In view of the language in *Bolling*, an analogy may be drawn to cases involving economic exclusion in state courts. In *Fay v. New York*, 332 U.S. 261 (1947), the Court stated:

We do not mean that no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law. But we do say that since

Federal district court clerks and court appointed jury commissioners are responsible for the selection of qualified jurors.<sup>10</sup> A number of different selection systems are employed in the district courts,<sup>11</sup> among them the key-man system used in the New Mexico district. Under this system the clerk of the court and a jury commissioner select key-men who in turn select *all* prospective jurors.<sup>12</sup> The rules that have been established for maintaining a challenge to the array under this system appear effectively to insulate it.

In *Padgett v. Buxton-Smith Mercantile Co.*,<sup>13</sup> plaintiff, a manual laborer, challenged the jury array on the ground that there was no one on the jury panel below the economic status of foreman.<sup>14</sup> Plaintiff moved in the alternative for permission to examine the key-men who had furnished the names of prospective jurors.<sup>15</sup> The purpose of the latter motion was to discover the methods and standards used by the key-men to ascertain whether any discriminatory practices occurred. Both motions were denied by the trial court.<sup>16</sup> On appeal, the Tenth Circuit affirmed, holding that the absence of any particular class on the panel does not make the entire array suspect.<sup>17</sup> The denial of the alternative motion was also affirmed.<sup>18</sup>

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Congress has considered the specific application of this Amendment to the state jury systems and has found only these discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process. *Id.* at 283.

See also Legislative Reference Service, Library of Congress, *The Constitution of the United States of America, Analysis and Interpretation* 854 (1953).

10. 28 U.S.C. § 1864 (1957).

11. See note 39, *infra*.

12. Record, p. 43.

13. 283 F.2d 597 (10th Cir. 1960).

14. *Id.* at 598.

15. Record, p. 11. On March 3, 1960, plaintiff received notice that trial date was March 21, 1960. Petit jurors were drawn on March 1, 8, and 10, 1960. Challenge to the jury array was filed on March 10, 1960. Record, p. 5 *et seq.*

16. Record, p. 31. At the hearing on the motions on March 14, plaintiff filed a motion to interrogate the jury commissioner. The clerk testified at the hearing that he made an attempt to get a representative cross-section on the jury; that some of the key-men were selected from acquaintances and others from an unknown directory; that the lists submitted by the key-men were the sole source of prospective jurors; that the panel was selected solely from the questionnaires returned answered. Record, p. 37 *et seq.*

17. *Padgett v. Buxton-Smith Mercantile Co.*, 283 F.2d 597, 600 (10th Cir. 1960).

18. The court stated that plaintiff had opportunity to examine the clerk as to the identity of the key-men, but failed to mention that disclosure of the key-men had been denied in two prior 10th Circuit cases. *Windom v. United States*, 260 F.2d 384 (10th Cir. 1958) (reason given was protection of the key-men from harassment, both by those wishing to serve on juries and those wishing to avoid jury duty); *Bary v. United States*, 248 F.2d 201 (10th Cir. 1957) (no names and addresses disclosed because there was no statute or rule requiring such disclosure, thus leaving it in the sound discretion of the court whether or not to allow disclosure).

In the two federal cases that have upheld a motion to quash on grounds of exclusion of an economic class, admissions of intentional discrimination supplied the requisite evidence.<sup>19</sup> Admissions by the commissioner or the court clerk under the key-man system would be inadequate, with the possible exception of admissions of discrimination in the choice of key-men or in picking the array from the returned questionnaires. In *Padgett* the clerk testified that he did not even know the qualifications of the key-men whom he had selected!<sup>20</sup> Only admissions by the key-men would seem to be of sufficient moment to justify a finding of systematic exclusion. It is questionable whether a key-man would admit that he had discriminated against a class or group in breach of his duty.<sup>21</sup>

However, before a challenger can secure these admissions, he must satisfy the preliminary burden of rendering the jury "suspect."<sup>22</sup> A showing of the absence of a class or group on the *panel* is insufficient to make the *array* suspect because the panel is picked by chance.<sup>23</sup> Therefore, the challenger must show discriminatory exclusion in picking the array. The number of persons on the array cannot be less than 300,<sup>24</sup> and normally is considerably more.<sup>25</sup> If the challenger finds, upon examination of the questionnaires,<sup>26</sup> a total absence or only token representation of an economic class, this would probably be sufficient to make the jury "suspect."<sup>27</sup>

The character of the key-man system itself might give rise to an inference of

19. *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946) (economic exclusion of daily wage earners); *International Longshoremen's Union v. Ackerman*, 82 F. Supp. 65 (1949) (economic exclusion of wage earners).

20. See note 16 *supra* in regard to the clerk's testimony on this point. The clerk testified further that some of the key-men were picked at random, Record, p. 42. The array selected by the jury commissioner and the clerk could be only as representative as the lists turned in to them by the key-men. Thus, the responsibility of selecting a representative jury seems to be entirely in the hands of the key-men.

21. The *Padgett* opinion, *supra* note 7 at 599, quotes the following from the letters sent out to the key-men: "We request your assistance in the preparation of a jury list for this court. We desire the names of \_\_\_\_\_ men and women residing in your county who would make good jurors, it being our desire to compile a jury list composed of good citizens from the several counties of the State representing a cross-section of the population, *fairly apportioned as to sex and as to racial, economic and social groups.*" (Emphasis added.) It is interesting to compare this letter with the one sent out at the time of *Windom* 260 F.2d 384 (10th Cir. 1958), which is quoted at page 385: ". . . to compile a jury list composed of good citizens from the several counties of the state representing a cross-section of the population, *fairly apportioned as to sex and racial origin.*" (Emphasis added.)

22. In *Padgett v. Buxton-Smith Mercantile Co.*, 283 F.2d 597, 599 (10th Cir. 1960), the court stated that a full scale investigation should not be required until the panel is suspect.

23. *Id.* at 599.

24. 28 U.S.C. § 1864 (1950).

25. The number picked for the array in *Padgett* was 810. *Padgett v. Buxton-Smith Mercantile Co.*, 283 F.2d 597, 598 (10th Cir. 1960).

26. The time limitation for examination in the *Padgett* case makes this procedure at least burdensome. Plaintiff in the case had at most only 14 days in which to make the examination. See note 15 *supra*.

27. *Padgett v. Buxton-Smith Mercantile Co.*, 283 F.2d 597, 599 (10th Cir. 1960).

discrimination. If the key-man is not acquainted with Negroes or laborers, it is unlikely that he will pick them for the array. Since, as a practical matter, the jury commissioner and court clerk cannot know the extent of the key-men's acquaintances, they cannot be sure they have obtained a representative jury. The analogy with cases involving the exclusion of Negroes from jury service is compelling.<sup>28</sup> It has been suggested that selectors have an affirmative duty to inquire as to who is qualified among a class and that a failure to so inquire tends to prove discrimination.<sup>29</sup> The analogy is particularly forceful where, as in the instant case, the clerk and the commissioner do not even know the qualifications of the key-men, let alone the scope of their acquaintances.

Examination of questionnaires returned by prospective jurors might reveal sufficient grounds for quashing the panel. The United States Supreme Court has held, in cases involving the exclusion of Negroes from juries, that a presumption is raised or a prima facie case is created of unlawful exclusion of a class or race when total exclusion or token representation is shown to have existed for many years.<sup>30</sup> Statistical data limited to showing merely the proportion of a class in society compared to its proportion on a panel or array has been held to be inconclusive.<sup>31</sup> In the 10th Circuit the jury challenger has been limited as to the yearly records he may examine in an attempt to show a continuous trend or practice of exclusion.<sup>32</sup> If this limitation were to be continued, a challenger would be severely handicapped in sustaining an attack along this line.

Under the New Mexico District key-man system, an impossible burden of proof is placed on one who challenges the jury panel or array on the ground of exclusion of an economic class. He will be allowed to examine the key-men only after an examination of the questionnaires submitted by the prospective jurors has rendered the jury panel or array "suspect."<sup>33</sup> Results of the examination of the key-men are likely to be inconclusive; a showing of lack of proportional representation, of only token representation, or even total absence of a class

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28. As the United States Supreme Court said in *Smith v. Texas*, 311 U.S. 128, 132 (1940): "... discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them."

29. Annot. 1 A.L.R.2d 1291, 1301 (1948) and cases cited therein.

30. *Id.* at 1309 and cases cited therein. See also, *Nier, Challenging the Social Composition of Federal Juries in Colorado*, 32 *Dicta* 189, 195 (1955).

31. The following cases involve unsuccessful challenges to grand juries, jury arrays, and jury panels on the ground of economic exclusion: *Windom v. United States*, supra note 13; *Bary v. United States*, 248 F.2d 201 (10th Cir. 1957); *United States v. Flynn*, 216 F.2d 354 (2d Cir. 1954); *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950); *United States v. Local 36 of International Fishermen*, 70 F. Supp. 782 (S.D. Cal. 1947); *United States v. Charles Kazuyuki Fujimoto*, 105 F. Supp. 727 (D. Hawaii 1952); *United States v. Brandt*, 139 F. Supp. 362 (N.D. Ohio 1955); *Dow v. Carnegie-Ill. Steel Corp.*, 224 F.2d 414 (3d Cir. 1955).

32. In *Bary v. United States*, 248 F.2d 201 (10th Cir. 1958), where the court allowed an examination of the questionnaires sent out to prospective jurors, the examination of these questionnaires was limited to the prior four years instead of the requested ten years and the names and addresses on the questionnaires were not disclosed.

33. *Padgett v. Buxton-Smith Mercantile Co.*, 283 F.2d 597, 599 (10th Cir. 1960).

on the array would probably succeed only in making the array "suspect";<sup>34</sup> and even if the array was "suspect" it is doubtful that the challenger could sustain the burden of proving exclusion in the face of testimony on the part of the key-men and the jury commissioners that they had not systematically excluded any class or group.<sup>35</sup> The prospects of successful attack are discouraging.<sup>36</sup> The system itself insulates jury selection from attack. The right to have a representative jury under these circumstances is a right without a remedy.

In disposing of *Padgett*, the Court of Appeals should have pursued one of at least three alternatives. They could have reversed and remanded the case for an examination of the key-men. This alternative would, in effect, eliminate the key-man system because every jury challenge would result in calling an unknown number of key-men to testify. The challenger in *Padgett* did not adduce sufficient evidence to make the jury "suspect," the apparent prerequisite to a motion to examine the key-men. However, in light of the obstacles to a demonstration that the jury is "suspect," the court would have been warranted in using this device as its medium for expression of disapproval of such a delegation of duty by the statutorily appointed selectors.

Secondly, the court could have granted the motion to quash in the exercise of its supervisory powers, expressing disapproval of the key-man system in specific terms. A recent survey indicates that only 11 of 87 districts reporting use a "pure" key-man system.<sup>37</sup> In three other districts the system is used, but not exclusively.<sup>38</sup> In over 40 districts, a list, such as a voters' list, previous jurors lists, and telephone directories are used to some extent.<sup>39</sup>

34. *Id.* at 599.

35. *Windom v. United States*, 260 F.2d 384 (10th Cir. 1957) (challenge of the jury array on the ground that only persons of elevated social and economic status were selected, and appeal from a refusal of the court to disclose the names of the key-men. The court stated, at 385: "Some refutation of the trial court's statement that 'we have on our regular panel and every term of court people from almost every walk of life, every nationality, religious creed, and every race . . .' is necessary."); *Bary v. United States*, 248 F. 2d 201 (10th Cir. 1957) (challenge to the array of the grand jury and the panel of the petit jury. The court stated, at 206-07: "The clerk, three of his deputies, and the jury commissioner testified. . . . And based in part upon the testimony adduced at the hearing, in part upon the records of the court, and in part upon its knowledge of conditions in Colorado, the court found that there had not been any systematic exclusion or token representation of the groups referred to in the challenge.").

36. The purpose of this discussion is not to intimate that systematic exclusion has existed in any particular situation. Our purpose is to emphasize the virtual impossibility, under the key-man system, of making a successful challenge in the absence of admissions on the part of the jury commissioners that systematic exclusion has been practiced. The same situation would exist if the jury commissioners were merely ignorant of the existence of systematic exclusion being practiced by the key-men.

37. *Operation of the Jury System in the Federal District Courts*; *Charts and Summaries*, Institute of Judicial Administration (1948); Southern district of Alabama; western district of Arkansas; Connecticut; eastern district of Illinois; Maine; western district of Michigan; Mississippi; North Dakota; eastern district of Oklahoma; northern district of Texas; northern district of West Virginia.

38. Southern district of Alabama; western district of Wisconsin; Vermont.

39. For excellent statistical summaries concerning all phases of the operation of the



Since a jury of only twelve persons cannot personally represent every cognizable group in our society, regardless of how they are selected, a sensible definition of "representative jury" would be one picked from the community as a whole without the existence of systematic exclusion of any group. An increase in the uncontrollable personal discretion of jury selectors creates a corresponding increase in the suspicion of discrimination.<sup>40</sup> It is therefore suggested that jury selection be limited to chance selection methods which are capable of being proved.<sup>41</sup>

The third alternative would have been based on constitutional grounds. The right to a representative jury in the federal court system should be specifically declared to be a constitutional right under the due process clause of the fifth amendment.<sup>42</sup> If that right is rendered nugatory because there is no way to assert it, then the bar to assertion should be removed. The key-man system, because it effectively frustrates the assertion of that right, should have been declared invalid and the case reversed and remanded.

WILLIAM E. SNEAD  
JAMES E. WOMACK

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jury system in the federal district courts, see *Operation of the Jury System in the Federal District Courts; Charts and Summaries*, Institute of Judicial Administration (1948).

40. "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." *Glasser v. United States*, 315 U.S. 60, 86 (1942). *Contra*, *Knox, Jury Selection*, 22 N.Y.U.L.Q. Rev. 433 (1947); *Otis, Selecting Federal Court Jurors*, 29 A.B.A.J. 19 (1943). See also, *Fay v. New York*, 332 U.S. 261 (1947).

41. By this is meant that the method used should be susceptible of proof through objective standards. For example, the commissioners could, in the selection of an array, take every 5th name from the available major directories in the district. Questionnaires would then be sent to the ones whose names were picked. The commissioners would then select from those who returned the questionnaires those who were qualified by statute. This list would then constitute the array, from which the panel is picked by chance.

While such a procedure would not guarantee that the most intelligent members of our society would sit on federal juries, it can hardly be argued that the key-man system accomplishes this somewhat questionable objective. The suggested system would be more likely to insure that a representative jury sat in the federal courts. If this jury did not contain some of the more intelligent members of society the words of John Proffatt would be appropriate:

Therefore, however we may notice the shortcomings and delinquencies of juries, which unfortunately are too often apparent, we should not so much condemn their action as lament the unhealthy and depraved character of a community from which they are taken, and which, on the whole, they fairly represent. Whenever we find an accusation against the one, we should seek to improve the other, and whenever we conclude the one a failure, we abandon our faith in the other. Proffatt, *Trial By Jury*, 62 (1877).

42. See note 9 *supra*.