NOTES

CONSTITUTIONAL LAW: STATE JURY SELECTION PROCEDURE HELD A VIOLATION OF THE FOURTEENTH AMENDMENT

Criminal defendants have frequently raised due process and equal protection objections to the exclusion from their state court juries of various racial, economic, and occupational groups. In Labat v. Bennett, *the Fifth Circuit, in order to determine the validity of such exclusions, enunciated a constitutional test: whether the exclusion is related to juror competence; whether it is justfied by public necessity; and whether the exclusion is compatible with the attainment of a jury which represents a cross section of the community.*

ALTHOUGH the states are not constitutionally required to provide jury trials in criminal cases,[1] nevertheless when a jury is utilized, the fourteenth amendment directs that it be fairly and impartially constituted.[2] Consistent with this command, the state may exercise considerable discretion in the formulation of its jury selection procedures.[3] The selection practices of many states may be seriously challenged, however, in light of *Labat v. Bennett*,[4] in which the Court

[1] The jury trial provisions of the sixth amendment have been held inapplicable to the states. See Fay v. New York, 332 U.S. 261, 288 (1947); Palko v. Connecticut, 302 U.S. 319, 324 (1937) (dictum); Maxwell v. Dow, 176 U.S. 581 (1899). Because the states at the present time widely prescribe criminal jury trials, the possibility that the relevant portion of the sixth amendment will be incorporated into the fourteenth appears to be remote. See Irvin v. Dowd, 366 U.S. 717, 721-22 (1961), citing COLUMBIA UNIVERSITY LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 579 (1959).

[2] Kadish, *Methodology and Criteria in Due Process Adjudication*, 66 YALE L.J. 319, 346 (1957); Scott, *The Supreme Court's Control Over State and Federal Criminal Juries*, 34 IOWA L. REV. 577, 579, 581 (1949).

[3] Brown v. Allen, 344 U.S. 443, 471 (1953); Fay v. New York, 332 U.S. 261, 271, 291 (1947). See Rawlins v. Georgia, 201 U.S. 638, 640 (1906); Gibson v. Mississippi, 162 U.S. 565, 580 (1896); Neal v. Delaware, 103 U.S. 370, 386 (1880).

[4] 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 35 U.S.L. WEEK 3353, 3355 (U.S. Apr. 10, 1967, No. 956). *Labat* is the last of a series of seven cases in which the Fifth Circuit en banc undertook to settle a number of recurring issues in the jury selection process. 365 F.2d at 711. The other cases were Scott v. Walker, 358 F.2d 561 (5th Cir. 1966) (racial discrimination in state court criminal petit jury selection); Billingsley v. Clayton, 359 F.2d 13 (5th Cir.), *cert. denied*, 385 U.S. 841 (1966) (action to enjoin alleged racial discrimination by state in selection of venire); Davis v. Davis, 361 F.2d 770 (5th Cir. 1966) (racial discrimination in state court grand and petit criminal jury selection); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) (racial discrimination in federal

of Appeals for the Fifth Circuit held that jury selection in Orleans Parish, Louisiana, was characterized by racial discrimination and that, on the facts presented, the exclusion of daily wage earners from petit jury venires produced an unconstitutional deprivation of an impartial jury representing a cross section of the community.

The two Negro petitioners were convicted of rape by an all-white jury in 1953. In 1960 the United States Supreme Court remanded a habeas corpus proceeding to the federal district court[5] for disposition of the petitioners' claim that Negroes had been systematically and intentionally excluded from the petit jury venire from which their jury had been drawn.[6] Testimony in the district court indicated that names of prospective jurors were *chosen*[7] from the city directory by a three-member, all-white jury commission.[8] Because their experience had indicated that daily wage earners usually requested to be excused from jury duty on grounds of hardship,[9] the commissioners by-passed all known members of this class. The individuals chosen were examined and any daily wage earners who happened to be called and who made some showing of hardship were generally excused. The names of the selected prospects were then placed in a card file, from which 750 names were *chosen* by the commissioners for the jury wheel. A grand jury venire was *chosen* twice yearly from the wheel; and from the remaining names, a proposed petit jury venire of 150 was drawn at random, one such venire for each section of the criminal district

jury selection); Jackson v. United States, 366 F.2d 34 (5th Cir. 1966) (same); Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966) (purposeful inclusion of Negroes on state grand jury).

[5] The petitioners' original convictions were affirmed by the Supreme Court, Michel v. Louisiana, 350 U.S. 91 (1955), *rehearing denied*, 350 U.S. 955 (1956), on the grounds that they had waived their right to challenge the *grand* jury composition by failing to make a timely objection thereto. The Court later granted certiorari, United States *ex rel.* Poret v. Sigler, 361 U.S. 375 (1960), and remanded the case to the district court to ascertain whether there had been discrimination in *petit* jury selection. Implicit in the Supreme Court's remand was a finding that waiver of objections to the grand jury did not preclude a complaint addressed to the composition of the petit jury.

[6] The Louisiana statute regulating juror exemptions does not excuse Negroes. LA. REV. STAT. § 15:174 (1950). Furthermore, the statute on juror qualifications specifically proscribes distinctions based upon race or color. LA. REV. STAT. § 15:172 (1950). Petitioners alleged that discrimination against Negroes resulted from the manner in which the selection system was administered. Brief for Petitioners, p. 2, Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966). See note 36 *infra*.

[7] *Chosen* describes selection of particular individuals to serve on juries, as opposed to drawing or other random designation.

[8] United States *ex rel.* Poret v. Sigler, 234 F. Supp. 171 (E.D. La. 1964).

[9] Since Orleans Parish does not pay its jurors, the burdens of jury service were deemed especially onerous for daily wage earners whose pay was docked during absence from work. 365 F.2d at 715.

court. From the proposed venire each judge granted further excuses for hardship and *chose* a *final* venire of seventy-five persons, from which petit juries were drawn at random.[10] This process had never produced a Negro for a criminal petit jury.[11]

Nevertheless, the district court refused to grant writs of habeas corpus, finding that the absence of Negroes from petit juries was the result of the liberal granting of hardship excuses, a procedure in which racial discrimination was held to play no part.[12] The court of appeals, however, reversed. The court noted that non-whites composed about thirty-two per cent of the parish population[13] and that the parties had stipulated that ten per cent of the *proposed* venires were non-white.[14] Nevertheless, after an independent assessment of the figures available on the composition of the venires, the court disregarded the stipulation, favoring use of the statistics concerning *final* venires.[15] These latter figures indicated that the percentage of Negroes in the four years immediately preceding petitioners' first trial was under four per cent[16] and in the four months preceding trial approximately three per cent.[17] Ruling that these statistics presented a prima facie case of racial discrimination,[18] the court required that

[10] For a detailed description of the entire jury selection system, see *id.* at 713-15.

[11] *Id.* at 716.

[12] United States *ex rel.* Poret v. Sigler, 234 F. Supp. 171, 177 (E.D. La. 1964).

[13] 365 F.2d at 716.

[14] *Ibid.*

[15] *Id.* at 716-17. The final venire was the result of the judge's request for volunteers. See note 17 *infra*. The fact that final venire figures are chosen to represent the true proportion of Negroes on venires would indicate that if a volunteer system operates to eliminate Negroes, such a system will not be upheld regardless of its potential for fairness. See generally Respondent's Petition for Rehearing, pp. 13-14, Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966).

[16] The actual figure was 3.7% of the sample studied over the period from January 1948 to March 1953. 365 F.2d at 716-17.

[17] The actual figure was 3.1% of the sample studied over the period from November 1952 to March 1953. *Ibid.* The figures for the commissioners' proposed venires involved a more favorable racial balance. In the years preceding petitioners' trial the average proportion of non-whites was 6.2%, the available non-whites composing 25.8% of the population. In the five months preceding trial, the proposed venire was 4.9% non-white. *Id.* at 716. The final venire was composed primarily of volunteers. No figures were noted on the number of Negroes who volunteered for jury service. *Id.* at 715; see note 15 *supra*.

[18] *Labat's* approach to the allocation of the burden of proof, termed the "rule of exclusion," is designed to spare individual petitioners the hardship of an extensive analysis of possibly voluminous data on the selection system in the possession of the state. Petitioners are allowed to make out a prima facie case by showing only objective results, namely, an absence of Negroes from juries or a disproportionately small representation of them. See, *e.g.*, Hill v. Texas, 316 U.S. 400, 402 (1942); Pierre v. Louisiana, 306 U.S. 354, 361-62 (1939); Norris v. Alabama, 294 U.S. 587, 591 (1935);

the state provide a constitutionally acceptable explanation for the absence of Negroes.[19] The state's assertion that the absence of Negroes resulted fortuitously from liberally excusing daily wage earners was held insufficient to carry its burden of proof on the

Neal v. Delaware, 103 U.S. 370, 397 (1880); Gillespie, *The Constitution and the All-White Jury*, 39 KY. L.J. 65, 77 (1950).

Once a claimant has made out a prima facie case, the burden shifts to the state to disprove pernicious discrimination. "[T]he indisputable fact that no Negro had served on a criminal court grand or petit jury for a period of thirty years created a very strong showing that during that period Negroes were systematically excluded from jury service because of race. [This placed] . . . a duty [upon] . . . the State to try to justify such an exclusion as having been brought about for some reason other than racial discrimination." Patton v. Mississippi, 332 U.S. 463, 466 (1947). Compare Swain v. Alabama, 380 U.S. 202, 205-09 (1965).

The "rule of exclusion" is apparently "available in supplying proof of discrimination against *any* delineated class." Hernandez v. Texas, 347 U.S. 475, 480 (1954) (Mexican-Americans). (Emphasis added.) However, it appears that this prima facie test has been applied primarily in cases involving alleged discrimination against groups traditionally subject to social, political, and legal oppression. *Compare* Hernandez v. Texas, 347 U.S. 475 (1954); *with* Fay v. New York, 332 U.S. 261 (1947), *and* United States v. Flynn, 216 F.2d 354 (2d Cir. 1954). See generally Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 323-27 (1965).

The proposed Civil Rights Bill of 1966, Title II, § 204 contained provisions for shifting the burden of proof three times. Upon an allegation of discrimination the state officials would be required to furnish a detailed description of the selection system. If the complaining party then introduced evidence of discrimination in support of the challenge, that party would be given access to state selection records not ordinarily made public. If the court found probable cause, the state would then have the burden of disproving the allegations of discrimination. H.R. REP. NO. 1678, 89th Cong., 2d Sess. 54-57 (1966). See generally Note, *The Congress, the Court and Jury Section: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069 (1966).

[19] 365 F.2d at 719. The percentage figures in *Labat* indicate a smaller proportion of Negro representation than appeared in Swain v. Alabama, 380 U.S. 202 (1965), wherein the Supreme Court refused to find racial discrimination upon a showing of disproportionate Negro representation. *Id.* at 209. In *Swain*, Negroes composed about 26% of the population eligible by age for jury service and over a number of years had actually composed 10-15% of the grand jury panels and petit jury venires, *id.* at 205, which are comparable to the grand jury venires and final petit jury venires in *Labat*. The 10-15% figure in *Swain* thus compares to a 3-4% figure in *Labat*. See text accompanying notes 16-17 *supra*.

It should be noted that both the concurring and the dissenting judges in *Labat* found the majority's statistical analysis to be inconsistent with the Supreme Court's determination in *Swain*. In particular, they felt that "this minimum of ten percent representation [on the proposed venire] as compared to thirty two per cent Negro population does not make out deliberate and intentional limitation or exclusion of Negroes from jury service." 365 F.2d at 740 (separate opinion of Bell, J.); see *id.* at 737 (Gewin, J., dissenting). Furthermore, the mere fact that no Negroes had actually served on juries for many years preceding the trial in question, a crucial factor in the majority's analysis, was thought not to be determinative of deliberate exclusion under the *Swain* approach. *Id.* at 739-40 (separate opinion of Bell, J.); see Swain v. Alabama, *supra* at 205-09. Thus, the *Swain* decision presented the *Labat* majority with considerable obstacles to circumvent. See 365 F.2d at 712-13; Note, 52 VA. L. REV. 1069, 1070 n.6 (1966).

alternative grounds that the exemption of daily wage earners was a subterfuge for deliberate racial discrimination[20] and that the exclusion of the entire daily wage earner class violated petitioners' rights to due process and equal protection of the laws.[21]

Due process of law requires, at a minimum, that a criminal defendant's jury be fair and impartial.[22] Thus, it is clear that a state may not cause a defendant to be tried by demonstrably biased or incompetent judges or jurors.[23] Moreover, in order to diminish the prejudicial effect of any antipathy existing between various ethnic and social units from which jurors are drawn, some courts have indicated that jury venires must reasonably represent a cross section of the community as a condition precedent to the constitution of a truly impartial tribunal.[24]

However, various factors limit a defendant's opportunity to demand the benefits of an absolute cross section, the existence of which is subject to restrictions imposed by a variety of public, private, and judicial interests. For example, the public interest may dictate that certain classes of persons whose work is especially vital to the welfare of the community should be exempt from jury service.[25] Further

[20] 365 F.2d at 724-25. See notes 51, 53 *infra* and accompanying text.

[21] 365 F.2d at 719-20. See note 51 *infra* and accompanying text. Judge Gewin dissented on the theory that petitioners did not adequately prove intentional racial discrimination and that, in the absence of such proof, the percentage figures in *Labat*, accepting the 10% Negro representation stipulated, compared favorably with figures in Brown v. Allen, 344 U.S. 443 (1954), wherein the Supreme Court refused to find discrimination in the presence of less favorable figures on Negro representation. 365 F.2d at 737-38 (Gewin, J., dissenting); see note 19 *supra*.

Judges Bell and Coleman were agreed that a pattern of racial discrimination had not been demonstrated. 365 F.2d at 739-40 (separate opinion of Bell, J.); see note 19 *supra*. However, they concurred in the result on the ground that the exclusion of daily wage earners as a class deprived petitioners of an impartial jury in violation of due process and equal protection. 365 F.2d at 740-41.

[22] See note 2 *supra* and accompanying text.

[23] *E.g.*, Tumey v. Ohio, 273 U.S. 510 (1927); Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915) (dictum); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

[24] See, *e.g.*, Brown v. Allen, 344 U.S. 443, 474 (1953); Smith v. Texas, 311 U.S. 128, 130 (1940); Allen v. State, 110 Ga. App. 56, 62, 137 S.E.2d 711, 715 (1964).

"The conception of a jury selected without class discrimination is a narrower conception than that of a fair and impartial jury. It is, however, an essential element in the conception of a fair and impartial jury." Kentucky v. Powers, 139 Fed. 452, 463 (C.C.E.D. Ky. 1905), *rev'd on other grounds*, 201 U.S. 1 (1906).

See generally Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process, and Equal Protection*, 74 YALE L.J. 919, 923 n.29 (1965).

[25] Typical exemptions are those of the professional classes, such as doctors and lawyers. *E.g.*, ARK. STAT. ANN. § 39-104 (1947) (exemption of physicians, surgeons, prac-

limiting the supply of jurors is the practical requirement that the jury, to function as an evaluative tribunal, should be composed of competent individuals.[26] In addition, the interests of individuals selected for jury service may necessitate excusing those for whom service would be a hardship.[27]

Effective benefit of a jury drawn from a representative cross section is, however, most severely circumscribed by the requirement that a defendant have standing to challenge the composition of any particular jury.[28] According to traditional doctrines, a defendant must demonstrate that an improperly drawn jury actually prejudiced his position.[29] However, obvious difficulties involved in assessing the

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ticing attorneys, ministers); CAL. CIV. PROC. CODE § 200 (exemption of attorneys, ministers, teachers, physicians); S.C. CODE ANN. § 38-104 (1962) (exemption of registered practicing optometrists). For additional examples, see note 83 *infra*. Rarely attacked, exemptions of this sort have traditionally been held within the states' powers. See, *e.g.*, Rawlins v. Georgia, 201 U.S. 638 (1906) (exclusion of professional classes).

[26] See Brown v. Allen, 344 U.S. 443, 473 (1953); Glasser v. United States, 315 U.S. 60, 85-86 (1942); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912) (dictum); Rabinowitz v. United States, 366 F.2d 34, 92 (5th Cir. 1966) (separate opinion of Coleman, J.)

The proposed Civil Rights Bill of 1966 provided literacy requirements for federal court jurors, *viz.*, that they be able to "read, write, speak, and understand the English language." H.R. 14765, 89th Cong., 2d Sess. § 101-1866 (1966). However, the minimal nature of these requirements was underscored by former Attorney General Katzenbach in the following terms: "A person who is able to fill out the form substantially, who stated on the form that he is able to read, write, speak and understand the English language, and who satisfies the remaining qualifications [of residency, etc.] must be found qualified to serve." Statement before Subcommittee 15, House Judiciary Committee, in support of H.R. 14765, May 4, 1966, p. 9. The prospective juror himself is thus actively to participate in the determination of his competency for service. See generally Note, 52 VA. L. REV. 1069 (1966).

In many states, statutes define competency requirements. *E.g.*, IOWA CODE § 607.1 (1962); NEB. REV. STAT. § 25-1601 (1) (1964); N.Y. JUDICIARY LAW 596 (b).

[27] The practice of granting individual excuses is acceptable even in the federal jury system, *e.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217, 224 (1946), wherein selection and exclusion are governed by statute, see 28 U.S.C. §§ 1861-63 (1964), and a defendant need not prove prejudice to attack a jury exclusion. See note 51 *infra*. See also Blume, *Jury Selection Analyzed: Proposed Revision of the Federal System*, 42 MICH. L. REV. 831 (1944). See generally Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1098-1100 (1924).

[28] Present Supreme Court standing requirements would preclude an *unprejudiced* defendant's attack on jury exclusions even if it were not generally recognized that states do have power to "edit" jury venires. See, *e.g.*, Fay v. New York, 332 U.S. 261, 291-94 (1947); 60 HARV. L. REV. 613, 618-19 (1947).

[29] *E.g.*, Fay v. New York, *supra* note 28, at 291-94; Rawlins v. Georgia, 201 U.S. 638 (1906); People v. Manuel, 41 Cal. App. 153, 155-56, 182 Pac. 306-07 (Dist. Ct. App. 1919). *Contra*, Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964), 78 HARV. L. REV. 667 (1965); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965). See Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 636-38, 658-59 (1962).

social, psychological, and economic data necessary to prove that excluding a certain group from jury duty results in actual prejudice[30] have been mitigated by the "same class" rule, which provides that a defendant is presumed to have been prejudiced if he is a member of a class which has traditionally been the subject of discriminatory practices.[31] As a practical matter, therefore, the operative effect of the "same class" rule is clearly circumscribed, providing constitutional protection only where a clear equal protection violation exists.[32] However, precisely because of the rule's restricted application, it is inaccurate to speak of the defendant's general due process right to have *his* jury selected from a venire representing a cross section of the community.

In addition to due process considerations, the equal protection clause has been successfully invoked to secure reversal of convictions obtained under an allegedly discriminatory jury selection system.[33] However, it may be noted that the equal protection analysis is premised on the notion that white defendants will be treated more favorably than Negro defendants by all-white juries.[34] Singularly absent

[30] See Note, 74 YALE L.J. 919, 920-23 (1965).

[31] Hernandez v. Texas, 347 U.S. 475, 477-78 (1954); Note, 74 YALE L.J. 919, 920-23 (1965); Scott, *supra* note 2, at 583-84.

The Supreme Court has never determined the question of standing in relation to one who is not a member of the excluded class. The Court sidestepped this question in Fay v. New York, 332 U.S. 261, 287 (1947). See generally Note, 52 VA. L. REV. 1069, 1098 (1966); 78 HARV. L. REV. 667 (1965).

[32] See Note, 74 YALE L.J. 919, 920 (1965).

[33] See, *e.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Hernandez v. Texas, 347 U.S. 475 (1954); Neal v. Delaware, 103 U.S. 370 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880).

While there was initially some doubt as to the applicability of the equal protection clause to equality in jury service, the language of the amendment was later held broad enough to cover it. See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58, 64-65 (1955); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 145 (1950). See also Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928). The equal protection clause has been invoked frequently by Negro defendants alleging the exclusion of Negroes from their juries. See Gillespie, *The Constitution and the All-White Jury*, 39 KY. L.J. 65 (1950). See also Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

The equal protection argument is of course available to defendants who are members of any class excluded from the jury, which class has traditionally been the subject of substantial bias or oppression. See, *e.g.*, Hernandez v. Texas, *supra* (Mexican descent); Kentucky v. Powers, 139 Fed. 452 (C.C.E.D. Ky. 1905) (political party), *rev'd on other grounds*, 201 U.S. 1 (1906); State v. Guirlando, 152 La. 570, 93 So. 796 (1922) (dictum) (Italians); Juarez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925) (Roman Catholics).

[34] See, *e.g.*, Fay v. New York, 332 U.S. 261, 285 (1947). Compare Cassel v. Texas,

in the decisions has been that form of equal protection rationale which requires that there be a reasonable relation between the classification made and the end to be achieved—the approach which has traditionally been taken with respect to state police power regulations.[35]

Within the limited scope of constitutional inquiry the courts have faced both *direct* and *indirect* means of excluding minority groups.[36] *Direct* exclusions involve the deliberate omission of the members of a class for reasons which fail to articulate an objective policy. Effectuation of this manner of exclusion requires a standard for jury selection sufficiently subjective that the jury commissioners may give free rein to their personal prejudices.[37] Absent an acceptable ex-

339 U.S. 282, 301-02 (1950) (Jackson, J., dissenting). Of course, in many circumstances the defendant may be able to assert both due process and equal protection objections to the jury selection procedure. Thus, "to the extent that the Negro defendant is allowed to invoke the *due process* clause, the premise is that a jury from which Negroes are intentionally excluded will not give him a fair trial; the alternative *equal protection* foundation for reversing such convictions (which is more commonly encountered in the opinions of the Supreme Court, when one clause is singled out) is that white defendants will be treated more generously by all-white juries than Negroes, so that even though the brand of justice meted out to Negroes would be constitutionally unobjectionable if applied to all, a weaker brand is given to Whites." Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387, 1406-07 (1962). (Emphasis added.) See Note, 74 YALE L.J. 919, 926-30 (1965).

Results of a recent study show significant differences in the incidence of sympathy aroused by various categories of criminal defendants. It was concluded that "defendants under twenty-oue have the highest sympathy index (+17), women defendants rank next (+11), then older defendants (+8), down to Negro defendants who show a negative sympathy index (—7) indicating that these defendants appear on balance unattractive to the jury." KALVEN & ZEISEL, THE AMERICAN JURY 210 (1966).

[35] *E.g.*, Morey v. Doud, 354 U.S. 457 (1957); Smith v. Cahoon, 283 U.S. 553 (1931). For a critique of the chary application of the "reasonable classification" analysis in the Supreme Court, see Note, 74 YALE L.J. 919, 926-29 (1965). *But see* Hernandez v. Texas, 347 U.S. 475, 478 (1954); Note, 52 VA. L. REV. 1069, 1100-01 (1966).

For an inquiry into criteria of reasonableness of state classifications, see Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-53 (1949). See generally Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962).

[36] The primary mechanisms available to exclude jurors are statutes and the exercise of administrative discretion. Statutory exclusion of Negroes on racial grounds was struck down by the Supreme Court in 1880 as a violation of equal protection. Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880). Since that time, attention has focused on exclusions made in the administration of statutes fair on their faces. See cases cited note 38 *infra*.

[37] Thus, the most obvious of subjective standards is that which permits jurors to be *chosen* rather than randomly drawn. See Eubanks v. Louisiana, 356 U.S. 584 (1958); Pierre v. Louisiana, 306 U.S. 354 (1939). Another system susceptible of prejudiced application is that which provides an opportunity for administrators to remove Negroes from a petit jury venire and assign them to a grand jury where a

planation for the dearth of representatives of the relevant class when a subjective standard is in operation, the Supreme Court has not been hesitant to vindicate the rights of affected defendants by overturning convictions obtained under such systems.[38]

On the other hand, *indirect* exclusions involve the omission of a particular group or class as the result of the application of a standard which on its face is socially or racially neutral.[39] Such a

unanimous decision is not required for indictment. *E.g.*, Scott v. Walker, 358 F.2d 561 (5th Cir. 1966).

A direct exclusion may also result from the failure of jury commissioners to include any Negroes on the venire because they knew of no eligible Negroes, Cassell v. Texas, 339 U.S. 282 (1950); Smith v. Texas, 311 U.S. 128, 131-32 (1940); United States *ex rel.* Seals v. Wiman, 304 F.2d 53, 59-60 (5th Cir. 1962); or from the listing of Negroes as numbers 13, 14, 15, or 16 for a twelve-man jury, Smith v. Texas, *supra* at 129.

[38] The following cases concern jury selection systems involving "direct" exclusions which have been invalidated by the Court: Arnold v. North Carolina, 376 U.S. 773 (1964) (per curiam) (white and Negro names separately listed on source list for grand jury); Eubanks v. Louisiana, 356 U.S. 584 (1958) (instances of *choice* throughout selection system); Hernandez v. Texas, 347 U.S. 475 (1954) (commissioners selected those "best qualified"—exclusion of those of Mexican descent); Avery v. Georgia, 345 U.S. 559 (1953) (white and Negro names kept separate by use of different-colored tickets); Cassell v. Texas, 339 U.S. 282 (1950) (commissioners chose from their personal acquaintances); Hill v. Texas, 316 U.S. 400 (1942) (commissioners investigated no Negro potential jurors); Smith v. Texas, 311 U.S. 128 (1940) (if listed at all, names of Negroes almost invariably appeared as numbers 13 through 16, for a twelve-juror panel); Pierre v. Louisiana, 306 U.S. 354 (1939) (*choice* of jurors); Norris v. Alabama, 294 U.S. 587 (1935) (Negro names designated "col." on jury list); Neal v. Delaware, 103 U.S. 370 (1880) (commissioners chose "sober and judicious" persons—no Negroes).

There is no need to discuss challenges to the grand and petit jury separately, as the only difference between them is a practical one: if both the grand and petit juries are successfully challenged, the indictment will be quashed and the conviction reversed. *E.g.*, Pierre v. Louisiana, *supra* at 361. Furthermore, no distinction will be drawn between total absence of representation and token representation, as such limitation is likewise unconstitutional. Smith v. Texas, *supra* at 131-32.

Even while vindicating a defendant's right to a jury drawn without discrimination, however, the courts have indicated that no member of defendant's race need be present on his jury, Swain v. Alabama, 380 U.S. 202, 203 (1965); Virginia v. Rives, 100 U.S. 313 (1879); and that proportional representation of racial, geographic, and occupational groups is neither required, Swain v. Alabama, *supra* at 208; Brown v. Allen, 344 U.S. 443, 471 (1953); Cassell v. Texas, *supra* at 286-87; Fay v. New York, 332 U.S. 261, 291 (1947); Scott v. Walker, 358 F.2d 561, 571 (5th Cir. 1966); United States v. Dennis, 183 F.2d 201, 223 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); nor allowed, Swain v. Alabama, *supra* at 208; Cassell v. Texas, *supra* at 286-87.

[39] Arguably, some cases may fall either in the direct or indirect category. Those cases involve selection criteria which, though capable of impartial application, have a subjective element which allows discrimination against a minority group in judging such qualities as intelligence or manner of the prospective juror. Such a system has been approved even where administrative exclusions were alleged to exclude about 85% of the manual laborers who survived statutory elimination, though only 33% of the nonmanual laborers were similarly eliminated. United States v. Flynn, 216 F.2d 354, 382-83 (2d Cir. 1954). *But see* Hernandez v. Texas, 347 U.S. 475, 480-82 (1954), where the

standard was before the Supreme Court in *Brown v. Allen*,[40] where the state sought to select as jurors those individuals "with the most property."[41] The Court, finding no indication of discrimination based solely on race, approved the results of this system even though there was evidence that Negroes constituted only seven per cent of the jury list in a county whose population was thirty-eight per cent colored.[42] Similarly, in *Fay v. New York*,[43] the Court upheld the state's application of intelligence, citizenship, and literacy tests to secure "blue ribbon" panels, notwithstanding evidence of a minimal two-tenths of one per cent representation of working class people in a county where this group comprised fifty-seven per cent of the population.[44]

In the foregoing instances, where the application of objective standards disclosed no obvious opportunity for the operation of intentional discrimination, the Court was quick to accept a rational explanation for the absence of the classes involved.[45] The Court's restraint was undoubtedly due to some reluctance fully to accept the premise that a defendant cannot receive a fair trial from a jury composed of individuals whose backgrounds are different from his own[46] and to its articulated desire to accord states an opportunity to tailor the jury system to their particular needs.[47] As yet, the Su-

commissioners' testimony that they impartially sought competence in jury prospects was held not sufficient to overcome a prima facie case of discrimination against Mexican-Americans, who formed 14% of the population, yet had not been represented on a jury for twenty-five years. These decisions are reconcilable, however, if it is assumed that the Supreme Court did not find a good faith attempt to select jurors on an impartial basis in the *Hernandez* case.

[40] 344 U.S. 443 (1953).

[41] *Id.* at 480.

[42] *Id.* at 481. The racially discriminatory *effect* of the economic standard, however, was not developed in the lower courts and not considered by the Supreme Court. *Id.* at 480, 482.

[43] 332 U.S. 261 (1947).

[44] *Id.* at 298 (Murphy, J., dissenting).

[45] It is notable that, in contrast to *Labat*, the Court in neither *Brown* nor *Fay* examined the tendered explanations for exclusions in a coutext independent of race or class. The *Brown* Court did note, however, that the petitioner failed to raise an objection to juror selection on an economic basis. 344 U.S. at 480.

[46] In discussing due process and occupational exclusions, the Court has said: "But we are not ready to assume that these differences of function [among different occupations] degenerate into a hostility such that one cannot expect justice at the hands of occupations and groups other than his own." Fay v. New York, 332 U.S. 261, 292 (1947).

[47] "But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court has always been careful not so to interpret [the fourteenth] . . . Amendment as to impose uniform procedures upon the several states

preme Court has never struck down a state selection system because of discrimination resulting from *indirect* exclusions.

Though requiring defendants to meet a stiff constitutional test in challenging state juries, the Supreme Court has liberally shaped federal jury selection policy through the exercise of its supervisory power.[48] In *Thiel v. Southern Pac. Co.*,[49] a civil case, the Court invalidated the systematic exclusion of daily wage earners on the ground that the economic status of the excluded jurors had no reasonable relationship to their capacity as jurors.[50] Although the decision was based solely upon the supervisory power,[51] the Court's analysis invokes a genre of equal protection argument—whether the classification has a reasonable relation to the end in view[52]—which has been unavailable to defendants in state jury exclusion cases.[53]

In *Labat* the Fifth Circuit entered the area of indirect, economic

whose legal systems stem from diverse sources of law and reflect different historical influences." *Id.* at 294.

[48] See *id.* at 287 (dictum); Ballard v. United States, 329 U.S. 187, 195 (1946); Thiel v. Southern Pac. Co., 328 U.S. 217, 225 (1946); Note, 52 VA. L. REV. 1069, 1105-19 (1966); *cf.* McNabb v. United States, 318 U.S. 332, 340 (1942).

[49] 328 U.S. 217 (1946), 35 CALIF. L. REV. 142 (1947), 59 HARV. L. REV. 1167 (1946).

[50] 328 U.S. at 223. The Court's examination of the relationship between the classification and the ends to be achieved thereby resembles the equal protection analysis which has been primarily employed in testing police power classifications. See note 35 *supra* and accompanying text.

An additional requirement in the federal courts is that a jury must be drawn from a group that represents a community cross section. Glasser v. United States, 315 U.S. 60, 85 (1942). However, some pre-editing has been allowed as an efficiency measure. Thus, an evaluation of writing ability, appearance, and manner is permitted to avoid calling those persons who will probably prove unsuitable, provided that whole classes are not thereby totally excluded or limited to token inclusion. United States v. Flynn, 216 F.2d 354, 384, 387 (2d Cir. 1954). The *Flynn* case may be distinguished from *Thiel* by noting that, in *Thiel*, wage earners were excluded before they even made an appearance. In addition to condemning this advance class rejection, the *Thiel* Court added that prospective jurors must be selected without the systematic exclusion of economic, social, religious, racial, political, and geographical groups of the community. 328 U.S. at 220.

[51] *Id.* at 225; see 59 HARV. L. REV. 1167 (1946). On the issue of standing, the Court did not require that the defendant in *Thiel* actually demonstrate that he was prejudiced by the wrongful exclusion. Because federal statutes govern jury selection in the federal courts, note 27 *supra*, improper jury selection alone necessitates a reversal of the proceeding. Ballard v. United States, 329 U.S. 187, 195 (1946); Sedler, *supra* note 29, at 636-37.

[52] See note 35 *supra* and accompanying text.

[53] The Court's usual method of stating the equal protection issue in *state* jury exclusion cases has been to inquire whether, as a result of an exclusion, the defendant received less favorable treatment than that accorded others, not whether the exclusion itself, viewed apart from the defendant challenging it, was reasonably related to the end of proper jury selection. See, *e.g.*, Fay v. New York, 332 U.S. 261, 285-86 (1947). See also notes 33-35 *supra* and accompanying text.

exclusions in a state selection system and found the practice unacceptable for two reasons:

> (A) The exclusion of daily wage earners *as a class* violates the petitioners' due process and equal protection rights to an impartial jury representing a cross-section of the community.
> (B) The exclusion of this large class, 47 per cent of all Negro workers in Orleans Parish . . . discriminated against Negroes in violation of the equal protection clause in that the class contains a disproportionately large number of Negroes.[54]

To the extent that the question before the court was whether the state had intentionally excluded Negroes from its petit jury venires,[55] the court's discussion of the constitutionality of excluding wage earners could arguably be considered dicta. However, in light of the court's extensive consideration and novel conclusion regarding the wage earner exclusion and the fact that there was a greater consensus on this issue than on proof of invidious racial discrimination,[56] the invalidation of the economic criterion deserves careful scrutiny.

In exploring the impact of the daily wage earner exclusion on the cross section obtained, the court cited *Thiel* as a "strong case for petitioners"[57] and elevated that holding to one of constitutional magnitude. Then, in order to determine the reasonableness of the daily wage earner exclusion in *Labat,* the court evaluated this exclusion according to a triple test: whether the exclusion was related

[54] 365 F.2d at 719-20. See notes 19, 41-42 *supra* and accompanying text.

[55] 365 F.2d at 701. (Emphasis in original.) The question of intentional racial discrimination was certified to the district court by the Supreme Court. See note 5 *supra.*

[56] See note 21 *supra* aud accompanying text. There were adequate grounds for a finding of intentional exclusion of Negroes. In light of the fact that the commissioners had taken no remedial action after the earlier Louisiana decision, State v. Anderson, 205 La. 710, 18 So. 2d 33 (1944), in which they were put on notice that their selection methods would have to be modified to avoid racial discrimination, it is arguable that they intended the discriminatory result which they knew would follow. Even more pertinent to the finding that excluding wage earners was merely a subterfuge for racial discrimination was the fact that subsequent to the petitioners' trial and prior to the instant case, the jury selection system was invalidated by the Supreme Court in Eubanks v. Louisiana, 356 U.S. 584 (1958). Moreover, the standards used were subjective. See note 37 *supra* and accompanying text. Traditionally, a state's disavowals of invidious discrimination are more closely scrutinized in such circumstances. See note 38 *supra* and acompanying text.

[57] 365 F.2d at 722. The court indicated that earlier cases, including *Thiel,* while ostensibly based on the supervisory power, nonetheless spoke so directly to abuse of the jury system as to justify a finding that the holdings went "beyond the mere application of supervisory power" and were reminiscent of the invocation of constitutional considerations. *Id.* at 722 n.40. See note 80 *infra.*

to juror competence,[58] whether there was a public need for the uninterrupted work of the excluded class,[59] and whether that class formed such a large portion of the community that no jury from which its members were excluded could be truly representative.[60]

The facts of *Labat* made resolution of the case easy since the wage earner exclusion failed each of the standards. Yet the court's failure clearly to articulate the significance of the various elements of the test poses questions as to its application in situations less obvious than that presented in *Labat*. Thus, while the court was able to state categorically that economic status can have no relation to juror competence, broader and more difficult issues relating to the level of competence which a state may constitutionally require of its jurors were left unresolved. Nor did the court investigate the nature of the public interest which would justify excluding persons on that basis. Similarly, there was no intimation, except in general terms, of the extent to which a cross section may be limited before it becomes constitutionally suspect.[61] Nevertheless, the court did intimate that

[58] 365 F.2d at 721-23.

[59] *Id.* at 723, 726-27.

[60] *Id.* at 723. Although the exclusion challenged in *Labat* was accomplished by administrative officers and was unauthorized by statute (see note 6 *supra*), the court's reliance on the constitutional significance of the exclusion indicates that such exclusion would be invalid whether administratively or statutorily effected. Consequently, the triple test should be viewed as a standard against which state exemption and exclusion statutes must be measured, with the concomitant presupposition that if such statutes do not pass the triple test, they are similarly invalid. In the application of such a standard the present statutory selection measures of many states will be called into serious question. See notes 25 *supra* and 83 *infra*.

At this point the procedural context in which the triple test comes into play should be noted briefly. Initially, it is incumbent upon the party challenging the selection process to make a prima facie showing of unconstitutional jury exclusions. This demonstration may indicate that particular classes or groups of the population have been systematically excluded from jury service. See note 18 *supra*. The burden of going forward with the evidence is then on the state to demonstrate a rational nexus between the exclusion and a legitimate state policy relating to competency standards or public need criteria. *Cf. ibid.* Presumably, if the state introduces no evidence, the attack upon the exclusion will be sustained. In this instance, the matter is ended without the invocation of the triple test. On the other hand, should the state attempt to justify the exclusion on the basis of public need or competency, then a balancing of the three elements of the triple test becomes necessary. In addition to the public need and competency justifications for the exclusion, the percentage of the population actually barred, or the cross section function, is a significant element to be considered.

[61] The *Labat* court disapproved the abridgment of the cross section to the extent that it involved the exclusion of "47 per cent of all Negro workers in *New Orleans*," 365 F.2d at 724 (emphasis added), when it was earlier established that Negroes formed about 32% of the population of *Orleans Parish*. Note 13 *supra* and accompanying

a fourth grade literacy level was an appropriate standard of competence[62] and that exemptions based on personal hardship should be limited in light of the solemn public obligation to serve on juries.[63] It is unclear, therefore, that the exclusionary schemes in *Brown v. Allen*[64] and *Fay v. New York*[65] would have been sustained under the Fifth Circuit's test.

While the court's statement of the constitutional infirmity in *Labat* emphasized the cross section question,[66] nevertheless, to the extent that a *triple* test is proposed, the court did not adequately discuss the interrelationship of the three criteria when some, but not all, of them are satisfied in any given case. There are, in fact, eight categories into which any exclusionary scheme might fall. The possibilities may be diagrammed as follows:[67]

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text. There is, however, no numerical statement of the extent to which the cross section of *Orleans Parish* was abridged by the exclusion of Negro workers.

Furthermore, while these figures generally indicate an unconstitutional limitation of the cross section, the court did not define the minimum ratios which would pass muster under its test. For a comparison of the statistical circumstances in *Labat* with figures approved by the Supreme Court in Swain v. Alabama, 380 U.S. 202 (1965), see note 19 *supra*.

[62] The suggestion of a fourth grade literacy level is implicit in a passage in which the court states that "certain other statistics have a special relevancy to the number of Negroes in the parish eligible to serve on juries. . . . In 1950 64 per cent of the non-white population had more than four years schooling." 365 F.2d at 726. In addition, the appendix to the majority opinion includes the percentages of whites and non-whites in Orleans Parish who have at least a fourth grade education. *Id.* at 728. Merely including the figures would not seem particularly significant, as the tables in which they appear were provided by petitioners. Brief for Petitioners, p. 11. However, Judge Bell, concurring, criticized the suggestion implicit in the reproduction of these figures. 365 F.2d at 741. Assuming that Judge Bell was familiar with the views of the other judges in greater depth than they appear in the majority opinion, it is significant that he stated that they are contemplating "jury service by functionally illiterate persons." *Ibid.* This remark suggests that, in his view, the majority have approved the fourth grade standard for juror qualification.

[63] See *id.* at 727.

[64] See notes 40-42 *supra* and accompanying text.

[65] See notes 43-44 *supra* and accompanying text.

[66] The significance of the cross section element of the triple test is indicated by the court's requirement that the parish jury commissioners actively seek Negroes for their venires. 365 F.2d at 725. This suggestion is reinforced by Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), in which the court held the purposeful inclusion of Negroes on the venire to be constitutioual. The approval of deliberate inclusion provides striking contrast to earlier cases which had consistently held that selection procedures should be "color-blind." *E.g.*, Akins v. Texas, 325 U.S. 398, 403 (1945); Strauder v. West Virginia, 100 U.S. 303, 310 (1880); see Note, 52 VA. L. REV. 1069, 1103 (1966).

[67] Although there are technically eight categories, those two which involve schemes which fail all three standards or which pass all three pose no special problem as to the result produced by the interaction of the standards.

CATEGORIES:	0	1	2	3	4	5	6	0
Competence	0	0	0	0	+	+	+	+
Public Need	0	0	+	+	0	0	+	+
Cross Section	0	+	0	+	0	+	0	+

0 indicates that an exclusion fails the designated test.
+ indicates that an exclusion passes the designated test.

Category one may be illustrated by *State v. Madison*,[68] cited approvingly in *Labat*,[69] which invalidated the exclusion of those who would not state their belief in God. In light of our society's acceptance of a diversity of philosophies, it could hardly be argued that lack of belief in God renders one per se incompetent for jury service. Furthermore, there would appear to be no public need to exclude such persons to avoid interruption of their work. Nevertheless, exclusion of the nonbeliever class does come close to satisfying the third standard in that nonbelievers probably do not comprise so large a segment of the population that the representative nature of a cross section of the community would be impaired.[70] Yet, because the *Labat* court approved the *Madison* result, it is arguable that the cross section desired is one which approaches the maximum representation of community opinion in all areas; or, alternatively, that regardless of the fact that the exclusion does not patently disrupt the representative character of the venire, it is nonetheless invalid since it is unrelated to juror competency and excludes from the cross section some community members for whose exclusion there is no reasonable necessity. It appears, however, that these alternative analyses of the court's position may be reconciled by the formulation that the cross section must be *at least* broad enough to encompass all those individuals for whose exclusion there is no justification under the competency and public need standards. Therefore, any category one exclusion would seem to be invalid by definition.

Categories two and three contain those exclusions which are not

[68] 240 Md. 265, 213 A.2d 880 (1965); see note 80 *infra*.

[69] 365 F.2d at 724; see note 80 *infra*.

[70] Figures available from the Bureau of the Census indicate that of the sample studied, less than three per cent of those individuals fourteen years of age or older *professed* no religion. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT 40 (1965).

justifiable on grounds of competence, but are related to public need, and which differ only in that category two involves an exclusion which would severely affect the cross section obtained. The result in these two instances is somewhat unclear, as there may be a curious interaction between the requisites of the cross section and those of the public need. If, for example, doctors were the excluded category and they formed a significant portion of the cross section in category two, then presumably they are plentiful in the community, and the public need for their exclusion is vitiated insofar as this rationale is based on the notion that there are usually insufficient doctors to treat the sick. Therefore, this exclusion would be invalid. However, in category three, the exclusion would seem far more justifiable, since the fact that the impairment of the cross section is only minimal operates to reinforce the importance of the public need, since that need is magnified when few doctors are available.

Category four would encompass an exclusion which bears a relationship to competence, for which there is no public necessity, and which impairs the cross section. An example might be the exclusion of those without a high school education in a community where the general educational level is low. This circumstance brings sharply into focus the question of establishing a minimum level of competence which would maximize the cross section obtained consistent with the defendant's right to a competent tribunal. As noted above,[71] the Fifth Circuit's tendency would be to resolve any apparent conflict in favor of the cross section.

A similar examination of category five indicates that it differs from four only in that the cross section would not be severely impaired by the education requirement. This situation could occur in a community with a high educational level. While it is true that the cross section is only minimally affected, the *Labat* court's emphasis upon the cross section requirements, as opposed to competency criteria, would raise a question as to the validity of such an exclusion.

Category six would involve an exclusion which is justifiable in terms of competence and public need but which severely affects the cross section obtainable. Few exclusions will fall into this category because of the unlikelihood that the members of a particular group

[71] See notes 62, 66 *supra* and accompanying text.

would be simultaneously incompetent for jury service and justifiably excused in terms of the public need. Any exclusions which do fall in category six, however, should be sustained regardless of their effect on the cross section, as the concurrence of the competency and public need factors should save the selection scheme.

While an examination of the permutations possible within the court's triple test serves to illustrate how the three standards might interact in given situations, it seems improper that the state should be forbidden to delineate reasonable standards for juror competency, regardless of the resulting effect on the cross section of a particular community.[72] The public need and general level of individual competency will vary from community to community, but this factor should have no effect on a defendant's right to be tried by a competent tribunal. If the right to jury trial is to be meaningful, the jury must include those members of the community who can understand the issues, weigh the evidence, follow their instructions, engage in orderly debate, and return with a considered verdict. A certain level of intellectual attainment is necessary to perform these functions, and defendants, and the state as well, have a crucial interest in having their arguments heard by an impartial *and competent* tribunal. To apply these principles to the mechanics of the triple test, once a reasonable level of competence has been decided upon, it should not be varied simply because it appears that in a given community the cross section is impaired. Neither, for that matter, should the competence criterion be altered merely because its result in some communities is to eliminate a large number of Negroes, although the *Labat* court in its alternative holding[73] indicates that a standard which excludes a disproportionate number of Negroes is automatically suspect.[74]

If competence were clearly defined and if all those who did not meet that standard could be excluded with no further consideration,

[72] Nevertheless, although the Fifth Circuit has made no definite pronouncement on what general level of competency should be maintained, its reference to a fourth grade literacy level indicates that the court may be willing to accept a relatively low competency standard in order to maximize the cross section. See note 62 *supra*.

[73] See text accompanying note 54 *supra*.

[74] See 365 F.2d at 724-25. To the extent that the number of Negroes excluded in some communities will doubtless vary almost exponentially with the years of schooling required, the court's preoccupation with a broad community cross section suggests that the competency requirement must be cut back to avoid excluding them. This is a democratic standard, but a regrettably fatuous one, as the Supreme Court itself has implied. Fay v. New York, 332 U.S. 261, 291 (1947).

then categories four through six, concerning exclusions related to competence, would be presumptively valid, regardless of the relationship of the exclusion to the cross section and public need criteria. Reasoning from the court's approval of the *Madison* case, category one would seem to be invalid.[75] The area of doubt as to the effect of the triple test on state exclusions would thus be limited to those exclusions in categories two and three which involve the balancing of the community's interest in the uninterrupted work of those who provide its essential services against the right of the defendant to a cross section of maximum breadth.

So to insist on the sanctity of competency requirements reduces the triple test to that which has always been applied in jury selection cases, namely, the community's needs balanced against the defendant's right to a representative cross section.[76] Nevertheless, the *Labat* test is meaningful in light of the effective rejection of the requirement that actual prejudice must be proved in order to contest jury composition. In this connection, the majority opinion asserted that

> the undermining of the jury system's fact finding process, the opportunity for unfairness, the risk that defendants *who may be daily wage earners* will be prejudiced by exclusion of jurors in the same class are dangers which would compel condemnation of the practice without the necessity of the court's finding actual prejudice affecting the outcome of the case.[77]

By speaking in terms evocative of the "same class" rule,[78] the court may mean simply that it is extending the benefits of that rule to a class not traditionally subject to bias and oppression. On the other hand, the court's assertion that "the very integrity of the fact-finding process" is jeopardized by the wage earner exclusion,[79] plus the statement that the *opportunity* for unfairness and partiality should properly be the subject of constitutional objection, compel the conclusion that absolute abandonment of the prejudice principle was intended.[80] Thus, every defendant is constitutionally entitled to a jury drawn in accordance with the triple test.

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[75] See text accompanying notes 68-70 *supra*.
[76] See notes 24-25 *supra* and accompanying text.
[77] 365 F.2d at 723. (Emphasis added.)
[78] See notes 30-32 *supra* and accompanying text.
[79] 365 F.2d at 723 (quoting Linkletter v. Walker, 381 U.S. 618, 639 (1965)).
[80] It is instructive that the court approvingly quoted from Allen v. State, 110 Ga.

In holding that standing is not dependent upon a showing of prejudice, the Fifth Circuit has done what the Supreme Court has declined to do.[81] Therefore, the basic question is whether the opportunity for undetectable or objectively unprovable prejudice, against which the triple test ultimately guards, is sufficiently great to warrant overriding the posited reasons for the Court's reluctance to adopt any such test in the past.[82] Arguably, a state's interest in maintaining a particular approach to jury selection is not so overriding a concern as to justify the continuation of practices which could conceivably prejudice a defendant. Yet one concern of unquestioned importance to a state is that of achieving finality in litigation. The major difficulty with the triple test is that the test, coupled with the defendant's opportunity to make out prima facie case by showing only objective results, would make the state's burden of rebuttal difficulty to carry because the standards imposed by the triple test are as yet largely undefined.[83] Furthermore, despite the *Labat* court's

App. 56, 59-60, 137 S.E.2d 711, 715-17 (1964), a passage wherein the Georgia court, holding that a white civil rights worker had standing to challenge the exclusion of Negroes, stated that a jury not representative of the community is a denial of due process *to every defendant.* 365 F.2d at 723. See generally Note, 43 N.C.L. REV. 404 (1965); 78 HARV. L. REV. 667 (1965). The Fifth Circuit also relied heavily upon State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) (see notes 68-69 *supra* and accompanying text), a case in which the *Allen* rejection of the "same class" rule was recognized and extended. In *Madison,* a member of the Apostolic faith, himself a believer in God, was granted standing to challenge the exclusion of non-believers from his jury. The *Madison* court attempted to underplay its departure from the traditional "same class" doctrine by noting that the Maryland exclusion was statutory rather than administrative and that the "same class" rule has been utilized only with respect to the latter category. 240 Md. at 268 n.1, 213 A.2d at 882 n.1. However, because the *Madison* court held that the exclusions violated Madison's due process and equal protection rights, the fact that the exclusion was accomplished statutorily and not administratively would seem to be irrelevant. Thus *Madison* is left among the forefront of state court cases requiring a broadened concept of the "cross section of the community," under which the prejudice principle is abandoned and the litigant is given standing even though he is not a member of, nor closely identified with, the excluded class. The *Labat* court's citations of *Allen* and *Madison* strongly indicate that the Fifth Circuit intends to abandon the "same class" rule, to the extent that it required a particularized demonstration of prejudice on the part of one who is not of the same class as the excluded jurors in order to have standing to attack the exclusion.

[81] See note 31 *supra.*

[82] See notes 46-47 *supra* and accompanying text.

[83] See text preceding note 61 *supra.* In addition to the fact that only indefinite standards were laid down by *Labat,* the extent to which application of the triple test would burden state jury selection systems is indicated by the present widespread existence of state statutes creating exemptions of dubious validity in terms of the public interest rationale. Examples are the exclusions of women, licensed veterinarians and embalmers. S.C. CODE ANN. § 38-104 (1962). Many states exempt occupational classes for whose exclusion there would seem to be no present justification, *e.g.,*

announced abandonment of the prejudice principle, if the probability of prejudice is minimal, it would be fatuous to reverse convictions which were to all appearances fairly and impartially rendered.[84] Thus, it would seem unwise for the Supreme Court to adopt the rule in the absence of further judicial amplification of the terms "competence," "public need," and "cross section."

Finally, as the racial issue inevitably clouds the holding in *Labat*, the case was a poor vehicle for the explication of non-racial jury exclusion standards. Consequently the court should have followed the approach traditionally utilized to remedy instances of racial discrimination,[85] saving consideration of the issue of economic exclusions for a case in which that issue was more clearly presented.

keepers of ferries or tollgates, express agents, and mail carriers, CAL. CIV. PROC. CODE § 200; the president and cashier of any state or national bank, "one miller to each gristmill; one head sawyer and engineer in each steam sawmill and shingle mill; one foreman and engineer in each factor and machine shop." WIS. STAT. § 255.02 (1965).

[84] The desire to assure the reliability of the guilt determining process is the underlying reason that convictions are reversed when obtained in the absence of constitutionally required procedures. Kadish, *Methodology and Criteria in Due Process Adjudication*, 66 YALE L.J. 319, 346 (1957). It would therefore seem inappropriate to apply the remedy of reversal in the absence of some actual doubt as to the impartiality and thus the reliability of a verdict. Thus, retention of the condition that actual prejudice be demonstrated in order to obtain reversal of a conviction has been emphasized by various judges. *E.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217, 229 (1946) (Frankfurter, J., dissenting); State v. Madison, 240 Md. 265, 277, 213 A.2d 880, 887-88 (1965) (dissenting opinion). However, the prejudice principle has been severely criticized to the extent that it requires an inquiry into actual and not merely possible prejudice. *E.g.*, Note, 52 VA. L. REV. 1069, 1122 (1966); Note, 75 YALE L.J. 322 (1965); 78 HARV. L. REV. 667 (1965).

[85] See note 56 *supra*.