

1948

The Constitutionality of Blue Ribbon Juries

David W. Ketler

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

David W. Ketler, The Constitutionality of Blue Ribbon Juries, 38 J. Crim. L. & Criminology 369 (1947-1948)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

Thomas S. Chuhak }
Lloyd A. Van Deusen } *Criminal Law Editors*

The Constitutionality of Blue Ribbon Juries

Although sovereignty of states over matters primarily of local concern narrows the Supreme Court's function in reviewing state procedures, the Court has been increasingly concerned with the procedural side of state criminal law enforcement during the past fifteen years.¹ Among those subjects to which review has been extended lately are the right of the defendant to counsel,² coerced confessions,³ the introduction of perjured testimony by the prosecution,⁴ and access to the courts.⁵ The purpose of this paper is to deal only with the problem of jury selection and to explore briefly its constitutional environment in order to determine the constitutional restrictions on state procedures.

Jury Requirements for the Federal Courts

Insofar as the Sixth Amendment to the Federal Constitution guarantees the right to a jury trial in criminal prosecutions it was intended to be declaratory of the common law right as it existed at the time of the Amendment's adoption.⁶ The following characteristics were among those included in the time-honored concept of jury trial as guaranteed by that Amendment: (1) the jury must be impartial in its feelings as between defendant and state; (2) it must be summoned from the district where the crime was committed; (3) the verdict must be unanimous; (4) the jury must be protected from the influence of interested parties.⁷

¹ Boskey and Pickering, *Federal Restrictions on State Criminal Procedure* (1945) 13 U. of Chi. L. R. 266; Moore, *Due Process of Law in "Race" Cases* (1944) 2 Nat. B. J. 240.

² *Foster v. Illinois, ... U. S. ...*, 67 S. Ct. 1716 (1947); *Powell v. Alabama*, 287 U. S. 45 (1932). See note *infra* p. 375 of this Journal, *Limitations on an Accused's Right To Counsel*.

³ *Brown v. Mississippi*, 297 U. S. 278 (1936).

⁴ *Pyle v. Kansas*, 317 U. S. 213 (1942).

⁵ *Cochran v. Kansas*, 316 U. S. 255 (1942).

⁶ The English common law was not, however, the sole source of the trial system of the States. See Colvin, *Participation of the United States of America with the Republics of Latin America in the Common Heritage of Roman and Civil Law*, 10 *Proceedings of the Eighth American Scientific Congress* 467; 1 Johnson, *The Swedish Settlements on the Delaware* (1911) 450 *et seq.* While proclaiming trial by jury to be the "glory of the English law", Blackstone carefully observed that it was but a "privilege". 3 Blackstone, *Commentaries on the Laws of England* (15th ed. 1809) 350. It was incorporated into the Constitution of the United States as a right. 2 Story, *Constitution* (4th ed. 1873) §1779.

⁷ 1 Cooley, *Constitutional Limitations* (8th ed. 1927) 676, 677. U. S. Const. Amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .".

In order that the jurors display the required impartiality it has been thought desirable that they be a group representative of the locality from which they are chosen. With respect to state jury selection procedures this feature has become a focal point of constitutional controversy, not under the Sixth Amendment, but under the equal protection and due process clauses of the Fourteenth Amendment. This is a result of decisions holding that the provisions of the Bill of Rights are not directly applicable to state procedures.⁸ The standards of jury selection which the Supreme Court has set up recently are imposed only on the federal system.⁹

Constitutional Limitations on State Procedures

The first eight Amendments to the Constitution were considered at the outset to be applicable only with reference to the federal government,¹⁰ but the ratification of the Fourteenth Amendment might reasonably have been construed to extend the protection of the Bill of Rights to the citizens of the several states under the privileges and immunities clause.¹¹ It was soon held, however, that the provision afforded protection only to those privileges and immunities inherent in federal as distinguished from state citizenship.¹² Now it is well-settled that a state has full control over the procedures of its courts both in civil and criminal cases subject only to the qualification that such procedure does not conflict with specific and applicable provisions of the Federal Constitution so as to work a denial of "fundamental rights."¹³ Consequently the due process and equal protection clauses of the Fourteenth Amendment have become the only constitutional restrictions on the adoption or exercise of criminal procedures by the states.

Under the due process clause some of the rights guaranteed by the first eight Amendments, being part of our common heritage of fundamental rights, have been held to apply as against the states.¹⁴ The difficulty, obviously, is in deciding which rights are fundamental and which are not. According to Mr. Justice Cardozo in *Palko v. Connecticut*¹⁵ the criterion is that such provisions of the Bill of Rights as are "implicit in the concept of ordered liberty" are likewise embodied in the Fourteenth Amendment.

⁸ *Walker v. Sauvinet*, 92 U. S. 96 (1876) (Seventh Amendment, jury trial in civil cases); *Presser v. Illinois*, 116 U. S. 252 (1885) (Second Amendment, right to keep and bear arms); *Maxwell v. Dow*, 176 U. S. 581 (1889) (Fifth Amendment, indictment for infamous crime; Sixth Amendment, trial by jury in criminal prosecutions).

⁹ *Thiel v. Southern Pacific Co.*, 328 U. S. 217 (1946); *Ballard v. United States*, 315 U. S. 60 (1946). *Cf.* *Glasser v. United States*, 315 U. S. 60 (1941).

¹⁰ *Barron v. Mayor and the City of Baltimore*, 32 U. S. 243 (1833).

¹¹ U. S. Const. Amend. XIV §1 " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"

¹² *Slaughter House Cases*, 83 U. S. 394 (1872); *Twining v. New Jersey*, 211 U. S. 78 (1908).

¹³ *Brown v. New Jersey*, 175 U. S. 172 (1899).

¹⁴ First Amendment: *De Jonge v. Oregon*, 299 U. S. 353, 364 (1936) (freedom of assembly); *Bridges v. California*, 314 U. S. 252, 268 (1941) (freedom of speech and press); *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639 (1942) (freedom of religion). Sixth Amendment: *Powell v. Alabama*, 287 U. S. 45, 67 (1932) (right of accused to have counsel); *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1933) (right of accused in criminal cases to be informed of the charge against him).

¹⁵ 302 U. S. 319 (1947).

In the recent case of *Adamson v. California*¹⁶ the Supreme Court held that the privilege against self-incrimination of the Fifth Amendment was not drawn under the protection of the due process clause.¹⁷ Four justices,¹⁸ however, contended that the Bill of Rights was intended by the framers of the Fourteenth Amendment to be made applicable to the states,¹⁹ and one denied the validity of either view, urging that the due process clause has an independent potency.²⁰ It may be expected that this cleavage will continue for the present, at least; but as the make-up of the present Court changes it is not unlikely that more rights will be called fundamental and held guaranteed by the Fourteenth Amendment.

As it stands now the right to trial by jury in a state proceeding is not a privilege of national citizenship, nor is it such a fundamental right as to be guaranteed by the Federal Constitution against state action.²¹ The often-stated dictum reasserted in the *Palko* case,²² that a state might do away with trial by jury altogether so long as the trial as conducted met those essential standards of fairness inherent in the concept of due process, has never been tested. Since the "standard of fairness" criterion depends upon the current Supreme Court's notions of civilized practice it is hard to believe that the concepts of due process and right to trial by jury would not merge, should a state attempt to abolish the jury system. Although such an attempt is not likely to be made, jury trial having long been a part of our national and state tradition,²³ subsequent references to this dictum have helped to fortify decisions reached on due process grounds.²⁴

Most of the cases which have been appealed to the United States Supreme Court on the ground of improper selection of grand or petit jurors in state criminal proceedings have involved the exclusion of Negroes from jury lists.²⁵ All of the cases in which the interference of the Court with state procedures has been successfully invoked have in-

16 ... U. S. ..., 67 S. Ct. 1672 (1947).

17 *Accord*, *Twining v. New Jersey*, 211 U. S. 78 (1908).

18 Justices Black, Douglas, Rutledge, and Murphy.

19 *See Adamson v. California*, ... U. S. ..., 67 S. Ct. 1672, 1684 (1947) (Black, J., dissenting).

20 Mr. Justice Frankfurter in a concurring opinion insisted: "The Amendment neither comprehends the specific provisions (of the Bill of Rights) . . . nor is it confined to them. * * * The relevant question is whether the criminal proceedings . . . offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . ." *See Id.* at 1678, 1682, 1683.

21 *See: Palko v. Connecticut*, 302 U. S. 319 (1937); *Walker v. Sauvinet*, 92 U. S. 90 (1876); *Maxwell v. Dow*, 176 U. S. 581 (1899).

22 *See Palko v. Connecticut*, 302 U. S. 319, 332 (1937).

23 *See note 6 supra*.

24 *Fay v. New York*, ... U. S. ..., 67 S. Ct. 1613 (1947); *Cf. Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1946).

25 *Rogers v. Alabama*, 192 U. S. 226 (1904) (systematic exclusion of Negroes from jury service); *Hollins v. Oklahoma*, 295 U. S. 394 (1935) (no Negro had served on jury in county since 1907); *Hale v. Kentucky*, 303 U. S. 613 (1938) (no Negro summoned for service on grand or petit juries in county for thirty years except on one occasion); *Pierre v. Louisiana*, 305 U. S. 354 (1939) (none for forty years); *Smith v. Texas*, 311 U. S. 128 (1940) (subtle but nonetheless systematic exclusion). *But cf. Rawlins v. Georgia*, 201 U. S. 638 (1905) (exclusion of professional men and others not a denial of due process).

volved a violation of federal "civil rights" statutes.²⁶ Objections to the composition of juries have thus far been upheld only where the defendant was a member of the excluded class, although the Court has intimated that in a proper fact situation it might relax this rule.²⁷ In such cases the burden of proof is upon the defendant to establish not only a systematic exclusion of a class, but also that such exclusion was intentional.²⁸ Nothing less than complete exclusion of members of the class has sufficed to establish either a violation of the federal statutes or denial of equal protection or due process.²⁹ While the negro-discrimination cases have involved infractions of federal statutes, recent cases suggest that discrimination in selection of jurors on account of race is a violation of equal protection of the laws irrespective of the applicability of the statutes.³⁰

The Fay Case

This is the background against which *Fay v. New York*³¹ was decided. Two labor union officers were found guilty of extortion by a special or so-called "blue ribbon" jury in a New York state court. They appealed their conviction primarily on the ground that the New York statute³² providing for selection of the special jury was so administered as to deny the petitioners due process and equal protection. This contention was based on the allegations that members of the labor-

26 18 Stat. 336, 8 USCA §44 (1875) "No citizen possessing all other qualifications . . . shall be disqualified for service as grand or petit juror in any court of the United States, or any State on account of race or color . . ."

27 See *Fay v. New York*, . . . U. S. . . ., 67 S. Ct. 1613, 1628: "Assuming that defendants, not being women, have standing to complain of exclusion of women from the general and special jury panels, we are unable to sustain their objection. * * *" The use of such language would seem to be unnecessary were the justices convinced that in no case could a defendant complain of the exclusion of a class unless he be a member of that class.

28 *Akins v. Texas*, 325 U. S. 398 (1945); *Thomas v. Texas*, 212 U. S. 278 (1908).

29 In *Akins v. Texas* 325 U.S. 398 (1945), it was contended that jury commissioners limited to one the number of Negroes on the jury list merely to give the appearance of Negro representation. The Court held that the defendant had failed to provide clear proof of a deliberate limitation of the number of Negro jurors. Whether the Fourteenth Amendment prohibits the limitation of Negroes to the proportion that their eligible number bears to the total eligible persons was left undecided.

30 See: *Hill v. Texas*, 316 U.S. 400 (1942); *Akins v. Texas*, 325 U.S. 398 (1945).

31 . . . U.S. . . ., 67 S.Ct. 1613 (1947).

32 Judiciary Law §749-aa., 29 McKinney's Consolidated Laws of New York Annotated 511-516:

"§749 aa.3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy or secretary as to his qualifications and fitness to serve as a special juror. Such county clerk may issue a subpoena requiring any person within such county to attend before him, his deputy or secretary at a time specified for the purpose of testifying concerning the qualifications or fitness of himself or any other person to serve as a special juror and the propriety of the selection of such juror. * * * In case of his failure to attend and testify as required by such subpoena or a refusal to be sworn or to answer any legal or pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. * * * The county clerk, in the record made by him of the jurors selected as such special juries, shall enter the age of each special juror so selected, his business or vocation, if any, the length of his residence in the state and county and, if naturalized, the date of his naturalization. Such record shall be a public record and shall be open to inspection."

ing class were systematically and deliberately excluded from such juries and that women were likewise excluded. Petitioners further contended that they were denied equal protection of the laws on the ground that juries selected from the special panel were more inclined to convict than those from the general panel. The Supreme Court rejected these contentions and affirmed the verdict of the state court, four justices dissenting.

This was not the first time that the Court has passed upon the constitutionality of the New York law. Soon after the enactment of the original special jury statute the Court rejected an attack upon it which was made on the ground that the jury "was taken from a particular body of citizens and not from the general body of the county" thus denying the defendant due process and equal protection.³³ The Court in the *Fay* case was willing to reopen the question of the constitutionality of the special jury system and the administration of the New York statute "in the light of more recent trends of decision and of particular facts about the present operation of the jury system not advanced in support of the argument in the earlier case."³⁴

No specific standards as to education and employment qualifications of special jurors are set out in the New York statute. Jurors are selected from those accepted for the general panel by the county clerk after testifying under oath as to their qualifications and fitness.³⁵ Obviously the clerk has wide discretion in his selection. While the statutory purpose is plainly to select persons of higher than average intelligence who are able to handle intricate factual issues the scheme manifestly would permit selection of persons from a high economic and social stratum to the exclusion of those from lower economic and social levels. Although evidence was offered from which it was inferable that the standards employed by the clerk were of an economic and social nature, the defendants failed to prove to the satisfaction of the majority that the distribution of the jury panel occupationally was not the result of the application of legitimate standards.³⁶ Consequently the Court decided that the state might apply tests of intelligence, citizenship, and understanding of English even though a disproportionate number of the laboring class were thereby excluded from jury service.³⁷

Neither was the Court willing to set aside the conviction on the ground that the proportion of women on the jury panels did not equal their proportion of the population. There is no constitutional requirement that women be on the jury. Rather the proposition is based on

³³ *Hall v. Johnson*, 186 U. S. 480 (1901); *cf. Brown v. New Jersey*, 175 U. S. 172 (1899) ("struck jury" statute held constitutional).

³⁴ *Fay v. New York*, ... U. S. ..., 67 S. Ct. 1613, 1619 (1947).

³⁵ See note 32 *supra*.

³⁶ A table presented by the defense showed that the special jury panel included only 0.2% craftsmen, foremen, service workers, and laborers, while 99.8% were professional persons, proprietors, managers, sales, and clerical workers. Of the last named group, comprising 38% of the special jurors, three were union members who were peremptorily challenged. Evidence that there was no discrimination as to occupation in the selection of the panel was uncontradicted directly. The showing of lack of proportional representation of laboring groups was made without the necessary proof of purpose to discriminate against the groups themselves.

Failure of a statute to set forth any standards for selection of jurors does not render it constitutionally invalid. *Murray v. Louisiana*, 163 U. S. 101 (1895); *Franklin v. South Carolina*, 218 U. S. 161 (1909).

³⁷ *Fay v. New York*, ... U. S. ..., 67 S. Ct. 1613, 1629.

a changing view of the rights of women in our public life. While the Court may insist on their inclusion on federal juries,³⁸ woman jury service has not become so much a part of the customary law of the land that failure of the states to follow the practice can be considered a denial of equal protection or due process.³⁹ The Court further pointed out that Congress has considered the application of the Fourteenth Amendment to state jury selection procedures and has found only discriminations involving race and color deserving general legislative condemnation. Therefore one who would have the courts intervene on grounds not covered by the statute must prove clearly that in his own case the procedure was so arbitrary that it denied him equal protection or due process.⁴⁰

In support of their allegation that special juries are more inclined to convict than general juries the defendants offered in evidence reports by the New York State Judicial Council recommending abolition of special juries.⁴¹ However, these reports were made partly on the basis of studies made over ten years ago; and the Court took the position that the evidence was not sufficiently recent to avail the defendants in this case.⁴² Still the Court indicated that if it were clearly proved that a greatly disparate ratio of conviction had continued for a substantial length of time, a defendant, in the absence of explanation, could complain of this inequality as a denial of equal protection of the laws even if it were shown that a special jury court never had convicted any defendant who did not deserve conviction.⁴³

The same four justices who dissented in the *Adamson* case⁴⁴ also disapproved the majority decision in the *Fay* case, being of the opinion that the equal protection clause of the Fourteenth Amendment "prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community."⁴⁵ More consistently the minority might have said that such a right is inherent in state citizenship by virtue of the incorporation of the Sixth Amendment jury trial provisions into the guarantees of the Fourteenth. They did not suggest that use of the special jury in this case subjected the defendants to a trial so lacking in fairness as to be a denial of due process.

Conclusion

If, in any given case, it can be proved that a substantial number of any class, qualified to act as jurors, have been systematically and deliberately excluded from jury service because of race, color, occupation,

38 *Ballard v. United States*, 329 U. S. 187 (1946).

39 *Fay v. New York, ... U. S. ...*, 67 S. Ct. 1613, 1628, 1629 (1947).

40 *Id.* at 1625.

41 A study of homicide cases by the New York State Judicial Council revealed that in 1933-1934 special juries convicted in 83% and 82% of the cases while juries selected from the general panel convicted in only 43% and 37%. Fourth Annual Report of the Judicial Council of the State of New York (1938) 46. In 1945 the Council recommended that the special jury be abolished inasmuch as the improvement in the quality of jurors generally removed the need for special jurors. Eleventh Annual Report of the Judicial Council of the State of New York (1945) 49, 50.

42 *Fay v. New York, ... U. S. ...*, 67 S. Ct. 1613, 1626.

43 *Ibid.*

44 See note 18 *supra*.

45 See *Fay v. New York, ... U. S. ...*, 67 S. Ct. 1613, 1632 (1947) (Murphy, J. dissenting).