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Grant P. Du Bois Jr.

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## DESIRABILITY OF BLUE RIBBON JURIES

By GRANT P. DU BOIS, JR.\*

*"In murder and other important cases where the district attorney asks and invariably gets a blue ribbon jury, the edge becomes an overwhelming advantage. The blue ribbon is the aristocracy of juries composed of bankers, merchants, executives—in short, rich men of superior intelligence and 'conviction.' The district attorney has a card file index on these blue-bloods, their batting average and credit rating such as 'good,' 'excellent' or 'unreliable.' To give the panel the semblance of democratic representation, a leavening of 'ordinary' jurors is thrown in in order to show a colorable compliance with the law."*<sup>1</sup>

CONTROVERSIAL in nature and historically suspect in its use, as the above quotation indicates, the modern blue ribbon jury represents a remarkable development in procedures of jury selection. Its name, a colloquial term given the special jury, is used most commonly in reference to the special jury provided by New York statute for counties of over 1,000,000 population.<sup>2</sup>

Accordingly, New York has been the major geographical source of litigation which has tested the method of selection by which its blue ribbon jury is created. The consequences of this litigation may best be seen in light of the blue ribbon jury's history, modern application, constitutionality, and the extent of its acceptance by the legal profession.

### *Statutory Sanctions in New York*

Specifically, blue ribbon jurors are those believed by the county clerk to possess additional qualifications for jury service which merit their selection from a general panel to serve on the special panel.<sup>3</sup> It is the administration of this sifting process and the statute authorizing it which have been contended to be in violation of the fourteenth amendment to the United States Constitution.<sup>4</sup>

The statute makes ineligible those prospective blue ribbon jurors who (1) have claimed and been allowed exemption from trial jury service; (2) have been convicted of a criminal offense, fraud, or other misconduct; (3) have opinions so opposed to the death penalty as to preclude finding a defendant guilty if the crime charged be punish-

\* Member, Second Year class.

<sup>1</sup> Brody, *Selecting a Jury—Art or Blind-man's Buff?*, 4 CRIM. L. REV. 67, 68 (1957).

<sup>2</sup> N.Y. Judiciary Law § 749-aal (McKinney Supp. July 1961).

<sup>3</sup> N.Y. Judiciary Law § 749-aa (McKinney Supp. July 1961).

<sup>4</sup> Moore v. New York, 333 U.S. 565 (1948); Fay v. New York, 332 U.S. 261 (1947).

able with death; (4) have been so influenced by an opinion formed from publicity that they doubt their ability to return an impartial verdict based on the evidence; (5) have a prejudice against any law of the state which would preclude finding a defendant guilty of its violation; and (6) claim they cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal so to testify shall not create any presumption against him.<sup>5</sup>

These statutory requirements, coupled with the questionnaire-interview method of selection,<sup>6</sup> create what has been called a blue ribbon panel of individuals from the ". . . upper economic and social stratum . . ." who possess ". . . presumably superior intelligence. . ."<sup>8</sup> However, in 1940, New York included substantially the same provisions in its standards for qualification for the general jury panel.<sup>9</sup> Recently the only distinction made between qualifications required for selection to the special panel, as compared to the general, was that they ". . . are the same . . . other than that the former must entertain belief in capital punishment while the latter need not."<sup>10</sup>

Accordingly, the distinction between New York's general and special jury selection procedures has become a fine one. Yet the blue ribbon jury has been the subject not only of litigation before the United States Supreme Court in which two five-four decisions held it not in violation of the fourteenth amendment,<sup>11</sup> but also of continuous study and recommendation for abolition by the Judicial Council of New York.<sup>12</sup> In regard to its utility in trial procedure, the principle of "blue ribbon" juror selection has been heralded as an important improvement,<sup>13</sup> estimated merely a temporary innovation,<sup>14</sup> and con-

<sup>5</sup> N.Y. Judiciary Law § 749-aa2.

<sup>6</sup> See N.Y. Judiciary Law Rule 17, at 801.

<sup>7</sup> *Fay v. New York*, 332 U.S. 261, 290 (1947).

<sup>8</sup> *People v. Meyer*, 162 N.Y. 357, 362, 56 N.E. 758, 759 (1900).

<sup>9</sup> N.Y. Judiciary Law §§ 595, 596(5), 597. See 6 N.Y. Judicial Council Ann. Report 204-06 (1940), and 8 N.Y. Judicial Council Ann. Report 39-41 (1942).

<sup>10</sup> *People v. Masella*, 16 Misc. 2d 1069, 1070, 183 N.Y.S.2d 568, 569 (Kings County Ct. 1959).

<sup>11</sup> *Fay v. New York*, 332 U.S. 261 (1947); *accord*, *Moore v. New York*, 333 U.S. 565 (1948).

<sup>12</sup> 3 N.Y. Judicial Council Ann. Report 34, 121-28 (1937); 4 N.Y. Judicial Council Ann. Report 46-48 (1938); 5 N.Y. Judicial Council Ann. Report 42-43 (1939); 8 N.Y. Judicial Council Ann. Report 39-41 (1942); 9 N.Y. Judicial Council Ann. Report 47 (1943); 10 N.Y. Judicial Council Ann. Report 41-42 (1944); 11 N.Y. Judicial Council Ann. Report 49-50 (1945); 12 N.Y. Judicial Council Ann. Report 53 (1946); 13 N.Y. Judicial Council Ann. Report 53 (1947); 14 N.Y. Judicial Council Ann. Report 72 (1948); 15 N.Y. Judicial Council Ann. Report 87 (1949); 16 N.Y. Judicial Council Ann. Report 95 (1950); 18 N.Y. Judicial Council Ann. Report 58-59, 157-71 (1952).

<sup>13</sup> MOLEY, *OUR CRIMINAL COURTS* 112 (1930).

<sup>14</sup> Tripp, *Validity of the "Blue Ribbon" Jury*, 46 MICH. L. REV. 262, 264 (1947).

demned as “. . . at war with our basic concepts of a democratic society.”<sup>15</sup>

### *Historical Significance*

Special juries were first considered desirable early in the common law<sup>16</sup> for the purpose of “. . . protection against packed or incompetent juries . . . ,”<sup>17</sup> and “. . . when the causes were of too great nicety for the discussion of ordinary freeholders.”<sup>18</sup> They were then known as “struck” juries for which forty-eight freeholders were selected in the presence of both parties. Each party was then permitted to strike twelve names, and the jury was drawn from the remaining twenty-four.<sup>19</sup> The common law struck jury formed the basis for numerous special jury statutes in the United States, including the blue ribbon variety ultimately created by statute in New York. The latter consists of a jury drawn from the special panel, upon application of either the prosecution or the defense, only when it is shown that the case is so intricate, or has been so widely publicized, that an ordinary jury cannot be obtained without delay and difficulty, and that for any reason, the due, efficient and impartial administration of justice would be advanced by the use of such a jury.<sup>20</sup>

### *Constitutionality*

The United States Supreme Court first held the New York statute<sup>21</sup> constitutional in 1902.<sup>22</sup> New York courts early upheld its constitutionality from two opposite standpoints: that its *use* did not deny due process of law;<sup>23</sup> and that the use of the *general* panel *did not deprive* defendant of special abilities allegedly possessed by those jurors who were removed to the special panel.<sup>24</sup> Finally, despite precedent against the defendants' contentions,<sup>25</sup> the Supreme Court granted certiorari<sup>26</sup> in 1946 to consider the constitutional questions presented in *Fay v. New York*:<sup>27</sup> whether the New York special jury statute and/or its administrative application denied defendants due process of law and

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<sup>15</sup> 8th Annual Message by Gov. Lehman to N.Y. State Leg., N.Y. Times, Jan. 4, 1940, p. 16, col. 4.

<sup>16</sup> *Anonymous*, 1 Salk 405, 91 Eng. Rep. 351, (1696). See generally *Rex v. Edmonds*, 4 B. & A. 471, 106 Eng. Rep. 1009 (1821).

<sup>17</sup> *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 212, 68 N.W. 53, 55 (1896).

<sup>18</sup> *Atlantic & Danville R.R. v. Peake*, 7 Va. 130, 12 S.E. 348 (1890).

<sup>19</sup> 3 \*BLACKSTONE COMM. 357.

<sup>20</sup> N.Y. Judiciary Law § 749-aa.

<sup>21</sup> N.Y. Judiciary Law § 749-aa.

<sup>22</sup> *Hall v. Johnson*, 186 U.S. 480 (1902).

<sup>23</sup> *People v. Dunn*, 157 N.Y. 528, 52 N.E. 572 (1899).

<sup>24</sup> *People v. Meyer*, 162 N.Y. 357, 56 N.E. 758 (1900).

<sup>25</sup> *Hall v. Johnson*, 186 U.S. 480 (1902).

<sup>26</sup> *Fay v. New York*, 329 U.S. 697 (1946).

<sup>27</sup> 296 N.Y. 510, 68 N.E.2d 453, (1947).

equal protection of the law contrary to the provisions of the fourteenth amendment to the United States Constitution.

Convicted of extortion and conspiracy to extort, defendant labor leaders had accepted each individual juror without challenge for cause. Their challenge was made to the special panel, and though timely, was overruled without discussion by New York state courts. Justices Murphy, Rutledge, Black and Douglas dissenting, conviction was affirmed. The majority opinion by Mr. Justice Jackson stressed that (1) the statute's prescribed special jury selection standards were not unconstitutional, because they do ". . . not exclude, or authorize the clerk to exclude, any person or class because of race, creed, color, or occupation. . . .";<sup>28</sup> (2) even if such a class of persons was excluded, it was not shown that defendants were denied a fair trial under the due process and equal protection clauses of the fourteenth amendment. The majority argued that the premises on which defendants based tables of statistics—to prove that ". . . laborers, operatives, craftsmen, foremen, and service employees were systematically, intentionally, and deliberately excluded from the panel . . ."—<sup>29</sup>were fallacious, and the figures insufficient as evidence of discrimination. It was noted that no occupational comparison of the special panel to the *general* panel was shown to prove a *different* occupational composition in the latter.

Perhaps more significant were defendants' statistics offered to show that special juries are more prone to convict.<sup>30</sup> The court similarly observed that defendants' figures (for example, that in 1934, special juries convicted in 82 per cent of cases, ordinary juries in only 37 per cent)<sup>31</sup> were too old, did not show the special jury to have convicted unless conviction was warranted, nor indicate that ". . . special juries have been more often reversed on the facts than ordinary ones."<sup>32</sup>

One year later in *Moore v. New York*,<sup>33</sup> defendants, convicted by a New York special jury of first degree murder, attempted to capitalize on an opportunity suggested in *Fay's* majority reasoning: for newer, more complete comparisons of blue ribbon convictions to those by the general panel. Introduced in evidence was a ten year study (1937-1946) to prove that special juries convicted in 22 per cent more cases than did ordinary juries. This sampling proved to be of too few, incomparable cases for the majority. (All but two of the nineteen special jury cases were capital, whereas the general panel cases were routine.) Also, a system of special and intensive investigation employed in capital cases by Bronx County's most experienced prosecutors was left

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<sup>28</sup> *Fay v. New York*, 332 U.S. 261, 270 (1947).

<sup>29</sup> *Id.* at 272.

<sup>30</sup> See 4 N.Y. Judicial Council Ann. Report 46 (1938).

<sup>31</sup> *Fay v. New York*, 332 U.S. at 278.

<sup>32</sup> *Id.* at 280.

<sup>33</sup> 333 U.S. 565 (1948).

unaccounted for. *Moore* was upheld by the same divided court, five-four.<sup>34</sup>

The dissenting opinion, on the other hand, saw no need for defendants to even allege such statistics in proof of violation of the fourteenth amendment:<sup>35</sup>

The constitutional invalidity of this "blue ribbon" system does not depend upon proof of the systematic and intentional exclusion of any economic, racial or social group. Nor does it rest upon a demonstration that "blue ribbon" juries are more inclined to convict than ordinary juries. Such factors are frequently . . . present in "blue ribbon" situations, though proof is extremely difficult. . . . The vice lies in the very concept of "blue ribbon" panels—the systematic and intentional exclusion of all but the "best" or the most learned or intelligent of the general jurors.

In *Fay*, the dissenting justices considered defendants' statistics adequate proof that the ". . . 'blue ribbon panel' suffers from a constitutional infirmity . . . [which is] the denial of equal protection of the laws. . . . Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof."<sup>36</sup> The dissenting opinion also gave merit to class exclusion cases cited in support of defendants' contention that a blue ribbon jury is not representative of a cross-section of the community.<sup>37</sup> The majority, however, distinguished those cases as dealing with *federal* juries only, over which the Supreme Court has greater supervisory powers than it does over state court proceedings. The majority made clear its purpose to ". . . protect the integrity of the trial process by whatever method the state sees fit to employ, . . ."<sup>38</sup> and noted that, "even in the Negro cases, this Court has never undertaken to say that a want of proportional representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution."<sup>39</sup>

### *The Controversy*

Following the narrow decisions in *Fay* and *Moore*, some writers surmised that the constitutional triumph of blue ribbon juries would be short-lived; that only a matter of time remained for the compilation of more thorough statistics to show conclusively a special panel's occupational exclusion of lower income groups and its greater propensity to convict.<sup>40</sup> Another writer saw the only distinction between the two

<sup>34</sup> *Ibid.*

<sup>35</sup> *Id.* at 569-70 (dissent).

<sup>36</sup> *Fay v. New York*, 332 U.S. at 300 (dissent).

<sup>37</sup> *Ballard v. United States*, 329 U.S. 187 (1946); *Thiel v. Southern Pac.*, 328 U.S. 217 (1946); *Glasser v. United States*, 315 U.S. 60 (1942).

<sup>38</sup> *Fay v. New York*, 332 U.S. at 294.

<sup>39</sup> *Id.* at 291.

<sup>40</sup> Note, 17 *CINC. L. REV.* 397, 399 (1948); Note, 46 *MICH. L. REV.* 262, 264 (1947).

opinions as turning upon ". . . whether the next justice who ascends the bench will join the present minority and thereby bring the state jury standards in line with the federal jury standards."<sup>41</sup> Such predictions, however, have not been realized. In 1952, the Judicial Council of New York again vigorously recommended abolition of the special jury, and advanced its most thorough study on the subject, covering the years 1941-1950.<sup>42</sup> The report included tables to show "greater imbalance" in the special jury as a cross-section of the community than in the general panel; the former was evidenced to be comprised of more business people than working people, and of those from a higher educational level. It was admitted in the report that "the small number of other (non-capital) cases tried before special juries as compared with the number of similar cases tried before general juries makes any comparison (of conviction ratios) of dubious validity."<sup>43</sup> The Council questioned the validity of the argument that "murder trials in counties of more than one million population are more intricate or difficult of comprehension than in counties of less than one million."<sup>44</sup> Despite the newer evidence, New York to date has not acted to abolish its special jury statute.

Nor have state jury standards "been brought in line" with federal jury standards. Federal juries are still subject to judicial supervisory powers which are not applicable to state jury procedure,<sup>45</sup> and proof of economic discrimination *prejudicial* to defendant must be still shown in support of an alleged violation of the fourteenth amendment.<sup>46</sup> In a significant federal case, *United States v. Dennis*,<sup>47</sup> Judge Learned Hand, holding there was no deliberate purpose to discriminate in favor of wealthier persons on the indictment and trial panels, perhaps pointed out the futility of the *Fay* minority view. He noted that a cross-section of the community is ". . . a random selection not weighted by any superiority of 'intelligence' or information."<sup>48</sup> In regard to the phrase "cross-section," Hand said:<sup>49</sup>

It means a fair sample . . . but nobody contends that the list must be a sample of the whole community. Minors and the aged are excluded, as are the infirm and those of unsound mind, and practically so are all the exempt. . . . It is therefore idle to talk of the justness of a sample, until one knows what is the composition of the group which it is to represent.

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<sup>41</sup> Note, 26 TEXAS L. REV. 533, 536 (1948).

<sup>42</sup> 18 N.Y. Judicial Council Ann. Report 157 (1952).

<sup>43</sup> *Id.* at 162.

<sup>44</sup> *Id.* at 159.

<sup>45</sup> *United States v. Sturdivant*, 289 F.2d 846 (3rd Cir. 1961).

<sup>46</sup> *The Jury System in the Federal Courts*, 26 F.R.D. 409, 430 (1960).

<sup>47</sup> 183 F.2d 201 (2d Cir. 1950).

<sup>48</sup> *Id.* at 222.

<sup>49</sup> *Id.* at 224.

The blue ribbon jury, then, has survived all contentions that it is in violation of the due process and equal protection clauses of the fourteenth amendment. Perhaps herein lies its greatest strength and most significant impact on American trial procedure—that the *discretionary principle* on which blue ribbon jury selection is based leaves little or no room for proof of discrimination, as indeed was made clear by the dissent in *Fay*: “. . . we are dealing here with a very subtle and sophisticated form of discrimination which does not lend itself to easy or precise proof.”<sup>50</sup>

In what respects, then, are its principles intangibly discriminatory? The New York Judicial Council has advanced the arguments that “a special juror inevitably feels superior and such a special jury system becomes distinctly un-American and not consonant with a trial by one’s peers”;<sup>51</sup> and that its use is restricted almost exclusively to first degree murder trials upon request of the district attorney *only*. Perhaps most important, the Council claims the discretionary nature of the special jury’s administration—*i.e.*, that individual selection to the blue ribbon panel may depend on an interviewer’s “opinion” of what makes a “better” juror—is especially discriminatory in light of the fact that the standards for selection of special and general jurors in New York have since 1940 been substantially the same.<sup>52</sup> The Council has also argued that though murder trials may be more intricate and important than others, there is no longer “. . . any factual basis for the assumption that they . . . require more understanding or ability on the part of jurors than many other types of cases.”<sup>53</sup> New York judges have often credited general jurors with competence equal to that of special jurors.<sup>54</sup>

On the other hand, it is still contended with equal vigor that these are “subtle” but not discriminatory characteristics of the blue ribbon jury. Some writers have seen the blue ribbon “free selection” principle as so desirable as to justify a jury comprised of all college graduates,<sup>55</sup> or “. . . the more rational of us . . . ,”<sup>56</sup> selected perhaps through the utilization of psychological tests for intelligence and personality qualifications.<sup>57</sup> The more recent appeals for the use of blue ribbon juries, however, are those stressing their desirability in first degree murder<sup>58</sup>

<sup>50</sup> *Fay v. New York*, 332 U.S. at 300 (dissent).

<sup>51</sup> 5 N.Y. Judicial Council Ann. Report 42 (1939).

<sup>52</sup> 18 N.Y. Judicial Council Ann. Report 157, 160 (1952).

<sup>53</sup> *Id.* at 159.

<sup>54</sup> *Schuster v. City of New York*, 25 Misc. 2d 670, 682, 205 N.Y.S.2d 190, 203 (Kings County Ct. 1960); *People v. Van Arsdale*, 175 Misc. 980, 982, 26 N.Y.S.2d 11, 13 (Queens County Ct. 1941).

<sup>55</sup> Note, 25 Wis. L. Rev. 690 (1950).

<sup>56</sup> Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 165 (1952).

<sup>57</sup> Note, 65 YALE L.J. 531 (1956).

<sup>58</sup> *People v. Gaston*, 15 Misc. 2d 773, 183 N.Y.S.2d 415 (1959).

and widely publicized trials.<sup>59</sup> One New York judge gave these reasons for use of a blue ribbon jury:<sup>60</sup>

First . . . the preliminary examination by the County Clerk has eliminated all of those prospective jurors who are opposed to the . . . death penalty in any case, and thereby, the trial is started with a group of prospective jurors who are not biased as to the law of our state; second, by reason of such elimination, the selection of the trial jury does not involve the protracted discussion of the death penalty by those who are being examined and by those who are conducting the examination, with the result that an atmosphere is created in the courtroom, and in all probability, a belief in the minds of those who are finally accepted, that the law of our State with reference to the penalty for murder in the first degree is not approved by a considerable number of fine citizens.

New York's use of the blue ribbon jury, then, has been narrowed by the conservative discretion of its courts, but not abolished. Whether or not its future is a limited one remains purely a matter of conjecture. But the flexible qualification standards prescribed for the special jury, which have been the focal point of blue ribbon jury opponents' attacks—that there exist administrative discriminatory aspects insusceptible of proof—may well prove significant for any state intending to liberalize its jury selection procedure.

The blue ribbon jury may also be said to have put the "cross-section" interpretation of impartial jury selection to its proof, so to speak. At least one writer has criticized California's statute for the selection of names for the jury list,<sup>61</sup> in that it only requires ". . . that jurors must be distributed on a geographical basis; . . . not necessarily [prohibiting] the selection of jurymen from particular classes of society."<sup>62</sup> This statute, which has been termed "California's only addition to the 'cross-section' theory,"<sup>63</sup> requires that jurors be selected by population proportion in each county.<sup>64</sup> To be sure, California statutes for jurors' competence<sup>65</sup> are flexible and intended for local variation.<sup>66</sup> In California, "there are few express rules to guide the local authorities, so that the real problem is to satisfy the vague spirit of the law. . . ."<sup>67</sup>

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<sup>59</sup> *Schuster v. City of New York*, 25 Misc. 2d 670, 205 N.Y.S.2d 190 (Kings County Ct. 1960); *but see* Goldfarb, *Public Information and the Cause Celebre*, 36 N.Y.U.L. REV. 810, 823 (1961).

<sup>60</sup> *People v. Van Arsdale*, 175 Misc. 980, 982, 26 N.Y.S.2d 11, 13 (Queens County Ct. 1941).

<sup>61</sup> CAL. CODE CIV. PROC. § 206.

<sup>62</sup> Baker, *In Defense of the Blue Ribbon Jury*, 35 IOWA L. REV. 409, 418 (1950).

<sup>63</sup> Note, 5 STAN. L. REV. 247, 250 (1953).

<sup>64</sup> CAL. CODE CIV. PROC. § 206.

<sup>65</sup> CAL. CODE CIV. PROC. §§ 198, 205.

<sup>66</sup> CAL. CODE CIV. PROC. § 204.

<sup>67</sup> Note, 5 STAN. L. REV. 247, 253 (1953).

### *Comparison to California Jury Selection*

Expressly, the Superior Courts of each California county are authorized to compose lists of prospective jurors from which they ultimately make panel selections.<sup>68</sup> At their discretion they may, in counties over 60,000 population, appoint a Jury Commissioner to assist them.<sup>69</sup> The Commissioner is assigned the duty of diligent inquiry to ". . . inform himself in respect to the qualifications of persons . . . who may be liable . . . to be summoned for jury duty."<sup>70</sup> He is subject to the supervision only of the court which appointed him.<sup>71</sup> Local discretion is thus extended to two areas vital to the selection of a proportionate "cross-section" of the community: (1) prospective jurors' competence, for which "sound judgment" is the sole statutory guide,<sup>72</sup> and (2) prospective jurors' excuses for exclusion from jury service for which they otherwise would be eligible.<sup>73</sup>

That damage to the coveted "cross-section" may result from excuses granted on a large scale from California jury service seems beyond doubt. Varied classes of society from different state locales have been excluded from jury duty because they are readily able to be excused. The most prevalent reason is economic hardship. The effect is to further diminish the representative composition of prospective juror lists. Some of these California groups have been determined as daily wage earners, San Francisco; mountain residents, Calaveras; commission men, Fresno; skilled labor, Monterey; defense workers, San Diego; small business owners, San Luis Obispo; dairymen, Siskiyou; technicians, Ventura; and throughout the state, young mothers.<sup>74</sup> Indeed, the problem generally of excuses granted too liberally has stirred much critical comment:<sup>75</sup>

The judge excuses those who ask to be excused, when they can show cause, say kinship, interest in the case, prejudice, and so forth. If you are called and want to be excused, you must stand up and give the judge a good reason, or you may smile and nod to one of the lawyers and the other lawyer will challenge you.

In *People v. Hess*,<sup>76</sup> the court considered a California Jury Commissioner's use of this delegated discretion for jury selection in a manner strikingly similar to the "sifting" of the general panel used to select a New York special jury. The Commissioner and his assistants reduced, through an elimination process based on personal interviews

<sup>68</sup> CAL. CODE CIV. PROC. § 204.

<sup>69</sup> CAL. CODE CIV. PROC. § 204(a).

<sup>70</sup> CAL. CODE CIV. PROC. § 204(c).

<sup>71</sup> CAL. CODE CIV. PROC. § 204(b).

<sup>72</sup> CAL. CODE CIV. PROC. § 205.

<sup>73</sup> CAL. CODE CIV. PROC. § 201.

<sup>74</sup> Note, 5 STAN. L. REV. 247, 256 (1953).

<sup>75</sup> Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 159 (1952).

<sup>76</sup> 104 Cal. App. 2d 642, 234 P.2d 65 (1951).

and compilation of data sheets, a list of 35,000 names to a jury panel of 3,500 for submission to the court. Appellants objected to the reduction as ". . . incredible and unreasonable. . . ."<sup>77</sup> The court found no showing of an abuse of the Commissioner's discretion, however, and no showing of exemptions or excuses from jury service permitted for any reason not pursuant to California statutes.<sup>78</sup>

The finding in *Hess* that a large deletion of prospective jurors was solely the result of reasonable excuses from service bears no resemblance to the principles of selection employed for creation of a blue ribbon jury in New York. But regardless of the means used, the comparison raises a pertinent question: whether the resultant damage to the "cross-section" ideal is any less prejudicial to a defendant from the use of one method of selection rather than another. In both *Fay* and *Hess* proof of prejudice was considered defendants' cause for a reversal, but was found wanting. In the latter case, the California court commented:<sup>79</sup>

. . . [T]he actions of a jury commissioner in selecting and making up a jury list are presumed to be valid, and in the absence of some showing of abuse of discretion by him his actions will not be disturbed. . . . [He has] full power to decide as to who are qualified to serve and who are entitled to be excused. . . . Errors and irregularities in failing to comply strictly with the statutes . . . when there is no resultant prejudice to the parties involved in litigation, does not invalidate the list.

It is also significant to note that the California Supreme Court did not look upon the majority view in *Fay* with disfavor when it commented on that decision: "The selection of jurors under this (New York) system favored those of superior qualifications for the special panel, but it did not discriminate against any social, political or economic group nor against any religious faith or race."<sup>80</sup>

There has not as yet been litigated a case in California in which a jury was challenged specifically because of alleged deliberate discriminatory selection of individuals possessing higher intelligence than the average required for a California juror. Nor has a California case been presented in which a method of jury selection similar to the "sifting" procedure authorized by New York's special jury statute was used. In light of the flexibility and discretion permitted for jury selection at local levels, however, the possibility that such questions may one day be presented before a California court is not altogether remote.

### Conclusion

It has not been proved that the selection of a blue ribbon jury systematically excludes low economic classes, creates a jury incapable

<sup>77</sup> *Id.* at 669, 234 P.2d at 83.

<sup>78</sup> CAL. CODE CIV. PROC. §§ 198-201.

<sup>79</sup> *People v. Hess*, 104 Cal. App. 2d 642, 669, 234 P.2d 65, 83 (1951).

<sup>80</sup> *People v. White*, 43 Cal. 2d 740, 752, 278 P.2d 9, 17 (1954) (*dictum*).

of establishing the standard of a reasonable man, or results in an unwarranted number of convictions. These facts are no more insusceptible of proof than are the reasons, for example, that a California Jury Commissioner might have for excusing one juror from service and not another. Accordingly, there seems no reason for a state with jury selection procedures as flexible as California's not to experiment with blue ribbon juries. Their use may well prove as valuable an expedient in trial procedures as have expert witnesses and evidence acquired through scientific technique. Most important, the blue ribbon jury may provide the best deterrent yet devised against the traditional nemesis of American courts—the jury verdict returned upon insufficient evidence.