Hastings Law Journal

Volume 13 | Issue 4 Article 7

1-1962

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SELECTION OF THE JURY

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WHO IS qualified to be a juror is clearly set out by statute.[1] Which ones from the qualified body of the citizenry *do* get selected for jury service, however, is not clearly set out by statute.[2] The selection of the jury list—the panel or array from which the individual jury is drawn—rests largely on the sound discretion of trial courts and their officers.[3] The soundness of their discretion has frequently been attacked as resulting in a jury which is not impartial for not complying with the *"cross section of the community standard."*[4] What this standard means and how far it is applied raises four main questions:

(1) To what groups in the community—social, economic, racial—does the cross section standard apply? If to economic groups, for example, what is the economic classification?

(2) What type of a showing must be made to bring about a reversal? Is mere non-compliance with the standard enough, or does the complainant have to show prejudice? If prejudice must be shown, does the complainant have to be a member of the excluded class?

(3) What differences are there in the application of the standard between state and federal jurisdictions? May the Supreme Court reverse or review in either situation?

(4) Lastly, does the cross section standard mean there must be proportional representation of all groups on the jury list? If so, does it also mean proportional representation on the individual jury?

Racial Exclusion

Soon after the ratification of the fourteenth amendment, it was determined that Negroes could not arbitrarily be excluded from jury panels. *Strauder v. West Virginia*,[5] involved a state law permitting only white males to serve on juries. This obviously made it impossible for a Negro male to sit on the jury. The Supreme Court, interpreting the fourteenth amendment, found that this was a clear violation of the "equal protection of the laws" clause of that amendment.

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[1] 28 U.S.C. § 1861 (1948); CAL. CODE CIV. PROC. § 198.

[2] Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946); see statutes cited *supra* note 1.

[3] *Ibid.*

[4] *E.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Glasser v. United States, 315 U.S. 60 (1942).

[5] 100 U.S. 303 (1879).

The violation, however, need not be found in a statute.[6] The Supreme Court in determining racial exclusion will inquire into the *results* of the selection by jury commissioners to see if they have discriminated against racial classes. Thus, in *Smith v. Texas*,[7] the Court noted that in a Texas county where there were thousands of qualified Negroes, none had ever served on a grand jury. With this showing and no more, the Court held that Negroes had been improperly excluded. The effect, sometimes called the "rule of exclusion," is that upon a mere showing of exclusion, a prima facie case of discrimination is established. The state, then, must overcome this presumption by showing it did not intentionally or systematically exclude the racial class.[8] This rule has been followed in other cases[9] and is the applicable rule in racial exclusion cases today. *Smith v. Texas* is also significant as being the first case to state that a trial by jury "necessarily contemplates an impartial jury drawn from a *cross section of the community*."[10]

Racial exclusion has most frequently arisen in cases involving Negroes, but the rule of *Smith v. Texas* is by no means so restricted. In similar situations, discrimination against Filipinos,[11] "non-Haolis,"[12] and Mexicans[13] has been proved. Presumably discrimination against any identified racial group could be proved.[14]

Attempts to interpret the cross section standard of *Smith v. Texas* as giving a right to have all ethnic groups in the community proportionally represented on the jury list have been rejected.[15] Likewise, the Court has not accepted the interpretation that an individual has a right to have the members of his race proportionally represented on an individual jury.[16] Many, however, do not consider the matter settled for the issue of a proportional requirement is still frequently raised.[17]

Social and Economic Group Exclusion

A more recent question has arisen over whether the cross section standard is applicable to exclusion of social and economic groups.

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[6] Carter v. Texas, 177 U.S. 442, 447 (1900) (dictum that discrimination could be by legislatures, courts, executive or administrative officers).

[7] 311 U.S. 128 (1940).

[8] See Akins v. Texas, 325 U.S. 298 (1945) (presumption overcome).

[9] Ross v. Texas, 341 U.S. 918 (1951) (per curiam); Cassell v. Texas, 339 U.S. 282 (1951); Hill v. Texas, 316 U.S. 400 (1942).

[10] 311 U.S. at 130.

[11] International Longshoreman's Union v. Ackerman, 187 F.2d 860 (9th Cir. 1949).

[12] *Ibid;* "non-Haolis" are, loosely in Hawaii, those other than the employer-entrepreneur group.

[13] Hernandez v. Texas, 347 U.S. 475 (1954).

[14] See Strauder v. West Virginia, 100 U.S. 303, 305 (dictum).

[15] Cassell v. Texas, 339 U.S. 282, 286-87 (1951); Akins v. Texas, 325 U.S. 398, 403 (1945); Virginia v. Rives, 100 U.S. 313, 322-23 (1879).

[16] Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); Norris v. Alabama, 294 U.S. 587, 590 (1935).

[17] *E.g.*, Hoyt v. Florida, 82 S. Ct. 159 (1961).

Although the point had been earlier raised,[18] the first case *proving* economic discrimination was *Thiel v. Southern Pac. Co.*[19] The plaintiff brought suit in the superior court for San Francisco County whereupon the defendant removed the case to the federal court on the grounds of diversity of citizenship. The plaintiff sought damages for injuries allegedly caused by the defendant railroad's negligence. The plaintiff in the district court moved to strike the jury panel on the grounds that all daily wage earners had been purposely excluded from the jury list. The clerk of the court and the jury commissioner admitted they had excluded such persons to save the workers the inconvenience of coming to court because the judges had always excused daily wage earners for financial hardship. The district court denied the motion to strike the panel and the circuit court of appeals affirmed a judgment for the defendant.[20] The Supreme Court granted certiorari limited to the question of whether the motion to strike the jury panel was properly denied.[21] The Court in a six-two decision reversed. In doing so it used its non-constitutional ". . . power of supervision over the administration of justice in the federal courts."[22]

The reason for reversal and the real evil involved in the selection of jurors here was the non-compliance with the cross section of the community standard.[23] Mr. Justice Murphy in the majority opinion stated, "The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen."[24]

The majority held a showing of prejudice was not necessary for reversal.[25] If it can be assumed that exclusion of a class to which the complainant belongs creates a greater likelihood of prejudice to him, it should be noted that here, the petitioner was *not* a member of the excluded class. Thus, the cross section standard as a requirement of an impartial jury was separated from a showing of prejudice to the individual appellant.

The concept of the cross section standard was further widened elsewhere in the majority opinion when it was made clear that the Court would as willingly have reversed if the exclusion had been of any other

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[18] Mamaux v. United States, 264 Fed. 816 (6th Cir. 1920).

[19] 328 U.S. 217 (1946).

[20] Thiel v. Southern Pac. Co., 149 F.2d 783 (9th Cir. 1945), *cert. granted* 326 U.S. 716 (1946).

[21] 326 U.S. 716 (1946).

[22] 328 U.S. at 225. See McNabb v. United States, 318 U.S. 332, 340 (1943).

[23] 328 U.S. at 225; *accord,* Ballard v. United States, 329 U.S. 187 (1946).

[24] 328 U.S. at 225.

[25] *Ibid.*

economic, social, racial, political or geographical group of the community.[26]

Mr. Justice Frankfurter in his dissent appeared to agree with the majority that economic groups should not be intentionally excluded,[27] but to reverse he would require that prejudice to the appellant be shown as resulting from the exclusion.[28]

Shortly after the decision in *Thiel*, the contention was made that the decision meant there must be proportional representation of all economic groups. If so, economic groups had to be classified. This argument was advanced by counsel for defendants in *United States v. Local 36, Int'l Fisherman's Union*.[29] In support of his proposition counsel employed a sociologist who contrived a chart breaking the population down into twelve broad categories. Each category was to have been proportionally represented on the jury panel. The practical difficulties and the necessary inferences from such a classification can be envisaged. As the district judge saw it:[30]

> To accept this breakdown as a reasonable classification as to economic status would compel the conclusion that everybody listed [as] . . . "Professional and Semi-professional workers," had the same viewpoint and mental attitude towards life as every other one. It would compel the court to say that a dancer (a chorus girl on Main Street perhaps) had the same viewpoint and mental attitude towards life as a clergyman. . . .

The district judge rejected both the idea of economic classification as suggested and also rejected an interpretation of *Thiel* which would require proportional economic representation.[31]

The Cross Section Standard in State Courts

Attempts within the states to apply the cross section standard of *Thiel* have frequently failed.[32] *Thiel*, having been decided on nonconstitutional grounds, is not a mandatory requirement on the state courts. The sixth amendment requires an "impartial jury" in criminal cases, but the sixth amendment was written by the Framers of the Constitution to apply only to the federal courts. Its protection can be extended to the states only if it can be brought within the "equal protection" clause of the fourteenth, or a violation of "due process" under the fourteenth can be shown. Under the "equal protection" clause, the

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[26] *Id.* at 220.

[27] *Id* at 229 (dissent).

[28] *Id.* at 229-30.

[29] 70 F. Supp. 782 (S.D. Cal. 1947).

[30] *Id.* at 789-90.

[31] *Id.* at 796; see Thiel v. Southern Pac. Co., 328 U.S. at 220; *cf. In re* Shibuya Jugiro, 140 U.S. 291 (1891).

[32] See State v. Neff, 169 Kans. 11, 218 P.2d 248 (1950); Rowland v. State, 218 Ark. 780, 213 S.W.2d 370 (1948); State v. Jones, 44 Del. 372, 57 A.2d 109 (1947).

Supreme Court, from the time of *Strauder v. West Virginia*,[33] has inquired into state jury compositions in the limited area of *racial* exclusion. Would it not be unreasonable to suppose that the Court might make the same inquiries into state jury compositions in the area of *economic* exclusion?

Fay v. New York,[34] a case on appeal from the New York Court of Appeals, raised the issue. The Court, taking cognizance of the non-constitutional grounds used to decide *Thiel*, refused to extend the cross section standard of *Thiel* to state courts.[35] The majority of the Court distinguished the application of the cross section standard to racial exclusion cases as compared with the application to economic exclusion. In the former there was a federal statute involved[36] which implemented the "equal protection" clause of the fourteenth amendment by expressly prohibiting the exclusion of jurors because of race or color. There is no similar statute concerning economic exclusion, hence, the Court concluded, the "equal protection" clause does not extend to cases involving economic exclusion.[37]

The remaining basis for bringing sixth amendment protection to state courts would be under the "due process" clause of the fourteenth which does not automatically bring Bill of Rights guarantees within its scope.[38] The result of the majority holding, then, is that, on a case-by-case basis, challengers must prove that the effect of economic exclusion in the selection of the jury list produced a trial ". . . so unfair as to amount to a taking of their liberty without due process of law."[39] This requirement is in sharp contrast to *Thiel* which purports to give blanket coverage to all criminal and civil cases in federal courts of a cross section standard. There, on appeal, the challenger does not have to show that the exclusion amounted to prejudice to him personally, nor even show that he was a member of the excluded class.[40]

A vigorous dissent by Mr. Justice Murphy, who had written the majority opinion in *Thiel*, said the cross section standard of *Thiel* should be applied to state courts.[41] It may be assumed that Mr. Justice Murphy maintained his position that the real evil is non-compliance with high jury standards irrespective of prejudice to the individual appellant.[42] A defendant prosecuted by a state, as he stated it, ". . . has a constitutional right to be tried by a jury fairly drawn by a cross

[33] 100 U.S. 303 (1879).

[34] 332 U.S. 261 (1947) (5-4 decision), *reh. den.* 332 U.S. 784 (1947).

[35] 332 U.S. at 284, 287.

[36] 8 U.S.C. § 44 (1946), repealed and now covered by 18 U.S.C. § 243 (1948).

[37] 332 U.S. at 283.

[38] Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937).

[39] 332 U.S. at 296.

[40] See text accompanying notes 25 and 26 *supra*.

[41] 332 U.S. at 296 (dissent).

[42] *Id.* at 297.

section of the community."[43] Moreover, he did not think Congressional silence on the matter should prevent the Court from applying the equal protection clause of the fourteenth amendment whenever jury lists did not measure up to the cross section standard.[44] As precedence for such a step, he pointed out: The court has ". . . consistently interfered with state procedure and state legislation when we felt that they were inconsistent with the fourteenth amendment or with the federal commerce power despite Congressional silence on the matter. . . ."[45]

California and the Cross Section Standard

California, as indicated in *People v. White*,[46] follows the cross section standard. The appellant in that case appealed a criminal conviction to the California Supreme Court. His contention was that the trial court erred in denying his motion to dismiss the entire jury panel and that as a result he was denied his constitutional right to a trial by an impartial jury. There was evidence to the effect that the jury commissioner, with an eye towards getting as many businessmen as possible to serve as jurors, had excluded hourly workers.[47] The appellant was an hourly worker. The standard for selection of jurors in California is pointed out by Mr. Justice Carter in his opinion: "Any system or method of jury selection which fails to . . . encompass a cross section of the community or which seeks to favor limited social or economic classes, is not in keeping with the American tradition and will not be condoned by this court."[48] Applying this standard to the jury in question, the court found that it was "highly discriminatory and should not be condoned,"[49] but because of a state constitutional provision,[50] it was necessary to find prejudice to the appellant to bring about a reversal. Sufficient prejudice was not shown and the judgment was affirmed.[51]

Conclusion

The present state of the law, then, is that in federal courts, by the authority of *Thiel v. Southern Pac. Co.*, the cross section standard must be followed, and, in theory at least, there need be no showing of prejudice to the individual appellant. In the state courts, by the Constitution there is no method of jury selection mandatory on them except that there must be no discriminatory exclusions amounting to a denial of due process under the fourteenth amendment. This in turn is modi-

[43] *Id.* at 298.

[44] *Id.* at 297.

[45] *Id.* at 297.

[46] 43 Cal. 2d 740, 278 P.2d 9 (1954), *cert. denied*, 350 U.S. 875 (1955).

[47] Membership lists from various business and professional organizations extensively used.

[48] 43 Cal. 2d at 754, 278 P.2d at 18 (1954).

[49] *Id.* at 753, 278 P.2d at 17.

[50] CAL. CONST. art. 6, § 4.5.

[51] *Accord*, People v. Hess, 104 Cal. App. 2d 642, 234 P.2d 65 (1951).

fied by the well settled rule that any arbitrary exclusion of a racial group will be unconstitutional under the equal protection clause of the fourteenth amendment. California follows the cross section standard but prejudicial error must be shown for a reversal.

Thus, within this rather broad framework, there is still a wide area of discretion in the hands of the jury commissioners and other officers of the courts who select the jury list. Suggestions that their discretion should be more limited by enacting legislation setting up precise standards, ought to be rejected. To impose a precise standard of jury selection would pose enormous practical difficulties and greatly impede the day-to-day task of selecting jurors. One reason is that there is no one source of names available that would include all those qualified to serve as jurors. Another practical difficulty would be that a precise standard would undoubtedly require the categorizing of the population into racial, social, economic, political, and geographical groups. The groups overlap and any meaningful classification would be impossible to make.

More important than any arguments of impracticability is the policy that lies back of the cross section standard or any other standard of jury selection. It is that jury service is not a matter of classes. Competent jurors are to be found on all levels of society. And if one accepts the idea that jury service is an individual matter, there is little harm in allowing, short of wholesale arbitrary exclusion, a wide discretion to those who select the jury lists. The trial judge may still excuse jurors for good cause and the trial lawyer in the voir dire may still challenge those remaining. To accept the minority position in *Fay v. New York*[52] seems too severe. It would be quite unjust to reverse cases, perhaps intrinsically sound, merely because an economic class was excluded. It is better to make the appellant show prejudice before reversing, than to have federal courts interfering, perhaps whimsically, with the decisions of state courts. To do otherwise would, as Mr. Justice Frankfurter put it in *Thiel v. Southern Pac. Co.*, remind one of ". . . burning the barn in order to roast the pig."[53]

[52] 332 U.S. 261 (1947) (dissent).

[53] 328 U.S. at 234 (dissent).