MANDATORY INCLUSION OF RACIAL MINORITIES ON JURY PANELS

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THE ARGUMENT has been made in recent trials of criminal defendants who are members of minority races that racial discrimination in jury selection results in discrimination against a minority defendant,[1] thereby denying the defendant a hearing by an impartial tribunal.[2] The objection of the minority defendant is that generally the jury is not composed of the minority defendant's "peers," but rather it is composed of middle class whites who entertain prejudicial attitudes toward minority defendants, and who would therefore be predisposed to find the minority defendant guilty. It is felt that ignorance of the mores, language and life style in the minority communities, renders the "all white" jury incompetent to fully understand the elements of the case.[4] It is not suggested that a jury of the minority defendant's peers means an exclusively minority jury, but rather one consisting of people with some involvement in the minority community, who would thereby be able to sympathize with a minority defendant, *i.e.*, a juror who is himself a member of a minority race.

The United States Supreme Court, federal court, and state court cases prohibiting exclusion of a racial group from jury panels do not rest upon an "explicit" finding that the majority Caucasian population is racially prejudiced against Blacks, Chicanos or American Indians.[5] The absence of a finding of racial prejudice in the majority community has allowed the courts to conclude that because the minority defendant is not prejudiced by the absence of minority representation on his jury, he does not have a constitutional right to a jury composed partly of minority members. A recognition of the probable existence of prejudice in the "all white" jury would require that the state provide mandatory minority representation on the jury of a minority defendant.[6] Therefore, this article will attempt to demonstrate the existence of racism in the "all white" jury as a basis for requiring minority representation on the jury of a minority defendant. Then, the general methods of jury selection will be described in order to demonstrate their discriminatory effect on the selection of minority jurors. Finally, relevant court decisions and legal principles concerning racial discrimination in jury selection will be discussed as a basis for requiring minority representation on the jury of a minority defendant.[7]

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1. "Minority Defendant" and "Minority Juror" as used in this paper will refer to members of minority races.
2. A. GINGER, MINIMIZING RACISM IN JURY TRIALS: THE VOIR DIRE CONDUCTED BY CHARLES R. GARRY IN PEOPLE OF CALIFORNIA V. HUEY P. NEWTON, hereinafter cited as MINIMIZING RACISM IN JURY TRIALS (1969). Note that the all Black jury is one item of the Black power programme as discussed in S. Carmichael and C. Hamilton, Black Power: The Politics of Liberation in America (1967; H. Cruse, The Crisis of the Negro Intellectual and Rebellion or Revolution? (1967); B. Seale, Seize the Time (1970).
3. President's National Advisory Commission on Civil Disorder (1968).
4. Boyle, *Notes on Jury Selection in the Huey Newton Trial*, THE PROGRESSIVE, Oct., 1968 at 29, 34. *See also* Broeder, *The Negro in Court*, 1965 DUKE L. J. 19, 30 [hereinafter cited as Broeder] where he notes that where there was a Black juror, the white members of the jury panel often used him as an expert on Black ghetto culture.
5. *See e.g.* People v. Jones, 27 Cal. App. 3d 98 (1972).
6. U.S. CONST. amend. VI.
7. This argument is addressed to minority defendants only, although it has been argued that all defendants could assert such a right under a jus tertii theory. *See* Kuhn, *Jury Discrimination: The Next Phase*, 41 So. CAL. L.

1. PSYCHOLOGICAL DATA DEMONSTRATING PREJUDICE IN THE "ALL WHITE" JURY.

The law assumes that individual jurors will reach similar conclusions in similar situations, regardless of who the parties are. However, where one population group is prejudiced against another population group, the fact-finding process is hampered.[8] The President's National Advisory Commission on Civil Disorder[9] has termed America a "racist society," stating that two-thirds of the Caucasian population harbor prejudicial attitudes toward Blacks. Due to these prejudicial attitudes, a minority defendant may be denied a trial by a fair and impartial jury as required by the Sixth Amendment and applied to the states by the Fourteenth Amendment. While not *all* non-minority jurors are prejudiced against minority defendants, the courts and legislatures should operate on the assumption that prejudice, rather than impartiality, exists in the "all white" jury in the light of the high probability of prejudice reported by studies on the subject.

There is evidence that the community-learned characteristics of jurors[10] affect both the individual's decision and the process through which the jury comes to its collective verdict. The University of Chicago Jury Project found that in criminal cases, jurors with German or British cultural backgrounds were more likely to favor the government, while Blacks, Slavs, and Italians were more likely to acquit.[11] It has been suggested that Black jurors tend to favor the underdog.[12]

A study of verdicts in cases where insanity pleas were entered, showed that persons of British and Scandinavian origin were more likely to vote not guilty by reason of insanity than all other ethnic groups, except Blacks.[13] Another survey on attitudes of jurors concerning capital punishment, indicated that racial minorities were inclined to be opposed to the death penalty.[14] Significantly, opposition to capital punishment creates a disposition to vote for acquittal on the question of guilt.[15]

There is also a tendency for persons with a high school education to be more influential in jury deliberations than either grade school or college educated, and for businessmen and skilled laborers to be more influential than members of other occupations, particularly unskilled laborers or housewives.[16] Finally, the phenomenon of "jury legislation," the jury's rational modification of the law to make it conform to community views of what the law ought to be, has been noted to be a factor in the 50% of the disagreements between judge and jury.[17] Therefore, a jury without minority members will be more predisposed to convict a criminal defendant because of the role played by the community-learned characteristics of jury members in the determination of the verdict.

REV. 235 (1968) [hereinafter cited as Kuhn]. The United States Supreme Court has declined to pass upon the jus tertii argument. The Georgia Court of Appeals in *Allen v. State*, 137 S.E. 2d. 711 (1964) held that a white civil rights worker could appeal the exclusion of Blacks from his jury because he would be prejudiced thereby. The court went further saying:

> We are of the opinion that any system that results in the consistent selection of jurors from a group or portion only of those available for service in that office rather than from those available without discrimination, does not accord to any defendant the type of jury of which the law entitles him.

Id. at 715.

8. Labat v. Bennet, 365 F. 2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).
9. Note 3 *supra*.
10. *See* text accompanying notes 11-21 *infra*.
11. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 748 (1969).
12. Broeder, *supra* note 4 at 29.
13. SIMON, THE JURY AND DEFENSE OF INSANITY 111 (1967).
14. H. Zeisel, Some Data on Jury Attitudes Toward Capital Punishment, (Center for Study of Criminal Justice, University of Chicago, 1968).
15. *Id.*
16. Stodtbeck, *Social Status in Jury Deliberation*, 22 AM. SOCIOLOGICAL REV. 713, 719 (1957); R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 116 (1967).
17. H. KALVEN & H. ZEISEL, THE AMERICAN JURY III (1966). Note that the research on social characteristics of jurors has consisted almost entirely of small group studies of the influence of a juror's social status on the deliberations. The importance of these types of studies is diminished by the finding that in over ninety percent of all cases, the individual juror's decision is made prior to entering the jury room for deliberation. *Id.* at 488.

COMPARATIVE STUDIES of jury verdicts, relating specifically to Black defendants, demonstrate that "all white" juries produce racially oppressive results.[18] The Black defendant consistently runs a greater risk of conviction, of conviction of a higher degree of crime and of more severe punishment where the victim is white than do white defendants accused of serious crimes against Blacks. The jury is more likely to disbelieve a Black's witnesses, especially if the witnesses are themselves Black.[19] Of critical importance is the fact that the Black defendant is more susceptible than the white defendant to plea bargaining and other compromises by which he may waive his right to a jury trial. This waiver is significant because some studies have suggested that a defendant is twice as likely to be convicted by a judge as by a jury.[20] Finally, the "all white" jury, no matter how educated, cannot effectively screen out racism.[21]

The above data demonstrates that not only is the minority defendant more likely to be convicted than the non-minority defendant in general, but also that a jury from which minorities have been excluded is more predisposed to convict. Therefore, the minority defendant is placed at a grave disadvantage when he comes before an "all white" jury.

II. METHODS OF SELECTION OF JURIES

The method of selecting juries in the state courts is a matter of local law, limited only by a general federal statutory framework,[22] and therefore, the method of selection varies even within a given state. The general procedure is as follows: a list of prospective jurors is chosen from the "population"; this list is then reduced by eliminating those who are exempt, excused or who lack certain minimum skills; jury panels are then selected at random from the list; finally, after voir dire examination, attorneys dismiss jurors for cause or through the exercise of the peremptory challenge. Thus, there are three points in time at which discrimination against a minority prospective juror can occur: in drawing the initial "population" list, in the screening of the initial list, and in the exercise of the challenges after voir dire examination.[23] It is the thesis of this article that discrimination against minority jurors *does* occur at each of these points. A short discussion of the operation of each stage of the jury selection process will demonstrate the extent of this discrimination.

A. The Population List.

Discrimination against racial minorities occurs in the placing of names on the initial jury "population" lists. This discrimination exists in most cases because of the system employed in obtaining the sample for the jury lists: the public list method and the key man method.

Under the key man system, the jury commissioner selects "key men" from the community who in turn recommend other members of the community for jury service. An individual's acquaintances will usually be of similar socio-economic status and background, and therefore the "key men" generally recommended men with backgrounds similar to their own.

18. Broeder, *supra* note 4.
19. Kuhn, *supra* note 7 at 241. J. GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959) has noted that from 1930 to 1957, 361 Blacks and 38 whites were executed for rape of white victims in the South, demonstrating that a Black person accused of a serious crime against a white victim is statistically the most likely to suffer the death penalty.
20. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 26-27 (1966).
21. *Id.* Blacks in armed forces courts-martial tend to draw longer sentences than whites convicted of the same offense, Rockefeller, *Are Army Courts-Martial Fair?* 4 FED. B. NEWS 118, 119 (1957).
22. *See Note, The Jury: A Reflection of the Prejudice of the Community,* 20 HASTINGS L. J. 1417, 1421 (1969), for a more in-depth analysis of the discriminatory effect of modern methods of selection of juries.
23. Jury Selection and Service Act of 1968, 82 STAT. 53 (1968), amending 28 U. S. C. § § 1861-69 (1964).

This selection procedure produced a distorted reflection of the community because the jury pool was composed of individuals with backgrounds like the jury commissioner – white and middle class.[24] This method was generally upheld by the courts,[25] until the 5th Circuit condemned it in a case where the jury commissioner made no effort to find qualified people in the Black community.[26] The key man system remains the most widely used method of jury population selection,[27] and has generally been upheld by the courts.[28]

The public list method involves the seemingly innocent practice of compilation of population lists from the telephone directory, public utilities lists, or voter registration lists, which is in reality discriminatory against racial minorities. There is an obvious economic discrimination against the poor, and thus against racial minorities who form a large percentage of the nation's poor, in the use of telephone directories and public utilities lists. Therefore, these lists are not used as the exclusive source from which the jury pool will be drawn. The discrimination in the case of utilization of lists provided by the Registrar of Voters is less obvious, and has therefore survived challenge in the courts. Courts have refused to strike down this system of selection, noting the absence of proof of discriminatory intent in the use of such a neutral device as voter registration lists.[29] This method of jury selection, is in fact highly discriminatory against racial minorities.

BLACKS AND OTHER low income groups are less likely to register to vote.[30] Furthermore, non-voters are not randomly distributed throughout the adult population. Seymour Lipset has found the following groups tend to vote at a higher proportionate rate: men (as opposed to women); those with a higher level of formal education; persons with higher incomes; those aged 35-55 years; married persons; and members of organizations. Businessmen, white collar workers, and government workers vote at a higher proportionate rate than do unskilled workers, service workers, and servants.[31]

In each case, minority groups are heavily represented as the group least likely to vote. Blacks have a lower overall level of formal education, lower occupational level and lower income than the white community.

Finally, income makes more of a difference in voting turnout for Blacks than it does for whites.[32]

Failure to vote in a general election results in removal of the voter's name from the registration lists, and the lower occasional voting habit of the minority

24. Kuhn, *supra* note 7 at 262.
25. *See e.g.* Swain v. Alabama, 380 U.S. 202, 207-8 (1965).
26. *See e.g.*, Cassell v. Texas 339 U.S. 282, 287-8 (1950).
27. Lindquist, *An Analysis of Juror Selection Procedure in the United States District Court*, 41 TEMP. L. Q. 32, 33 (1967).
28. *See e.g.* Swain v. Alabama 380 U.S. 202 (1965); Billingsley v. Clayton. 359 F. 2d 13 (5th Cir. 1966) *cert. denied* 385 U.S. 841 (1966).
29. The use of voter registration lists as the source for the jury pool has been upheld by courts in Boston, New York, and California because those not registered to vote were not shown to constitute a racial, economic, political or other identifiable minority.
30. U.S. v. Bowe, 360 F 2d 1, 7 (2d Cir, 1966); Gorin v. U.S. 313 F 2d 641 (1st Cir, 1963); U.S. v. Greenberg, 200 F supp 382 (SDNY, 1961); Hill v. Texas, 316 U.S. 400, 414 (1941) Rabinowitz v. U.S. 366 F 2d. 34, 57 (5th Cir, 1966). Note the case of *People v. Craig*, Superior Court of Alameda County, April 18, 1968, where Judge Avakian held that the use of a key number system was discriminatory, however the court stated that the use of lists of registered voters as the selection method for jurors was proper because the percentage of adults otherwise qualified for jury service who failed to register in Alameda County: is probably small . . . since intensive voter registration drives take place before each state and national election, and no group is discouraged from registering or voting.
31. LIPSET, POLITICAL MAN 187-189 (1963). *See also* V.O. KEY, POLITICS, PARTIES AND PRESSURE GROUPS 633-644 (1958).

See Walter Burnham, *The Changing Shape of the American Political Universe*. 59 AM. POL. SCI. REV., No. 1 (March 1965) p. 22. Burnham notes that there has been a substantial increase in nonvoting and in occasional voting in this country in the last three quarters of a century.

	Core Voters	Peripheral Voters	Non Voters
Late 19th Century	66%	10%	20%
Present Day	44%	16%	40%

These statistics show, as Burnham states, a "political apathy on a scale quite unknown anywhere else in the Western world."

32. *See* Edward Litchfield, *A Case Study of Negro Political Behavior in Detroit*, PUB. OPINION Q. n. 2 p. 269 (June 1941).

groups depresses their representation even further by making those who vote occasionally only partially liable for jury service. A study of voting habits in Detroit found that the average Black registered voter turnout was 54.3% while the average Caucasian turnout was 75.1%.[33] This meant that almost one-half of the low proportion of Blacks who were registered were removed from the jury list, cutting their representation for jury draw drastically. This study was confirmed by a study of Black voting trends in northern industrial cities showing that, in 1948, 1952, and 1956 presidential elections the average rate of registered Black voter turnout was only 73.6%, far behind the white rate 83.4%.[35] Again, the fact that far fewer Blacks register to vote is relevant since the names remaining subject to the voter list would be 73.6% of the initially small number registered.[36]

The discriminatory effect of using voter registration lists has not been recognized by the courts since the use of the lists appears so fair – "every American can and should register to vote."[37] Most courts refuse to note that even random selection from broad lists such as voter registration lists, public utility customer lists, city directories and tax lists requires a test to determine whether each, all or some of these sources give a true and complete picture of the community and its components.[38]

B. Screening the Jury

The next step in the selection process involves screening of the jury panel by the elimination of the unqualified, and the exempt or excused persons.

1. THE EXCUSED.

All states excused individuals from jury service on the basis of economic or physical hardship.[39] Because of the payment of only $5.00 per day to each juror, members of lower income groups are placed at a severe financial disadvantage. The Jury Commissioner recognizes this financial hardship and will excuse or exempt these individuals.[40] Because of the large percentage of minority races at the lower end of the income spectrum, this payment itself acts in a discriminatory manner to exclude minorities from participation upon the jury. While the $5.00 per day payment was initially a realistic computation,[41] today this figure systematically excludes low income persons from jury service. Defendants have successfully challenged the flagrant practice of excluding *all* daily wage earners.[42] The courts have generally exercised little control over standards used to determine hardship and have accepted unquestioningly the resulting economic, and therefore generally racial, discrimination.[43]

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33. *Id.*
34. Chicago, Cincinnati, Cleveland, Detroit, Kansas City, Pittsburg, and St. Louis.
35. *See also* Glantz, *The Negro Vote in Northern Industrial Cities,* 13 W. POL. Q. 999, 1008 (1960); *See generally,* A. CAMPBELL, THE VOTER DECIDES (1954).
36. *Id.* at 1009.
37. *See e.g.* People v. Craig, No. 41750 (Superior Ct. Alameda City, Calif. April 18, 1968).
38. Race consciousness examination along the lines of the *Long Warrior vs. Peacock* (Civil No. 70-8c, WESC, filed Aug. 5, 1970) decision are suggested:

    The court having found that the voter registration list represents a fair cross-section of the community . . . shall be used. The jury selectors may reasonably supplement said voter registration list with names of residents of the jury district known then to be persons qualified for jury service.

39. *See e.g.* CAL. CODE OF CIV. PROC. § 201.
40. *See* the proposed jury reform legislation by Assemblyman Charles Warren, Democrat, Los Angeles, which required jurors to be drawn from a comprehensive list, rather than from voter registration lists and would increase the compensation of jurors to $25 daily rather than the present $6 to $12 per day.
41. Labat v. Bennet, 365 F.2d 698 at 724 (5th Cir 1966), *cert. denied* 386 U.S. 991 (1967). Stated:

    A benign and theoretically neutral principle loses its aura of sanctity when it fails to function neutrally . . . The disqualification of all daily wage earners, as it was obviously bound to do, disqualified far more Negroes than Whites, and, in the final analysis, operated to exclude all but a token number of Negores from the venires.

42. See *e.g.* Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Labat v. Bennet, 365 F.2d 698 (5th Cir. 1966) *cert. denied* 386 U.S. 991 (1967).
43. *See e.g.* U.S. v. Leonetti, 291 F. Supp. 461 (S.D.N.Y. 1968).

2. THE UNQUALIFIED.

Qualifications for jury service are both objective (for example, being at least 21 years of age or being a citizen of the United States) and subjective (for example, possessing ordinary intelligence.) Either type of qualification can be unduly discriminatory because significant segments of the population may be excluded, although individuals within that segment may be competent. For example in *Reza v. Los Angeles Superior Court,*[44] the defendant is currently seeking *certiorari* from the California Supreme Court claiming that alien defendants are denied equal protection of the law when their peers are excluded from judging their actions, because all aliens are excluded from serving as jurors by California Code of Civil Procedure Section 198 (1) that requires a juror to be a citizen of the United States. *Reza* argues that the only qualifications needed for jurors is that they possess their "natural intelligence and a sufficient knowledge of the English language .... There is no connection between competence and citizenship." The Mexican-American defendant here felt that aliens would have a better understanding of the pressures and problems of the ghetto situation.

THE SUPREME COURT upheld the use of subjective qualifications in *Fay v. New York*[45] which challenged the use of blue ribbon juries where the objective standard was "being intelligent, well-informed and literate in English." However, the use of objective tests to measure ordinary intelligence has recently come under attack. First, in *People v. Craig*[46] the trial court ordered dismissal of a jury panel in Alameda County because a vocabulary test measured middle-class mores and vocabulary rather than intelligence. The failure rate on the test was 14.5 percent in a white suburban community and 81.5 percent in a predominantly Black lower class community.[47] The court refused to believe that "81.5 percent of the registered voters in a section of Oakland are below the level of ordinary intelligence."[48] Then, the 9th U.S. Circuit Court of Appeals, passing on the same vocabulary test in *Carmical v. Craven*[49] held that since the test excluded many Blacks and poor people there was sufficient reason to grant another trial. The court stated that the object of the constitutional mandate is to produce master jury panels from which identifiable community classes have not been excluded.

The holding in *Carmical* appears to be confined to the proposition that if an intelligence test is used, it must in fact measure intelligence relevant to the selection of competent jurors thereby providing those of equal intelligence an equal opportunity to serve as jurors — regardless of race.

C. Prosecutorial Use of the Peremptory Challenge[50]

The prosecutor routinely utilizes the peremptory challenge to exclude minorities from the jury venire.[51] The courts

44. *Id.*
45. 332 U.S. 261 (1947).
46. No. 41750, Alameda City, Calif. April 18, 1968.
47. *Id.* at 5.
48. *Id.* at 7.
49. 451 F.2d 399 (9th Cir. 1971).
50. The peremptory challenge is a challenge which the prosecution and the defendant are allowed to exercise to remove a certain number of jury veniremen from the jury box without assigning a cause.
51. *See* Geary, Note 2, where a study found that the prosecution routinely excused minorities and Berkeley residents known to be more liberal on the peremptory challenge in the Huey Newton case. *See also* "Juries and Race: Lawyers Attack Courts Where Blacks Don't Get Tried by the Peers," Wall Street Journal, December 6, 1968 at 17.

GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959), at 328 cites a study by Professor Weinstein conducted in 1957. A questionnaire was sent to legal aid societies throughout the United States making inquiry about actual practices in the racial question of jury selection. The author reports:

> Some of the letters observe that few Negroes serve and offer as partial explanation the fact that the peremptory challenge is used . . . to some extent these practices reflect the belief that Negroes will react differently to evidence than will whites. On one hand it is thought that

have resolved the conflict between the right to use the peremptory challenge and a defendant's right to be tried by a fair and impartial jury in favor of the free exercise of the peremptory challenge. Where the courts defer to the use of the peremptory challenge by the prosecutor to exclude racial minorities from the jury array, the advantage supposedly gained by the presence of minorities on the jury is lost.

Although the procedure of peremptory challenge is formally authorized in state[52] and federal[53] practice, providing that no reason for challenge need be given, it is clear that the Constitution will not permit abuse of this procedure through a conscious intent to exclude a racial class.[54] While no cause need be assigned where a peremptory challenge is exercised, it is not a challenge without cause, and there should always be some reason for the action.[55] The courts will not tolerate abuse of the peremptory challenge. However, the courts have deferred to the use of the peremptory challenge to excuse minority members from the jury on the theory that a defendant is not entitled to a particular juror, and, therefore, he may not complain of the absence of some jurors who have been challenged by the prosecutor, since the right to trial by jury includes the right to reject jurors, but not the right to select them.[56] The Supreme Court has reasoned that the prosecutor, trying a minority defendant, removes the minority veniremen to get non-minority veniremen with the objective of removing prejudice and substituting probable impartiality.[57] But the non-minority juror, in general, does not come to the jury box free of prejudice.[58] The courts have ignored this fact and have further failed to perceive that the use of the peremptory challenge to exclude minority individuals from juries destroys the racial balance that made the original "population" selection fair. Once the group of prospective jurors has been picked through a nondiscriminatory method, constitutional restraint should not be lifted.[59]

There is no constitutional requirement for the peremptory challenge;[60] statutes were necessary to give the right to both the prosecutor and the defendant.[61] Some argue that the peremptory challenge was developed as a defense weapon for protection of the accused.[62] The origins of the peremptory challenge are unclear, but it had become firmly established as a defendant's right in felony trials by the fifteenth century.[63] While the state's peremptory challenge is probably older than the defendant's right, the English Crown in 1305 found that the unlimited right of the prosecution had proved itself to be "mischievous to the subject, tending to infinite delays and danger"[64] and it was taken away entirely by the Ordinance for Inquests.[65] This statute required the King to show cause for every challenge. The peremptory was never restored to the prosecution in England; however, by 1682, the courts had construed the Ordinance for Inquests to permit the use of a substitute for the Crown's lawyer to cause an unlimited number of

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a Negro will lean over backwards to convict another Negro in an effort to display impartiality. On the other hand it has been said that a Negro will favor a member of his race . . . .

52. *See e.g.* CAL. PEN. CODE § 1096.
53. *See* FED. R. CRIM. P. Rule 24(b).
54. 18 U.S.C.A. §243 (1948).
55. I.F. BUSCH, LAW AND TACTICS IN JURY TRIALS §139 (1959).
56. The courts further hold that because the defendent also has the right of objection, he should not complain of the absence of some juror if a fair and impartial trial jury remains. Hayes v. Mississippi, 120 U.S. 68 (1887).
57. Swain v. Alabama, 380 U.S. 202 (1965).
58. *See* Section 1 *supra.*
59. Rochin v. California, 342 U.S. 125 at 169 (1952) stated:

    Regard for the requirements of the Due Process Clause inescapably impose upon the Supreme Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even towards those charged with the most heinous offenses.

60. *See e.g.* Stilson v. U.S. 250 U.S. 583, 586 (1919).
61. 33 Edw I, stat 4 (1305).
62. Pointer v. U.S. 151 U.S. 396 (1873); Commonwealth v. Evans, 212 Pa. 369 (1905); Frazier v. U.S. 335 U.S. 497 (1948).
63. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 127-128, 433 (5th ed. 1956).
64. COKE, A COMMENTARY UPON LITTLETON, § 234 at 156 (15th ed. 1794).
65. 33 Edw I, stat 4 (1305).

jurors to be set aside until the panel had been exhausted, at which time, if 12 jurors had not been chosen, they were recalled in their original order, and the Crown was required to show cause for the challenge, or else to permit the juror to be sworn.[66]

IN THE UNITED STATES, the defendant's right to the peremptory challenge was considered a part of the inherited common law, while the prosecution's was not. The Supreme Court observed in *U.S. v. Shackleford:*

> The court is of the opinion that the right of challenge by the prisoner recognized by the act of 1790 does not necessarily draw along with it this qualified right, existing at common law.[67]

The *Shackleford* case held that the federal prosecutor could only cause jurors to stand aside, or challenge them peremptorily, if the state in which the court was sitting granted the right to the local prosecutor. Most states recognized the right to stand aside, but were slow to accord the peremptory challenge to the prosecution, only accomplishing it by statute. Congress did not abrogate the rule of conformity granting the peremptory challenge to the federal prosecutor until 1865.[68] Clearly from this history and from the slow pace at which the peremptory challenge was extended to the prosecutor by statute, the peremptory challenge has been considered and developed primarily as a defense weapon, shielding the defendant against the imposition of juries too ready to convict and too subservient to the state.

However, the Supreme Court in *Swain v. Alabama*[69] refused to accept this conclusion – by equating the peremptory challenge and the right to stand aside saying that, between the prosecutor and the defense, "the scales are to be evenly held."[70] It is not a reasonable inference that the claims of the prosecution and the defense to the right of peremptory challenge have historically been considered to be of equal weight. The dissent in *Swain v. Alabama* noted that:

> The preference granted by the court to the state's use of the peremptory challenge amounts to the perversion of a device to protect defendants into a device for restricting the availability of a constitutional right.[71]

The peremptory challenge permits the elimination of heterogenity in pursuit of the friendliest, most partial jury. Theoretically, each side will cancel the other out. However, minority individuals have inferior numerical representation in the jury panel, with the result that the jury finally chosen after exercise of the peremptory challenge, is usually composed wholly of non-minorities. This inferior numerical strength will be further diluted by the Supreme Court's recent rulings which held that a unanimous verdict is not required to support a criminal conviction, under the due process or equal protection clauses of the Fourteenth Amendment[72] or under the Sixth Amendment.[73] The Supreme Court, per Justice White, rejected the argument that non-unanimous jury verdicts unconstitutionally subverted the rights of minorities to serve on juries, by holding that, although jury panels must reflect a cross section of the community, no juror has the constitutional right to block conviction.[74]

The prosecutor should never be

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66. Lord Grey's Case, 9 How. St. Tr. 127 (K B 1682).
67. U.S. v. Shackleford, 59 U.S. 588 at 590 (1856).
68. The Act of March 3, 1865, ch. 86, § 2, 13 stat 500.
69. 380 U.S. 202 (1965).
70. *Id.* at 216.
71. *Id.* at 242.
72. Johnson v. La., 406 U.S. 365 (1972). White, writing the majority opinion stated:

    [R]equiring unanimity would obviously produce hung juries in some situations where non-unanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the state who prosecute and judge him is equally well served.

73. Apodaca v. Oregon, 406 U.S. 404 (1972).
74. *Id.*

allowed to remove Blacks on the basis of race, whether in pursuance of a policy of maintaining all white juries or in the belief that Black jurors will tend to favor the defendant out of racial sympathy.[75] The defendant should be permitted to challenge the prosecutor's use of the peremptory challenge when used to exclude a prospective minority juror wherever the challenge gives rise to a reasonable inference of discriminatory use of the peremptory challenge.[76] Challenges on strictly racial grounds would have to be distinguished from those for other permissible reasons. Where race was relevant to the case being tried, constant challenges to minority prospective jurors would be subject to review, but not impermissible. However, where a case had no racial implications, challenges constantly exercised against minority prospective jurors would be impermissible.[77] An *in camera* hearing could easily be held in order for the judge to question the prosecutor as to his reasons for excluding the prospective juror.[78]

III. THE CASES AND PRINCIPLES OF LAW GOVERNING THE JURY SELECTION PROCESS

A. Case Law

THE DISCUSSION of jury selection methods has demonstrated that discrimination against minority prospective jurors occurs at each step in the selection process. The legislatures and courts have increasingly recognized that certain procedures operate in a discriminatory fashion and have struck them down. Statutory provisions and case decisions concerning jury selection will now be discussed in an attempt to find a basis for mandatory inclusion of racial minorities on the jury of a minority defendant.

1. THE SYSTEMATIC EXCLUSION PRINCIPLE

The United States Supreme Court has held since 1880 that a Black defendant may not be tried by a jury from which Blacks have been excluded because of their race.[79]

However, the Court qualified itself by holding that a Black defendant was not therefore necessarily entitled to have any Blacks on the jury.[80] As a result, many states have avoided successful challenges to the jury array by simply refraining from any open discrimination against Blacks in the calling of grand or petit juries, while clandestinely omitting the names of Blacks from the jury lists.[81] This situation was tacitly acquiesced in until *Norris v. Alabama.*[82] The Supreme Court in *Norris* determined upon an examination of the jury selection process that Blacks had been excluded because of their race, and held that this procedure violated the Black defendant's rights under the Fourteenth Amendment.

The courts have defined the tests that should be utilized by the courts to determine whether there has been systematic exclusion of a particular group from jury service[83] so as to violate the constitutional right to a trial by an impartial jury, in only very general terms.[84]

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75. The California Supreme Court has recognized the possibility that "A prosecutor would abuse the high responsibilities of his office by employing the peremptory challenges to accomplish an otherwise constitutionally impermissible result . . ." In *People v. Buice*, 230 Cal. App. 2d 324, the court stated "We need not decide the constitutional issue for the reason that the defendant has not presented facts showing that such discriminatory challenges were in fact utilized by the prosecution in the instant case." In the case of *People v. Smith*, Superior Court of Alameda County, No. 42219 (July 1968) the trial court judge, Judge Phillips, declared a mistrial where the district attorney had exercised 26 peremptory challenges, the majority of which were against non-whites, and in fact, excluded all non-whites sitting as part of the prospective jury.
76. Kuhn, *supra* note 7 at 294.
77. Kuhn, *supra* note 7 at 291.
78. *Id.*
79. Strauder v. West Virginia, 100 U.S. 303 (1880).
80. *Id.* at 313
81. 294 U.S. 587 (1935).
82. 315 U.S. 60, 86 (1942).
83. *See e.g.* Avery v. Georgia, 345 U.S. 559 (1953); Hollins v. Oklahoma 295 U.S. 394 (1935); Carter v. Jury Comm'n, 396 U.S. 320 (1970).
84. People v. White, 43 Cal. 2d 740, 278 P. 2d 15 (1954), *cert. denied*, 350 U.S. 875 (1955).

The original jury discrimination cases held that a systematic exclusion of racial minorities from state jury panels was a denial of equal protection of the law.[85] The theory underlying the systematic exclusion rule has been that when a traditionally oppressed group is arbitrarily excluded from serving on juries, the probability of prejudice to a defendant belonging to that group is so great as to make a showing of actual prejudice unnecessary.[86] The systematic exclusion rule based on the equal protection clause, was the major limitation imposed on the state jury selection process by federal law because the due process clause of the Fourteenth Amendment forbade only trial by a jury that was not impartial. However, some states have independently adopted the cross-section standard.[87]

2. THE CROSS-SECTION STANDARD.

In the federal court system, the general rule is that the jury must be drawn from a group which represents a cross-section of the community. The cross-section rule is based on the due process principle, unlike the systematic exclusion rule which is based on the equal protection principle.[88] The due process claim includes the equal protection claim, but goes much farther in that the state comes under an affirmative duty under the due process clause to provide such a jury.[89]

The requirement that the Jury Commissioner make a good faith effort for selection of a representative cross-section of the community[90] is well expressed in *Brooks v. Beto:*

> 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. State of Texas,* 1940, 311 U.S. 128, 130, 61 S. Ct. 164, 85L. Ed. 84).
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> '[T]he proper factioning of the jury system, and indeed, our democracy itself requires that the jury be a body truly representative of the community and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.' (*Glasser v. United States,* 1941, 315 U.S. 60, 86 . . .)[91]

This cross-secton requirement was given congressional sanction by the Jury Selection and Service Act of 1968[92] which states:

> It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes.[93]

THE CONSTITUTION REQUIRES a fair cross-section,[94] and to attain that cross-section, jury selectors must become acquainted with the composition of the community. This requires a conscious recognition of the existence of the various elements in the community.[95] Even random selection from broad lists, such as voter registration records, city directories, tax rolls, public utility customer lists, and the like inescapably requires a

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85. Strauder v. West Virginia, 100 U.S. 303 (1880).
86. *Note, Jury Challenge and Capital Punishment and Labat v. Bennet: A Reconciliation,* 1968 DUKE L. J. 283 (1968).
87. *See e.g.* People v. White, 43 Cal. 2d 740, 754, 278 P. 2d 9, 18 (1954) *cert. denied,* 350 U.S. 875 (1955); St. v. Ferraro, 146 Conn. 59, 147 A. 2d 478 (1958), *cert. denied,* 369 U.S. 880 (1962); Allen v. St., 110 Ga. App. 56, 137 S.E. 2d 711 (1964); St. v. Lowry, 263 N.C. 536, 139 S.E. 2d 870 (1965).
88. *Note, The Jury: A Reflection of the Prejudices of the Community* 20 HAST. L. J. 1417, 1436; Labat v. Bennet, 365 F.2d 688 (5th Cir. 1967).
89. *See e.g.* Gideon v. Wainwright, 372 U.S. 335 (1963); *Comment, The Defense Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection,* 74 YALE L.J. 919, 938-939 (1965).
90. Kuhn, *supra* note 7.
91. Brooks v. Beto, 366 F.2d 1, 11-12 (5th Cir. 1966); Labat v. Bennet, 365 F.2d 698, 720 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967).
92. 82 Stat 53 (1968) amending 28 U.S.C. 1861-89 (1964).
93. Brooks v. Beto, 366 F.2d at 11-12 (5th Cir. 1966).
94. Brooks v. Beto, § 66 F.2d 1 (5th Cir. 1966); Long Warrior v. Peacock (Civil No. 70-8c WDSC, filed Aug. 5, 1970).
95. *Id.*

basic preliminary test: does use of these tests give a true picture of the community and its components? The sample given by the "lists" must be compared against the racial, economic and social groups known to exist. Jury selectors must be conscious of those components.[96]

If a fair cross-section is consistently lacking, then without more, it is established *per se* that the commissioners have failed in their duty.[97]

> To the contrary, the law – the very demands of the Constitution – so developed as to place a specific, tangible, identifiable burden of jury-choosing officials. It is not enough to choose from those they see. They must uncover the source of competent jury prospects from all significantly identifiable elements of the community. Innocent ignorance is no excuse. It neither shields the jury's action – verdict or indictment – from scrutiny, nor does it justify the half-hearted, obviously incomplete performance of duty by the officials. . . .[98]

In most cases the courts have required evidence of an intent to exclude in order to prove that discriminatory modes of jury selection exist.[99] The intentional exclusion of minority groups will be presumed from evidence that minority group percentage of the population is greatly in excess of the percentage of minority group jurors.[100] As the Court pointed out in *Labat v. Bennett,*

> . . . very decided variations in proportions of Negroes and Whites on jury lists from the racial proportion in the population, which variations are not explained and are long continued, furnish sufficient evidence of systematic exclusion of Negores from jury service. *United States ex rel Seals v. Wiman,* 304 F. 2d 53, 67 (5th Cir. 1962).[101]

Juries have been held discriminatorily selected where no Blacks served thereon within human memory,[102] and where only two or three served within thirty years.[103] *Labat v. Bennett,*[104] involved a five-year period in which the Black population of the county was 32 percent but the highest percentage of Black jurors in any year was only 3.7 percent.[105] Sometimes, the failure to include members of the minority group in the jury selection process, *e.g.,* the fact that no Black has been a jury commissioner, is of evidentiary value.[106]

Then, in *Carmical v. Carven*[107] the Ninth Circuit Court of Appeals held that an unconstitutional exclusion of Blacks from jury service had been shown despite the absence of intentional discrimination, where an ostensibly neutral intelligence test which excluded a disproportionate number of Blacks constituted a denial of equal protection and the test had not been reasonably related to the selection of competent jurors. The lack of discriminatory intent on the part of the Jury Commissioners was held to be no defense. *Carmical* has held that if the jury selection procedure unjustifiably discriminates against a minority group, the procedure *may* be declared unconstitutional, even where there was no intent to discriminate. Therefore, the Jury

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96. *Id.*
97. Rabinowitz v. United States, 366 F.2d 34, 56, 57-58 (5th Cir. 1966).
98. 366 F.2d 1, 12 (5th Cir. 1966).
99. Swain v. Alabama, 380 U.S. 202 (1965).
100. Although this presumption of intentional exclusion of minority groups may be rebutted, such rebuttal must consist in specific proofs of non-discriminatory conduct. In *Billingsley v. Clayton,* 359 F. 2d 13 (5th Cir. 1966) a presumption of intentional exclusion developed from statistical evidence was rebutted. There the plaintiffs proved wide statistical disparity in the selection of the venire. But the defendant jury commissioners proved that they selected jury venires through the best possible method, canvassing of neighborhoods. In Black neighborhoods the sight of white officials was so terrifying that Blacks did not answer information or otherwise refused to comply with the commissioners. Questionaires left on the door were never returned. The court held that although better procedures might have been to hire Blacks to canvass Black neighborhoods, the jury commissioners had proven good faith efforts sufficient to rebut an evidence of intentional exclusion of Blacks.
101. Labat v. Bennet, 365 F. 2d 698 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967).
102. 294 U.S. 587 (1935). At the same page the Court cited cases of 1 percent Black veniremen to 13 percent Black population, 2 percent Black veniremen to 31 percent Black population, 7 percent Black veniremen to 38 percent Black population.
103. Patton v. Miss. 332 U.S. 463 (1947). Hernandez v. Texas, 347 U.S. 475 (1954); (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967).
104. 365 F. 2d 698 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967).
105. Norris v. Alabama, 294 U.S. 587 (1935).
106. Patton v. Mississippi, 332 U.S. 463 (1947).
107. 451 F.2d 399 (9th Cir. 1971) pet. for re-hearing filed June 13, 1971.

Commissioner will be forced to examine the jury selection procedures to make sure that a disproportionate number of minorities is not excluded, and where such a prima facie showing of racial exclusion has been made, the state cannot justify the jury selection procedures merely by showing bona fide, nondiscriminatory reasons for the procedure. The court stated:

> When a jury selection system actually results in master jury panels from which identifiable classes are grossly excluded, the subjective intent of those who develop and enforce the system is immaterial.[108]

The *Carmical* decision expressly held that where an intelligence test is used, it must in fact measure intelligence relevant to the selection of competent jurors thereby providing those of equal intelligence an equal opportunity to serve as jurors. There is no language in the opinion that explicitly requires that a particular jury panel reflect the racial proportions in the community. Rather, the decision holds that continuous gross underrepresentation of Blacks on jury panels can only be justified by the state by showing that nonracial factors produced the disparity. However, given the requirement of other cases that the jury should represent a cross section of the community in order to meet constitutional requirements, the question arises whether any selection process can be legal if it consistently fails to attain this constitutional objective.[109]

B. *Affirmative Selection of Racial Minorities*

THE 5TH CIRCUIT REQUIRES as a constitutional standard, that juries represent a fair cross-section of the community. The cross-section requirement compels consideration of race in order to *secure racial balance*. This consideration of race must lead to "a comparison between the population and the system's end product."[110] But this would leave a minority criminal defendant who commits a crime in an area which is 99% white, or the Black defendant whose jury had been fairly and randomly selected, but which has resulted in an "all white" jury, array with a potentially biased jury. If the proposition is correct that an all white jury is *likely* to be prejudiced against a Black defendant, he will *potentially* be denied a trial by a fair and impartial jury. What is necessary is affirmative selection of minorities to serve on the criminal jury of a minority defendant.[111]

The courts have required state and federal officials responsible for jury selection to develop and follow procedures of conduct which do not operate to discriminate in the selection of jurors on racial grounds.[112] This requirement has lead to the decision in the *Brooks* court which recognized that a jury commissioner may take affirmative steps to compensate for the elimination of Blacks that has resulted in the past.[113] Finally, *Labat v. Bennett*[114] added the additional requirement that the jury commissioner take affirmative steps to compensate for the elimination of Blacks which had resulted from wholesale exclusion of blue collar workers.[115] Thus, while the Court has not implicitly required proportional representation,[116] it has encouraged jury officials to be color-

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108. 451 F.2d at 404. Judge Hufstedler's opinion stressed that, the object of the constitutional mandate is to produce master jury panels from which identifiable community classes have not been systematically excluded. The object is neither to reward jury commissioners with good motives nor to punish those with bad intentions.
109. Thiel v. Southern Pac. Co. 328 U.S. 217 (1946); Glasser v. U.S. 315 U.S. 60 (1942); Smith v. Texas, 311 U.S. 128 (1940).
110. Kuhn, *supra* note 7 at 326.
111. *See Comment, The Case for Black Juries*, 79 YALE L.J. 513 (1970).
112. Avery v. Georgia, 345 U.S. 559, 561 (1953) quoting Hill v. Texas, 316 U.S. 400, 404 (1942).
113. 366 F.2d 1 (5th Cir. 1966), *cert. denied* 386 U.S. 975 (1967).
114. 365 F.2d 698 (5th Cir. 1966), *cert. denied* 386 U.S. 991 (1967).
115. The *Labat* court stated at 365 F.2d 698, 724-726: "Here the exclusion of daily wage earners, barring 46% of the Negro work force, coupled with the commissioners' failure to seek additional Negroes for the general venire made it impossible for Negroes to reach the jury box in criminal cases."
116. Justice Douglas seems to be the only member of the Court advocating

conscious in order to develop systems which will result in a representative cross-section of the community being placed on jury rolls.[117] Furthermore, the indirect effect of these decisions may be to force jury officials to guarantee that the selection procedures result in jury panels which approximate the racial population in the surrounding community, in order to minimize the risk of having what is believed to be a proper test later declared invalid on the basis that it failed to accurately measure relevant selection criteria.

In the school segregation question, it is now accepted that public education authorities may be required to take race into account in order to eliminate patterns left over from *de jure* pupil segregation.[118] A similar argument can be made to require jury commissioners, who have consciously excluded minorities from juries in the past, to include a fair proportion on current juries. The inference from the *Labat* case implies that even *de facto* segregation[119] of juries must be compensated for by conscious compensatory selection of additional minority jurors.

Where a legitimate selection criterion results in the disproportionate exclusion of a particular group, the color consciousness principle which is inherent in the cross-section requirement would seem to permit compensatory selection procedures in order to ensure that the cross-section ideal is realized. Rather than lowering of qualifying standards to a point which jeopardizes the quality of the jury, it is simple to include a larger percentage of the class of persons who tend to be excluded at a disproportionately higher rate under whatever test or selection criterion is used.

C. *The Jury de Meditaten Linguae*[120]

Where the cases on systematic exclusion and cross-sectional representation may not be successful in providing a basis for mandatory minority representation on the jury, an analysis of the historical origins and rationalizations of the jury at early English common law may be useful. Originally, the competence and legitimacy of the jury were predicated on its being representative of the community.[121] The representative jury has been connected with the trial by one's peers, *judicium parium,* since Blackstone mistakenly equated the two.[122] The criterion of community wide representation, rather than judgment by peers, has been dominant with respect to the composition of the jury venire in the U.S., because of the democratic ethic which denies class distinctions and asserts that all citizens are peers. However, when a representative jury results in an all white jury for a minority defendant, he may be denied a trial by a fair and impartial jury. If trial by one's peers and trial by a representative jury conflict, the principle to prevail must be the principle which guarantees the defendant a fair and impartial trial jury.

The common law has recognized, since the 10th Century,[123] that trial by a

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proportional representation. See his dissent in CARTER V. JURY COMM'N. 396 U.S. 320, 342 (1970).

117. *See e.g.,* Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied,* 386 U.S. 975 (1967).

118. *See e.g.,* U.S. v. Bd. of Educa., 372 F.2d 836 (5th Cir. 1966); Bd. of Educa. v. Donwell, 375 F.2d 158 (10th Cir. 1967).

119. Exclusion of Negroes from the jury in *Labat v. Bennet* was not brought about by an officially implemented policy of excluding Negroes, but resulted de facto from excusing poor daily wage earners from whom jury service would constitute a genuine financial hardship.

120. The *jury de meditaten linguae* translated means "jury of the half tongue." A more thorough discussion of the *jury de meditaten linguae* follows.

121. Wells, *Origins of Petit Jury,* 27 LAW Q. REV. (1911).

122. *See* FORSYTH, TRIAL BY JURY, p. 109 (1852).

123. As early as the reign of Ethelred in the 10th century, Welshmen who were aliens were granted a *jury de meditaten linguae,* and the right was extended to a Jew as early as the 9th year of Edward I. The *jury de meditaten linguae* is noted in Rymer's Foedera in a deed of Inspeximus, or charter of confirmation, granted by Edward III which recites at length and confirms a charter granted by Edward I in the 31st year of his reign in which Edward I made ample provision for the protection and convenience of foreign merchants soujourning within the realm. Among other benefits the charter declared that in all pleas in which merchants are impleaded, except in capital cases, one half of the inquest shall consist of foreign merchants residing in the city or town, provided a sufficient number of them can be found, and the other one half of good and lawful men of the place. In the Rolls of Parliament for 1308 (2 Ed II) occurs a king's writ ordering an action of ejectment for

representative jury may deny a defendant a trial by a fair and impartial jury.[124] Therefore, special juries were provided at early common law in two cases. Special juries, composed of merchant experts, were provided in disputes between merchants in order to assure that the jury would understand the subject matter of the dispute. A second type of special jury, the *jury de meditaten linguae* was inspired by the desire to ensure fair treatment of aliens before a tribunal which could not be swayed by local prejudice. The *jury de meditaten linguae,* or jury of the half tongue, was composed half of aliens and half of local residents.[125] In England, this jury was first allowed by statute in cases where one of the parties was a foreign merchant[126] and later in both civil and criminal cases where the party demanding it was alien born.[127] The *jury de meditaten linguae* remained an inalienable right of the criminal defendant until 1870.[128] Pitt stated on its abolishment that: "It passes the will of man to see why the *jury de meditaten linguae* should ever have been abolished, and it is impossible not to regard its abolition as a grievous defacement of the paladium of British justice."[129] In the United States the right to such a jury has been recognized in some cases[130] and denied in others.[131] Its existence is not now recognized in the United States and some states specifically abolished it.[132]

In Canada, an alien, although denied a *jury de meditaten linguae,*[133] is entitled to a jury of at least one-half of persons skilled in the language of the defense,[134] since both the French and English languages are officially recognized.

The *jury de meditaten linguae* is commonly referred to as a "mixed" jury: "one composed of partly white men and partly Negroes or consisting partly of citizens and partly of aliens."[135] However, courts have held that, upon an indictment of a man of color for murder, he is not entitled to have a mixed jury.[136] The Supreme Court held that it could not assume that a defendant was tried by a partial jury, in violation of the constitution, merely because Blacks were not selected.[137] In *State v. Sloan,*[138] the court rejected the petitioner's contention that he had a right to jurors of his own color in analogy to the *jury de meditaten linguae* since *jury de meditaten linguae* was not a principle of the common law, and because the color line could not be recognized in the administration of criminal justice. The court held that "the

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lands in Shropshire to be tried by a jury of ½ Englishmen and ½ Welshmen.

124. The principle was not greatly asserted by aliens in the late 19th Century prior to its abolition in 1870, because many aliens did not know of its existence. *See* Solicitor's Journal, *supra* note 67. However, its place in the English trial by jury is seen in 8 Hen 6 ch. 29 which stated that the privilege remained unimpaired and separate from other jury qualification statutes. The courts held that subsequent statutes, no matter how generally expressed fixing the qualifications of jurors, do not apply to the *jury de meditaten linguae* because this statute was executed for the speedy execution of justice, and should be expounded favourably to serve the intent of the makers. *See* Richards v. Com. 11 Leigh (38 Va) 690.

It was noted in arguing the *jury de meditaten linguae* was not a common law right, that the defendant had to request the *jury de meditaten linguae* in the trial. However, Thayer demonstrated that originally an accused in all cases had to ask for a jury and therefore this fact does not make the *jury de meditaten linguae* any less a part of the common law.

125. *Id.;* F.X. BUSCH, LAW AND TACTICS IN JURY TRIALS, (1949). *See* Thayer, *The Jury and Its Development,* 5 HARV. L. REV. 295 at 300 (1892) where he notes that special juries have always existed at common law.

126. 27 Ed 111 c. 8 provided that for the convenience and protection of merchants soujourning in England, the foreign merchants had the right to request a *jury de meditaten linguae* in the civil case. If both parties were foreigners, the whole jury would be composed of foreign merchants; if one party was a foreign merchant, one half the jury would be composed of foreign merchants.

127. 23 Ed 111 c. 13.2 extended the *jury de meditaten linguae* to all criminal cases except capital cases.

128. 33 and 34 Victoria c. 14 s. 5. Note that trial by jury is itself almost dead in England in criminal trials.

129. *Trial by Jury and the Abolition of Jury de Meditaten Linguae by* § *5 of Naturalization Act, 1870,* 68 SOLICITOR'S JOURNAL 949 (1924).

130. Republica v. Mesca (Pa) 1 Dallas 73; Wendling v. Com. 143 Ky 587, 137 SW 205, P v. McLean (NY) 2 Johns 381; Richards v. Comm. 11 (Va) Leigh 690.

131. U.S. v. McMahon, 4 Cranch 573; People v. Chin Mook Sox, 51 Cal. 597; State v. Fuentes, 5 La. Ann. 427; State v. Sloan, 2 S.E. 666, State v. Antonio, 11 N. C. 200.

132. Alabama, Colorado, Illinois, Maryland, Michigan, Mississippi, New York, Pennsylvania.

133. Reg. v. Melendez, 6 Newfound I. 121; Reg. v. Burdell, 5 N.S. 126; Reg. v. Thompson, 1 Pr. Edw. Isl. 226.

134. St. 8 Edw V11, c. 77, par. 2; Veuillette v. Rex, 58 Can S C 414; Montreal Tranways Co. v. Cr. Crowe, 24 Que. K. B. 122, 24 Dom L R 567, 570; Reg. v. Plante, 7 Man. 537; Reg. Levesque 3 Man. 582.

135. BOUVIER'S LAW DICTIONARY, p. 2235; BLACK'S LAW DICTIONARY, p. 994; CJS 2d Juries Section 3.

136. Mitchell v. Commonwealth, 33 Grat. 845.

137. Miera v. Territory, 81 p. 586; *see also* Richards v. Com. 11 Leigh (38 VA) 690.

138. State v. Sloan, 2 S.E. 666 (1887).

law knows no distinction among the people of the state in their civil and political rights and correspondent obligations, and none such should be recognized to those charged with its administration."[139]

The early common law recognized the potential prejudice to the alien tried in an English court, and provided for a jury composed partially of his peers to insure justice. Today, statistical studies of discrimination against a minority defendant by an all white jury have demonstrated that there is potentially discrimination in the "all white" jury against the minority defendant. Yet, the courts have refused to recognize the existence of racism against the minority defendant where there are no minorities represented on the jury. The *jury de meditaten linguae* could be recognized in the United States as part of the common law tradition protecting the defendant's right to an impartial jury, because the minority defendant tried by an "all white" jury will be denied a trial by a fair and impartial jury.[140] The *jury de meditaten linguae* offers a common law argument[141] that the law recognizes that there must be positive state action to include a required number of minorities on the jury of a minority defendant[142] in order to guarantee a criminal defendant a trial by a fair and impartial jury. The considerations of fairness to the defendant remain the same in segmented early English society[143] and segmented modern American society.[144] Some mechanism must be developed to preserve to the minority criminal defendant his right to an impartial jury, and the *jury de meditaten linguae* provides a common law basis for development of such a mechanism.

IV. *CONCLUSION*

The use of lay juries is based upon the presumption that these lay juries reflect the conscience and mores of the community.[145] If it is recognized that the community is composed of many sub-communities and sub-cultures, it becomes clear that in order to properly reflect the conscience of the community, each of these sub-communities must be represented on the jury. Thus, it is now recognized that there is a constitutional right to a jury drawn from a group which fairly represents a cross-section of the community. The Court declared this principle in *Glasser v. United States:*

> The proper functioning of the jury system, and indeed our democracy itself, requires that the jury be a body truly representative of the community and not the origin of any special class or group.[146]

Yet research on jury discrimination indicates an extremely wide divergence between the minority population qualified to serve and the actual presence of minorities on juries.[147] The effect of this imbalance on verdicts raises serious questions as to the maintenance of justice and fairness to this defendant. It has been

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139. *Id.* at 668.

140. The premises of *State v. Sloan,* 2 S.E. 666 (1887) and other cases leading to the determination that the *jury de meditaten linguae* was a discretionary grant from the trial court are not recognized today. The *jury de meditaten linguae* was early recognized as a part of the common law right to the jury trial. Today, it is recognized that color and race can be taken into consideration in remedying *de jure* and *de facto* discrimination in education and therefore the early cases should be re-examined and re-applied to present contexts.

141. The right of trial by jury as a constitutional guarantee is intended to preserve this right as it existed at common law at the time of adoption of the constitution. 2 Story, Const. 5th ed, section 1779; COOLEY, CONSTITUTIONAL LIMITATION, 6th ed. p 389.

The Courts have held that the object of constitutional provisions guaranteeing trial by jury was to preserve the right unimpaired in all cases where it was recognized at common law, Petition of Varney, D.C. Cal, 141 F. Supp 190 (1956).

142. Note that it was not necessary that all or any of the alien jurors would be natives of the same country as the prisoner. It was sufficient if they were foreigners. In the case of a minority defendant, any minority will protect against latent racism in the all white jury.

143. *See* Section I *supra.*

144. *See* Section I *supra.*

145. Kuhn, *supra* note 7, at 255.

146. 315 U.S. 60 (1941).

147. J. GREENBERT, RACE RELATIONS AND AMERICAN LAW 328-29 (1959); Ulmer, *Supreme Court Behavior in Racial Exclusion Cases,* 56 AM POL SCI REV 325 (1962); Mills, *Statistical Study of Occupations of Jurors in a (Maryland) United States District Court* 22 MARYLAND L REV 205-14 (1962); MYRDAL, AN AMERICAN DILEMMA 550-52 (1962). *See also* Broeder, *Voir Dire Examinations: An Empirical Study* 38 SO. CAL. L. REV. 503 (1965); Tucker, *Racial Discrimination in Jury Selection in Virginia,* 52 VA. L. REV. 736, 742-44 (1966).

Note, Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 MISS. L.J. 157 (1967).

shown by studies on jury discrimination against minority defendant, that challenges for cause cannot keep juries free from unconscious prejudice or from prejudice which the veniremen, through embarrassment or otherwise are unwilling to admit publicly on voir dire.[148] Some have recognized that the voir dire and the challenge system can eliminate those who are strongly biased but are ineffectual in achieving a jury free of racial bias.[149] The most effective way to minimize white racism on the jury of a racially relevant case is to form a jury including citizens from the racial minority groups.

There are potential problems with such an action,[150] but clearly the interest in a trial by a fair and impartial jury outweights all other considerations. Judges and the legislatures must compel persons charged with selecting that body of representative citizens, from which juries will be impersonally drawn, to consciously take race into account in order to achieve a proper balance in selection process.[151] The court in *Briggs v. Elliot*[152] said that the Constitution does not require integration, but merely forbids discrimination. The fallacy in this statement is the lack of recognition that failure to integrate in our heterogeneous culture *is* discrimination. A jury selection procedure, which results in a disproportionate selection of persons of one race over another, is discriminatory against one group in favor of the other, because most white jurors are prejudiced against minority defendants.[153] The minority defendant's interest in a trial by an impartial jury must be protected and the requirement of non-discriminatory jury lists, some kind of mandatory inclusion process and the disuse of the peremptory challenge by the prosecutor to exclude minority jurors, will result in an atmosphere by which a minority defendant can achieve a fair and impartial jury trial.[154]

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148. A. GINGER, MINIMIZING RACISM IN JURY TRIALS (1969).
149. *Id.* Geary suggests that at least the attorney of a minority defendant should try to choose the least racist person whom he defines as aware of racism, in contact with minorities, and has made efforts to combat racism. The contradiction between a representative and an impartial jury requires that procedures be implemented to maximize the number of least partial people, which is not likely to represent well the many cross-sections and cleavages in the population.
150. *See Note, The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection* 74 YALE L. REV. 919 (1965) for a discussion of the potential of unfairness when minority group members are chosen. This includes a discussion of self-hate, status, Black backlash, partisanship, etc.
151. It is clear that the court will have difficulty in determining how to require the courts to include minority jurors on the jury. The mere recitation of instructions by the judge to the jury commissioner has little value in itself in eliminating racial discrimination in jury selection because the value of the instructions can rise no higher than the commissioner's interpretation and application of those instructions. The Black defendant can assert such a right and if the court determines that there has been a denial of the right, reverse the conviction. A problem is always present when deterrence is thought to justify reversal of conviction as a proper remedy. The Black juror can challenge his right to be on a jury. Brown v. Ritter, 139 F. Supp. 679 (W.D.Ky. 1956). However, the burden should not be placed on the jury selection procedures. There should be legislative or judicial pronouncement of constitutional standards for a trial of a minority defendant by a jury composed of "some" minorities.
152. 132 F. Supp. 772, 777 (E. D. S. C. 1955).
153. *See* the President's National Advisory Commission on Civil Disorder (1968) generally and Section 1 of this paper.
154. A. GINGER, MINIMIZING RACISM IN JURY TRIALS (1969), stated that in the Huey Newton trial, the defense challenged the very competence of a jury which is conventionally drawn and constituted along prevailing concepts of representative of the community to provide a fair trial in the case of the black militant leader accused of murdering and assaulting white police officers. It was argued that "a jury of one's peers" in that case meant a jury drawn from the ghetto, with *similar life conditions and experiences* to the defendant.