



---

Fall 9-1-1976

## A Jury Of One's Peers

Lewis H. LaRue

Washington and Lee University School of Law, laruel@mac.com

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Constitutional Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Lewis H. LaRue, *A Jury Of One's Peers*, 33 Wash. & Lee L. Rev. 841 (1976).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol33/iss4/3>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

## A JURY OF ONE'S PEERS

LEWIS H. LARUE\*

The Sixth Amendment provides that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The problem is how to interpret the phrase: "an impartial jury." It is easy to say that "impartial" means "not partial" and then conclude from the dictionary meaning<sup>1</sup> of "partial" that the evil to be avoided is jurors who have already taken sides. In other words, we want to exclude from juries those who have already made up their minds about a case; we want jurors to decide cases upon the evidence introduced in court and not upon what they have heard in other places.

A more difficult question is whether "impartial" means "disinterested." It is interesting to note that "partial" is derived from the same Latin root as is the word "peer."<sup>2</sup> Etymology alone proves nothing, yet there is some irony in speaking not only of an impartial jury but also of a jury of peers. A plunkish etymological argument is that it is inconsistent to require a jury to be impartial and then also require it to be made up of peers, since by a strained etymology "not-partial" means "not peers." Moving away from etymology, let us ask the common sense question of why anyone would want a jury of peers? Presumably, he hopes to get a more friendly jury, a jury more likely to take his side, and so there does seem to be an inconsistency.

However, a more cautious approach is to remember the poet's dictum, "All Discord, Harmony not understood."<sup>3</sup> There may be some doubt as to whether the poet is right or wrong as a general position, but he is right in this particular matter. The inconsistency or "discord" in saying that we want a jury that is impartial but not too impartial makes sense. The sense that it makes goes something like this: we want a jury that has something in common with the defendant but no stake in his case. There is one thing that the jury must not have in common with the defendant: a particular interest or stake in the outcome of the case similar to the defendant's interest.

---

\* Professor of Law, Washington & Lee University, A.B. Washington & Lee University (1959); LL.B. Harvard University (1962).

<sup>1</sup> THE OXFORD ENGLISH DICTIONARY, sense 1 for the word "partial."

<sup>2</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, pp. 955, 966 and 1534.

<sup>3</sup> ALEXANDER POPE, *ESSAY ON MAN*, Epistle I, line 291.

Otherwise, it is good for the jury to have things in common with the accused, since this will help them understand and thus evaluate what the accused says in court.<sup>4</sup> This is my thesis, and the problem is how to test it.

Perhaps the best way to approach a test is by taking an actual case.<sup>5</sup> The accused was a twenty-three year old black male charged with armed robbery. The place of the alleged crime was Jacksonville, Onslow County, North Carolina. The victim was a young, black enlisted man in the U.S. Marine Corps stationed at Camp Lejeune, which is also in Onslow County. The accused was a pimp; he was self-employed in Jacksonville. The accused and the victim agreed on certain facts: the two of them got into a car, together with a young woman who was also black, in downtown Jacksonville. The three then drove to the accused's apartment where the victim handed money to the young woman. Then they drove back to where the journey began and the victim got out of the car. However, there was a conflict in the testimony as to why the victim handed the money to the young woman. The victim said that the accused had a weapon and threatened to use it unless money was produced. The accused denied this and said that the money was handed over in the regular course of an agreed upon, albeit illegal, commercial transaction between the young woman and the victim.

The fundamental issue was credibility. Whose story should the jury believe? The accused took the stand, and the jury's decision as to his truthfulness was surely influenced by their reaction to him. The jury had to decide what sort of man he was. Was the accused an honest pimp, supplying that which he had agreed to supply; or was he a dishonest pimp, promising to supply so as to lure victims to places where he could rob them? If the jurors despised pimps, and thus found the accused so despicable that they could not understand how there could be a difference between an honest pimp and a dishonest pimp, then they would be emotionally blocked from reaching the issue.

Furthermore, the credibility problem could not be decided by putting the testimony into collocation with other testimony or with circumstantial evidence and seeing which testimony was more plausi-

---

<sup>4</sup> Compare the words of Justice Brandeis: "knowledge is essential to understanding; and understanding should precede judging." *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, at 520 (1924) (dissenting opinion).

<sup>5</sup> A former student of mine, Jeffrey Stephen Miller, J.D. Washington & Lee 1975, participated in this case while working as a summer clerk. Mr. Miller brought the case to my attention; his sense of outrage about it provoked me to write this article.

ble in the larger context. The only other witness who had direct knowledge of the facts was the young woman. Her story agreed with that of the accused; but since he was her pimp and she was his prostitute, the agreement in their testimony adds nothing. A circumstance that favored the accused was that when he was arrested later that night, he did not have a weapon. However, the probative force of this was lessened by the time lapse of several hours between the transaction and the arrest. Another circumstance that favored the accused was that on the ride from downtown to the apartment and then on the ride back, the accused drove the car, the young woman sat in front with him, and the victim sat in the back of the car. In the movies, gangsters don't do it that way, and real-life gangsters often learn how to be gangsters from watching the movies. However, life does sometimes differ from art, the victim was eighteen, the accused was twenty-three, and fear is fear. The use of this fact turns upon the credibility of the victim's story that he was afraid. One can be afraid sitting alone in a back seat. A circumstance that hurt the accused was the the amount of money that changed hands was seventy-six dollars. This price was well above what was customary in that market, however the value of this evidence was lessened by the fact that the victim's youth and inexperience could have made him an easy mark.

What type of jury would be most competent to try this case? We can imagine several possibilities. One of the most interesting possibilities would be six black Marines from Camp Lejeune who normally use services similar to those supplied by the accused, and six black entrepreneurs of Jacksonville who usually supply services similar to those supplied by the accused. The actual jury before which the accused was tried was as different from this as one could imagine. The panel from which the jury was drawn was apparently selected so as to be a cross-section of Onslow County, and the names for the trial panel were apparently selected by random methods from the master panel. By a fluke of chance,<sup>6</sup> the jury was all white, all female, all middle-class in income, all in the fourth decade of their life or older, and all regular attenders of a fundamentalist protestant church. The accused was convicted.

This conviction raises nagging doubts. One does not know if the accused was guilty or innocent, but it is difficult to believe that the trial was fair. The crucial issue was credibility, and credibility turns

---

<sup>6</sup> I am accepting Mr. Miller's judgment that this jury was atypical and that there was no evidence of official misconduct, although the latter is hard to believe.

upon the use of the eye. One must watch the telling of the stories and then choose among them because of the way in which they are told. The eye that watches must not be hostile. There must be knowledge and then understanding before there can be judging.<sup>7</sup>

Even so, by the standards of positive law, there is no reversible error.<sup>8</sup> We do not require a jury of peers in any ancient or modern sense of the word "peers." We have given this ancient requirement a peculiarly American twist; in place of "peers" we have substituted "a representative cross-section of the community."<sup>9</sup> Furthermore, we do not summon a representative cross-section for any particular trial. Instead, a master list of potential jurors is drawn up and this master list is what is supposed to be a representative cross-section. The procedure that we use can best be described by saying that the jury that hears the case has passed through three filters. The community at large is filtered into a master list. The jury commissioners who draw up this list are supposed to use procedures that will generate a list that is a representative cross-section of the community. The master list is filtered into a jury panel. The court official who draws this panel is supposed to use random selection techniques. The panel is filtered into a trial jury by the attorneys through the exercise of challenges.

The procedure described above is more abstract and schematic than the reality of jury selection. However, it is an accurate description of our ideal, and it is a norm by which judges criticize practice.<sup>10</sup> This procedure is supposed to implement our orthodoxy, which is that the accused is entitled to a jury from which no part of the community has been excluded, but the accused is not entitled to a jury that includes any particular part of society. Putting this in current terms a black is entitled to have a master list with a reasonable number of blacks on it, but he is not entitled to have a trial jury with blacks on it. The first filter must pass blacks, but not the second or third. It is thus necessary to inquire into the history and rationale of our orthodoxy.

Our orthodoxy has not changed in any substantial way since 1880. In that year the Supreme Court decided three cases that have been honored ever since. In *Ex parte Virginia*<sup>11</sup> and *Strauder v. West*

---

<sup>7</sup> See note 4, *supra*.

<sup>8</sup> *Taylor v. Louisiana*, 95 S. Ct. 692, 702 (1975).

<sup>9</sup> *Id.* at 696-698.

<sup>10</sup> See *Taylor v. Louisiana*, 95 S. Ct. 692, 692-702 (1975).

<sup>11</sup> 100 U.S. 339 (1880).

*Virginia*<sup>12</sup> blacks were excluded from jury service, and in both of these cases the court said that the Fourteenth Amendment was applicable to the situation. In *Ex parte Virginia*, a state court judge was accused of refusing to select any blacks for service on juries in Pittsylvania County, Virginia. He was indicted under a federal statute, and the court held that Congress had authority to punish such conduct under its power to make appropriate legislation to enforce the equal protection clause of the Fourteenth Amendment. In *Strauder v. West Virginia*, a state statute excluded blacks from jury service. A federal statute provided that anyone who could not enforce his rights to equal civil rights in state courts could remove his case to federal court. A black defendant asked that his case be removed, and the court held that Congress had the power to provide for removal in such cases.

However, in *Virginia v. Rives*,<sup>13</sup> two black defendants who were charged with murdering a white man, indicted by an all-white grand jury, and tried by an all-white petit jury, were unable to get any relief from the Supreme Court. The defendants had made two motions in the state court prior to trial and both motions were denied. The first motion was to have one-third of the *venire* be composed of blacks, and when this was denied, the second motion was to remove the case to federal court, which was also denied. The Supreme Court held that there was no error in denying either motion. The accused did not allege or prove that anyone had done anything to cause the absence of blacks on the jury; on the evidence set out in the record of the case, the hypothesis of no blacks because of chance was just as likely as the hypothesis of no blacks because of discrimination.

In *Virginia v. Rives*, the court summed up its view of the law by saying:

It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men.<sup>14</sup>

At least one thing that the court said is correct—the two rights are different rights. The first mentioned right is the remedial corollary of a duty that is negative, i.e., thou shalt not exclude blacks from

---

<sup>12</sup> 100 U.S. 303 (1880).

<sup>13</sup> 100 U.S. 313 (1880).

<sup>14</sup> *Id.* at 322-323.

juries. The second mentioned right is the remedial corollary of a duty that is affirmative, i.e., thou shall include blacks in juries. But so what? Why not grant both rights? The only explanation that was offered in this case was the cryptic comment:

A mixed jury in a particular case is not essential to the equal protection of the laws. . . .<sup>15</sup>

The opinion contained no arguments that attempted to justify this conclusion ("not essential") and so one must return to the other two cases for clues.

Justice Strong's opinion for the majority in *Strauder* sets out the reasons for holding that the exclusion of blacks from juries is a violation of the rights of the black defendant. Justice Strong pointed out that the purpose of the Fourteenth Amendment was to protect blacks against discrimination;<sup>16</sup> he then said:

The very fact that colored people are singled out and expressly denied by a statute all rights to participate in the administration of the law, as jurors, because of their color, . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

\* \* \*

The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors; fellows, associates, persons having the same legal status in society as that which he holds.

\* \* \*

It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors. . . .<sup>17</sup>

These three excerpts set out three different reasons for condemning the exclusion of blacks from juries. First, political dynamics: the exclusion will be interpreted by all as a state-affixed stigmata and will handicap blacks in their general pursuit of equal justice. Second, definitional: a jury is a jury of peers, and the exclusion eliminates

---

<sup>15</sup> *Id.* at 323.

<sup>16</sup> 100 U.S. 306-07.

<sup>17</sup> *Id.* at 308-09.

peers. Third, fact finding: prejudice can distort the fact finding, and if blacks are excluded, then prejudice will have no check.

Justice Field's dissent argued with particular vigor against reasons two and three:

Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests.

\* \* \*

The position that in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not be any white persons on the jury where the interests of colored persons only are involved. The jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that in cases affecting members of the colored race only, the jury should be composed entirely of colored persons, and that the presiding justice should be of the same race. To this result the doctrine asserted by the District Judge logically leads. The jury *de medietate linguae* anciently allowed in England for the trial of an alien, was expressly authorized by statute, probably as much because of the difference of language and customs between him and Englishmen, and the greater probability of his defense being more fully understood, as because it would be heard in a more friendly spirit by jurors of his own country and language.<sup>18</sup>

The first excerpt is merely clever, and it should be given no more weight than any other argument which premises our inability to achieve complete justice and then concludes that we should not achieve partial justice. It is true that everyone doesn't get peers, but why not give this defendant his peers? Also, the purpose of the Civil

---

<sup>18</sup> 100 U.S. 367, 368-69.



War Amendments was to protect Negroes, not children, the aged, and other similar groups.

The second excerpt is more than merely clever, and it raises fundamental issues. Indeed, it gives us the key to understanding why the dichotomy of *Strauder v. West Virginia* and *Virginia v. Rives* was born and why it remains with us despite the fact that if a black defendant is harmed by the absence of blacks on his jury, he is harmed even if the absence is by chance and not by design. Why, then, did the majority not go further and guarantee to blacks the right to have blacks on the jury? After all, as the dissenter Justice Field said: "To this result the doctrine asserted . . . logically leads."

But the majority pulled back, however. One reason might be that the doctrine "is founded upon the notion that in such cases white persons will not be fair and honest jurors." One can not seriously suppose that it was possible for an all-white judiciary to adopt, without reservation, the premise that "white persons will not be fair and honest" towards blacks, and then follow up on all the logical consequences of this premise. Rather, we should expect the judiciary to assume that it is both possible and normal for whites to be fair and honest toward blacks.

Field is also close to a truth when he says that the trial of a black man by a mixed black-white jury will lead to decisions "reached by a sort of compromise, in which the prejudices of one race [are] set off against the prejudices of another." Of course, one could argue that such a dialectic is a good way to get justice. Yet we can understand why the court did not accept as a premise that justice can be found in the dialectic of prejudice, and then pursue the consequences of this premise. To do so would be to give up the idea that decisions are based upon the "law and the evidence." To adopt as a premise the idea of the dialectic of prejudice would require the sacrifice of the idea of the law as dispassionate neutrality.

By process of elimination, then, we come to the proposition that the political dynamics argument is the crucial argument to the majority. One could argue that a different sort of harm is done when harm is the result of chance than when harm is caused by a purposeful policy. Fate may be harsh, but malevolence is more harsh. It is worse to lose one's property to a thief than to a natural calamity. To use the language of current controversy, *de jure* segregation is worse than *de facto* segregation. All of this seems true but not satisfying. Granted that one is worse than the other, why not deal with both? What is it about the political dynamics argument that captured the imagination of the judges? One clue might be found in Field's reference to the jury *de medietate linguae*. As Field stated, it was

“anciently allowed in England for the trial of an alien;” the history of its disappearance is relevant, although it will take quite a few pages to demonstrate its relevance.

The archetypal alien in medieval society was the Jew. No one has ever claimed that the relations of Christendom toward the Jews were marked by any excess of Christian charity. But in 1201, King John granted a “Charter of Liberties” to the Jews of England in which the following appears, “if a Christian shall have a cause of action against a Jew, let him be tried by the Jew’s peers.”<sup>19</sup> A jury de medietate was used in a 1278 case in which Isabel de Lockerley charged Cresse, son of Lumbard, with rape. The sheriff was ordered to summons as the jury “twelve Christians of Wilton and twelve Jews, as well as of the town of Wilton.”<sup>20</sup>

We need not imagine that the privileges granted by the Charter of Liberties were a product of English liberalism. The editor of Selden Society volume sums up the matter by writing:

the Jews were far too valuable a prey to be left by the Crown to indiscriminate appropriation.<sup>21</sup>

An early statute of Jewry, part of the so-called Laws of Edward, states:

Jews and all their effects are the King’s property, and if anyone withhold their money from them, let the King recover it as his own.<sup>22</sup>

The Charter was a grant to the Jews of the necessary means of survival, the quid pro quo for being a source of revenue that the crown could tap at whim. Isabel de Lockerley did not show up for the trial, and so Cresse, son of Lumbard, was released and the mixed jury empanelled in his case did not have to decide anything. The mixed jury called to decide whether Hak of Canterbury and Abraham of Dorking had killed Matthew of Ockham did render a verdict; they said that the defendants were not guilty.<sup>23</sup> Most of the cases in the Selden Society report, however, are commercial, rather than criminal, cases. For example, Joel of Blois, a goldsmith, sued Cresse, son of Cresse, and the issue was whether Joel must pay 20s or 30s to redeem a chattel that he had pledged to Cresse; a mixed jury said Joel

---

<sup>19</sup> 15 PUB. SELDEN SOCIETY 1 (1901).

<sup>20</sup> *Id.* at 104 (the place of the alleged crime was Wilton).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 105-06.

owed 30s.<sup>24</sup> The index to the volume has an entry, "Jury, composition of, cases illustrating";<sup>25</sup> an examination of the material that is indexed shows that the mixed jury was common.

Given that the privilege of a mixed jury was granted to the Jews for the reasons stated, what follows? One can interpret the event in two different ways. We might say that it expresses a minimum. We could emphasize the Jew's precarious position and lack of altruism on the part of the Crown, and then argue that all could see that the irreducible minimum of fair treatment for a minority is a mixed jury. On the other hand, we can argue that it is an irrelevancy. We could emphasize the place of the mixed jury in a scheme of exploitation, and then argue that it has no place in free society.

Not all aliens were in so precarious a position as were the Jews; consequently, the privilege of the mixed jury for other aliens can be interpreted differently. In 1353, alien merchants were granted this privilege.<sup>26</sup> In 1354 the privilege was extended to all aliens.<sup>27</sup> Professor Thayer sums up the matter by saying that the privilege "was founded on considerations of policy and fair dealings."<sup>28</sup> The "policy" that he refers to was a crown policy to encourage foreign merchants and foreign artisans to come to England. Thayer shows good judgment by using the conjunction "and", for there seems to be no way that one could separate out the elements of "policy" and "fair dealing" and say which predominates. Consequently, it is profitable to turn away from England and examine the American response to this institution.

The American response to the jury *de medietate linguae* varied over time. Published records that would show the relevant details about jury selection in the eighteenth century are not available, but there is some available evidence, and from that evidence we may infer that the mixed jury was used in America until the first half of the nineteenth century.<sup>29</sup>

The first case upon which this inference may be based was a

<sup>24</sup> *Id.* at 138.

<sup>25</sup> *Id.*

<sup>26</sup> 27 Ed. III, stat. 2, c. 8.

<sup>27</sup> 28 Ed. III, ch. 13.

<sup>28</sup> J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, p. 94, n. 4 (1898).

<sup>29</sup> I am indebted to Mr. Miller, *see* note 5 *supra*, for these cases that he collected for a brief. His theory of the case was that the jury guaranteed by the Sixth Amendment was understood to be a jury of peers, that the use of the mixed jury shows how the requirement of peers was understood, and that this historical practice is relevant by analogy to his case. *Cf.* Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970).

Pennsylvania case decided in 1783.<sup>30</sup> Four Italians were indicted for murder and asked for a mixed jury. M'Kean, C.J., who was the trial judge, granted their motion which was properly granted if the statute 28 Edw. 3, c. 13 had been followed in Pennsylvania prior to the revolution. On this point defense counsel introduced an affidavit of a Mr. Thomas Clifford, who had been the victim of a burglary; Mr. Clifford stated that the accused, Frederick Ottenreed, was allowed a jury *de medietate linguae*. On the basis of this precedent, M'Kean ordered a mixed jury for the trial of Mr. Mesca and his co-defendants.

The case is evidence for the proposition that the mixed jury was used in America in the eighteenth century. More interestingly, the case report contains comments by M'Kean that prefigure the nineteenth-century response. He followed precedent, but stated that if he was not bound by precedent, if it were a case of first impression, then he would have decided the case differently.

The reasons that gave rise to the 28 Edw. 3 do not apply to the present government, nor to the general circumstances of the country. Prisoners have here a right to the testimony of their witnesses upon oath, and to the assistance of Counsel, as well in matters of fact as of law, which was not the case in England in the year 1353 when that statute was enacted.<sup>31</sup>

With these words, M'Kean raises a fundamental problem of cultural transmission. In the years after the American revolution, American judges had to decide what parts of English law should be accepted and what parts rejected. With respect to the jury, the problem was what parts of the English jury practice should be received. M'Kean was correct in saying that in fourteenth century, criminal defendants did not have a right to call witnesses nor did they have a right to the assistance of counsel. However, this should be put in context. Standard historical works such as Holdsworth<sup>32</sup> emphasize that the early jury was both witness and judge. The jury were neighbors of the accused and were supposed to know the facts. This is not to say that witnesses never appeared before the jury; but it was logical to deny the accused the right to call witnesses since in most cases it would have been reasonable to suppose that the jury, neighbors of the accused, would already know the facts. Thus, if anyone was to have the right to call witnesses, it would seem logical to give this right

---

<sup>30</sup> *Respublia v. Mesca*, 1 Dall. 73 (1783).

<sup>31</sup> *Id.* at 75.

<sup>32</sup> 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 312-350 (1931).

to the jury; they would know best when they were ignorant of some crucial fact and when thus a witness might be helpful.

Given this context, an argument can be made either for or against M'Kean's position. A proponent of M'Kean's position could say that the mixed jury was logical in those days because the neighbors of the accused, those who would know the facts, would be aliens. However, the jury is now composed of those who are ignorant of the facts and they judge the facts on the testimony of witnesses. The survival in English law of the mixed jury after this change in function, which was completed by the sixteenth century, is to be explained by cultural inertia. Consequently, we ought not preserve this relic.

An opponent of M'Kean's position could respond by saying that the survival of the mixed jury can be explained as more than mere inertia. The function of the aliens on the jury in the fourteenth century was not solely to improve the fact-finding capability of the jury, but also to improve upon its sense of fairness by acting as a check against prejudice. This latter function, the check on prejudice, is as valuable when the jury is fact-finder as it was when the jury was both witness and fact-finder.<sup>33</sup>

An evaluation of these opposing arguments is not easy. The logic of each argument proceeds from certain assumptions about what the function or rationale of the mixed jury was in the past and should be now, and one can not assess the argument until one assesses the assumptions. Unfortunately, determining the function and rationale of an institution like the mixed jury is difficult.

M'Kean went on to say:

We do not think, indeed, that granting a *medietas linguae*, will, at all, contribute to the advancement of justice; and we know it is a privilege which the citizens of Pennsylvania cannot reciprocally enjoy, as, at this day, there are no juries in any part of Europe, except in the British dominions.<sup>34</sup>

The part of the above sentence before the semi-colon would refer back to the preceding discussion about changed circumstances or forward to the remarks on reciprocity or perhaps even to some third consideration that is not expressed. As for the point about reciprocity, the issue is how much our treatment of aliens should be affected by the way in which other countries treat aliens.

The next case is a New York case of 1807.<sup>35</sup> An alien who was

---

<sup>33</sup> Cf. Justice Strong's third argument, note 17 *supra*.

<sup>34</sup> *Id.* at 75.

<sup>35</sup> *People v. McLean*, 2 Johns. 380 (1807).

charged with murder asked for, and was allowed, a jury *de medietate linguae*; the jury convicted. The issue on appeal was the procedure by which the mixed jury was summoned. The accused had asked that the trial be delayed and the jury be summoned in the interim period between the current term of court and the next term of court. The trial court refused to delay the matter and summoned the jury immediately, or in the language of the day, "*instanter*." The details of precisely how the jury was selected are not clear. The report says that 18 aliens and 18 citizens were summoned; the defendant was allowed all of his challenges, and then a jury of 6 and 6 was empanelled. The appellate court approved the trial court's procedure. The most interesting passage in the court's opinion is its reference to English history.

In the case of Count Koningsmark and others, tried for murder in 1681 (3 St. Trials, 468), and of Swendson, (5 St. Trials, 449) in 1702, for forcibly marrying Mrs. Rawlins, the prisoners claimed the privilege of aliens, and strangers were impaneled, and the prisoners tried on the same day.<sup>36</sup>

The court showed that it was familiar with English practice and that it judged this practice to be a legitimate model of how things ought to be done.

In 1823, John Marshall and St. George Tucker, sitting as the federal circuit court for the district of Virginia, granted a mixed jury to an alien charged with piracy. The mixed jury convicted, and the prisoner was sentenced to death.<sup>37</sup> The brief report has no discussion by the judges, and the only part of counsel's argument that we have is the following:

Albert Allmand, Esq., of counsel for the accused moved the court to set aside half of the array, and allow to the prisoner the substitution of the like number of foreigners,—a privilege, sometimes accorded to alien criminals by our courts, and with whom it is discretionary, but in regard to which there is no act of Congress, although the state laws have a provision to that effect.<sup>38</sup>

It is unfortunate that the report contains no discussion of the matter by two such distinguished judges as John Marshall and St. George Tucker. It is intriguing to note, however, that counsel spoke of this

---

<sup>36</sup> *Id.* at 380-81.

<sup>37</sup> *United States v. Cartacho*, 25 Fed. Cas. 312 (No. 14,738) (C.C.D. Va. 1823).

<sup>38</sup> *Id.* at 312-13.

privilege as discretionary as opposed to of right. The court granted the motion, but whether they did so on a theory of right or of discretion we do not know; and if discretionary, the sort of considerations that ought to inform one's discretion were not mentioned. Had the greatest of the Federalist judges and the greatest of the Jeffersonian judges discussed at length in a reported opinion the reasons they had for granting the motion, they might have had an incalculable effect on the course of American law.

If we turn to Tucker's Blackstone,<sup>39</sup> there is little that deals directly with the problem, and that which indirectly bears upon the problem is ambiguous. Blackstone discusses the jury *de medietate linguae* in civil trials and the English author doubts whether the ancient practice is still valid in civil cases.<sup>40</sup> Tucker's note is brief "Jurors *de medietate linguae* may be summoned by order of court. L.V. 1794, c. 73 Sec. 13." The section cited is in fact just as brief; it reads "Jurors *de medietate linguae* may be directed by the Courts respectively." It is significant that the statute contains the word "may," since this word is ordinarily used in statutes as a word granting discretionary power, as opposed to "shall", which imposes an obligation.<sup>41</sup> The overall impression that one would get on reading Tucker's Blackstone is that this institution is peripheral. Both Tucker and Blackstone were ardent believers in "natural rights", albeit Tucker's list is longer and infused with Jeffersonianism, but apparently neither of them thought of the jury *de medietate* as part of the aliens' natural rights.

One thing that is not apparent from Tucker's note is that chapter 73 of the 1794 collection of Virginia laws regulates the grand jury and petit jury in criminal cases. Why, then, is it appended to Blackstone's discussion of the civil jury? The discussion of the criminal jury in Blackstone does contain a short discussion of the matter:

Where an alien is indicted the jury should be *de medietate*, or half foreigners, if so many are found in this place; (which does not indeed hold in treasons, aliens being very improper judges of the breach of allegiance; nor yet in the case of Egyptians under the statute 22 Hen. VIII, c. 10).<sup>42</sup>

Tucker has no note to this passage. I infer, perhaps wrongly, from this

---

<sup>39</sup> For a general discussion of this work, published twenty years before the Cartacho case, see Cover, Book Review, 70 COLUM. L. REV. 1475 (1970).

<sup>40</sup> 3 BLACKSTONE, COMMENTARIES \*360-61.

<sup>41</sup> See counsel's argument in *United States v. Cartacho*, 25 Fed. Cas. 312 (No. 14,738) (C.C.D. Va. 1823).

<sup>42</sup> 4 BLACKSTONE, COMMENTARIES \* 352.

fault in exposition that Tucker did not think that the matter was important.

Tucker's Appendix F to Volume III is a valuable clue to some of his ideas that are arguably relevant to this matter. Appendix F is a proposal for reforms for the jury system in Virginia. Tucker writes as one who approves the jury in principle but is disturbed by the current practice; it can be argued that the changes that he proposes are inconsistent with the jury *de medietate*.

Tucker counts it as a major defect of the practice of his day that juries were not composed of "the most respectable freeholders in the county, men above the suspicion of improper bias (sic), or corruption; men whose understandings may be presumed to be above the common level"<sup>43</sup> but rather are composed of "idle loiterers about the court, who contrive to get themselves summoned as jurors, that they may have their expences (sic) borne."<sup>44</sup> Thus, elitism is not inconsistent with Jeffersonianism; it may well be, of course, that in this matter the elitism was justified. Let us pass by the factual issue of the actual competence of the jurors and make instead a different assumption: St. George Tucker's views were representative of a significant part of the lawyers of Virginia. Then there are two possibilities: most of the time jurors were incompetent, and the lawyers knew it; most of the time the jurors were in fact competent, but despite this the lawyers thought they were incompetent. Under either of the two possibilities, bad results would follow. As a technical matter, the efficiency of trials would be lessened.

"Hence the number of special verdicts, demurrers to the evidence, and points reserved; which the parties, mutually apprehensive of a decision by an incompetent jury, are ever ready to propose, or agree to."<sup>45</sup> Surely Tucker is correct in saying that if the parties believe the jury to be incompetent, then they will be unwilling to submit the matter in its entirety to the jury but will make technical maneuvers to shift parts of the case to the judge. The evil here is not solely a loss in efficiency but can lead to more important matters, as follows:

"Hence the number of new trials granted; because the jury have not understood or have misapplied the evidence. Hence in time, must result to the courts an influence in questions of fact which may become highly pernicious."<sup>46</sup>

---

<sup>43</sup> APPENDIX of the Trial by Jury in Virginia, at 64.

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

<sup>45</sup> *Id.* at 65.

<sup>46</sup> *Id.* at 64-65.



Lack of confidence in juries will inevitably lead to transfer of the juries' fact finding powers to the judge. To Blackstone and Tucker, this would be a disaster, since they thought that one of the chief guarantees against tyranny was the inability of the government to deprive a man of his life, liberty, or property unless twelve of his neighbors so decided. They believed, rightly or wrongly, that judges would be less of a check, since judges would be more likely to have political obligations to the government.

So, in order to restore confidence in the jury—it may be more accurate to say, in order to restore Tucker's confidence in the jury—a proposal was made; Appendix F contains a draft of a statute for regulation of juries in civil and criminal cases. For purposes of this article, the first two sections are relevant. In section one, the way in which those eligible for jury duty were to be selected was set out. The list was to be drawn from the tax rolls and was to be comprised of those "whose property or estate within the county, whether real, personal or mixed, shall be rated on the said list of taxable property to one hundred pounds, or more. . . ." <sup>47</sup> Section two provided that judges should select from this list to serve as jurors "honest, discreet and intelligent yeomen, freeholders, merchants and traders, citizens of this commonwealth." <sup>48</sup> This section also contains some exclusions from jury duty. Some of the exclusions seem routine: doctors, lawyers, clergy and government officials; others are not: tavern keepers, distillers, or vendors of spirits by retail, overseers or managers of plantations or mills for others, merchants' clerks, or shopkeepers, journeymen, or apprentices. . . ." <sup>49</sup> The proposed act does not mention the jury *de medietate*, and one could argue that it was not meant to abolish it. However, it does express a strong preference for a jury of men of substance and position, and thus it might be viewed as inconsistent with the preservation of the jury *de medietate*.

Another relevant part of Tucker's Blackstone is Appendix L to part II of Volume I, "Of the Rights of Aliens in the United States." <sup>50</sup> Blackstone had categorized persons as citizens, denizens, or aliens. <sup>51</sup> Denizens were in a half-way house between alienage and citizenship; a denizen enjoyed some of the privileges of citizens and suffered some of the disabilities of aliens. <sup>52</sup> An alien could become a denizen only

---

<sup>47</sup> *Id.* at 68.

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

<sup>49</sup> *Id.* at 69.

<sup>50</sup> APPENDIX, 98-103.

<sup>51</sup> 1 BLACKSTONE, COMMENTARIES \* 366-75.

<sup>52</sup> "A denizen is a kind of middle state, between an alien and a natural-born

by grace of the King, who in exercise of his prerogative could issue to an alien "letters patent" making him an English subject. Naturalization could follow by a special Act of Parliament, making him an English citizen.<sup>53</sup>

Tucker could have said that these categories were irrelevant to America and dismissed Blackstone's discussion as mere arcane knowledge. Instead, he ingenuously adapted these categories to our law. He reviewed the history of relevant legal materials from Queen Elizabeth's charter to Sir Walter Raleigh to the U.S. Constitution and the latest legislation of the Virginia legislature and the United States Congress. He concluded that an alien sojourner would remain an alien, but if an alien migrated to and settled in America then he became a denizen. Having become a denizen, he now had a right under general statutes to become a naturalized citizen. The chief contrast of American with English law, as Tucker sets it out, is the absence of discretion. In England, an alien could become a denizen only by grace of crown; in America, he could become a denizen by his own act of settlement. In England, a denizen could become naturalized only by special act of Parliament; in America, he need only comply with procedures set out in general laws. Once an alien made a permanent settlement, "he became a denizen, as of right, *instantly*; he became naturalized upon payment of the legal fees for his letters of naturalization, and upon taking the usual oaths."<sup>54</sup> Tucker sets out all this fondly, with the unstated pride of a patriot. The relevance of it all to the jury *de medietate* is that it cast doubt upon the concept of alienage upon which the institution of the jury *de medietate* was built. Tucker is laying the foundation for the argument that the alien in America is a very different person than the alien in England.

The next significant case was decided in the supreme court of North Carolina in 1825.<sup>55</sup> An alien charged with murder asked for a jury *de medietate linguae*. The trial court denied the request; on appeal, the denial was affirmed, the court holding that there was no error in denying a jury *de medietate linguae*. The report contains the most elaborate discussion of the problem as of 1825; all three members of the court, which was split 2-1 on the issue, wrote an opinion. The reporter's introduction to the opinions set out what appears to be an excerpt from a colloquy of court and counsel that occurred during argument.

---

subject, and partakes of both of them." *Id.* at \*374.

<sup>53</sup> *Id.* at \*373-74.

<sup>54</sup> APPENDIX at 99 (emphasis in original).

<sup>55</sup> *State v. Antonio*, 11 N.C. 200 (1825).

Henderson, J. [who voted that there was no right to a jury *de medietate*] Judge Williams [who was not a member of the supreme court] informed me that he allowed it at a court of oyer and terminer held in Wilmington many years ago for the trial of some prisoners who were aliens and natives of France. Gaston [counsel for the prisoner]: It seems, then, to have been considered the law; the Legislature has not since altered it.<sup>56</sup>

Mr. Gaston's statement is a masterpiece of the art of advocacy; it is accurate in every detail of what it says, it is persuasive, but it presents, of course, only one side of the question. The jury *de medietate* was considered law by Judge Williams in those days, but by how many other judges? The legislature has not done anything inconsistent with Judge Williams' view of the law, but has it adopted his view?

The question: did the legislature adopt Judge Williams' view of the matter?, can be rephrased: Did the legislature adopt the statute 23 Edw. 111, ch. 13? The legislature did not review all the English statutes, picking and choosing explicitly, that is to say, the legislature did not give the courts a list of English statutes with which to work. Instead, the North Carolina legislature, like all the rest of the state legislatures, stated general criteria by which the courts were to decide which English statutes were to be adopted.

Judge Hall, whose opinion is the first one set out in the report, translated the criteria of the statute into these terms: (1) was 28 Edw. 111, c. 13 "suitable and proper for the government and well-being of the colonist?" and (2) was it "not . . . repugnant to or inconsistent with the freedom and independence of the state and form of government?" established since the revolution.<sup>57</sup> You may recall that I have quoted Thayer as saying that the jury *de medietate* "was founded upon considerations of policy and fair dealing."<sup>58</sup> If considerations of "fair dealing" were the key, then Judge Hall's two tests would be met, but Judge Hall thought that considerations of "policy" were the key and thus that his two tests were not met. His own language is:

But it seems to me that those statutes [providing for jury *de medietate*] were in their nature local; they were founded more in commercial policy than in general principles calculated to answer alone the end of justice and reach the objects of criminal law.<sup>59</sup>

---

<sup>56</sup> *Id.* at 202.

<sup>57</sup> *Id.* at 205.

<sup>58</sup> See note 28 *supra*.

<sup>59</sup> *State v. Antonio*, 11 N.C. at 205.

Judge Hall had some evidence upon which he could infer that considerations of commercial "policy" outweighed the considerations of "fair dealing." During the reign of Henry V, a statute was passed setting certain qualifications for jurors; this statute did not state explicitly whether the jury *de medietate* was to be affected by it, but if so, then 28 Edw. III, ch. 13 was repealed. Subsequently, the courts resolved this ambiguity by deciding that the new statute repealed 28 Edw. III, ch. 13. The Crown and Parliament responded by 8 Hen. VI, ch. 29, which reaffirmed the alien's privilege to be tried by a jury *de medietate linguae*. The preamble of the statute, which Judge Hall quoted, states that the court's decision was unfortunate because of the effect of loss of this privilege upon foreign merchants:

Many merchant aliens have withdrawn, and daily do withdraw them, and eschew to come and be conversant on this side of the sea, and likely it is that all the said merchant aliens will depart out of the same realm of England if the said last statute be not more fully declared, and the said merchant aliens ruled, governed, and demeaned in such inquests according to the first ordinance aforesaid [28 Edw. III, ch. 13], to the great diminishing of the king's subsidies, and grievous loss and damage of all of his said realm of England. . . .<sup>60</sup>

Judge Hall went on to point out that those who colonized America were for the most part farmers and that the policy of Parliament was to exclude alien merchants from America, as they wished a monopoly in trade in English hands.

Judge Henderson concurred with Judge Hall; he stated that he agreed with all that his colleague said and he went on to discuss some other matters. Judge Henderson stated that the line between alien and non-alien was different in America than it had been in England.

[W]e find frequently bodies German, Swiss, and French settling among us, [and] the moment they arrived here . . . they were considered as colonist, having no intention to return; and, therefore, having no interests separate and distinct from other colonists, they lost their alien character.<sup>61</sup>

Judge Henderson went on to say that if the use of the jury *de medietate* had been widespread, this might outweigh other considera-

---

<sup>60</sup> *Id.* at 205.

<sup>61</sup> *Id.* at 207. *Cf.* St. George Tucker's analysis "of the Rights of Aliens in the United States" *supra*, text at notes 50-54. The ideology here is that there are no aliens in America, except those who have chosen to be alien.

tions, but that Judge Williams' use of it "once or perhaps twice"<sup>62</sup> was not enough.

Chief Judge Taylor dissented. He was not persuaded by Hall's account of history. The preamble of 8 Hen. VI, ch. 29. talked about merchants, but the substantive provisions were not limited to merchants. Taylor argued that mechanics and artisans were also encouraged to settle in England. As for the colonies, while it is true that foreign merchants were excluded so that trade with the colonies would be an English monopoly, it is also true that there was a policy of encouraging foreign agriculturalists and artisans to settle in America.<sup>63</sup>

The Chief Judge also said that history can give us no sure guides and that it would be best to decide the case on general principles. In his own words:

But though an alien of any description has at this day nothing to fear from the operation of malignant passions, he might labor under many disadvantages from our ignorance of his language and the customs of his nation. If these may be obviated by allowing him a portion of his countrymen, or foreigners, upon his jury, in case of life or death; if by these means he will be better enabled to bring forward his defense to the considerations of the court and jury; and if there is no positive law directing us, in plain and intelligible language, to disallow the claim, it appears to me safer to follow in the footsteps of our forefathers.<sup>64</sup>

The next important case was decided on St. George Tucker's homeground of Virginia in 1841.<sup>65</sup> Here, an Englishman who was charged with perjury asked for a mixed jury. The trial court granted the motion and ordered six citizens and six Englishmen summoned. However, three of the Englishmen failed to appear and of the three that did, one was challenged for cause. The defendant then asked that more Englishmen be summoned, and the attorney for the Commonwealth admitted to the court that there were more Englishmen in the county. However, the judge apparently did not want to delay the case so he ordered the jury filled up with bystanders. The accused was convicted, and he appealed. Although there were two aliens on the jury, it was not a jury *de medietate* since two is not one-

---

<sup>62</sup> *Id.* at 208.

<sup>63</sup> *Id.* at 210-12.

<sup>64</sup> *Id.* at 213.

<sup>65</sup> *Richard v. Commonwealth*, 38 Va. (11 Leigh) 690 (1841).

half of twelve. The case was treated as though *de medietate* had been denied; the only relevant statute in 1841 read the same as it had in St. George Tucker's day: "juries de medietate may be directed." The court, per Duncan, J., fastened upon the word "may", pointed out that this is a word giving discretion as opposed to imposing a duty, and consequently held that the accused had not been deprived of any rights.<sup>66</sup>

Writing for the court, Judge Duncan went beyond the narrow grounds for decision and discussed the wisdom of having a jury *de medietate*. Although the court was not explicit about why it did so, one can assume that the discussion was related to the holding about discretion. Since the trial courts are to have discretion to grant or not grant the jury *de medietate*, then the views of the appellate court upon the wisdom of exercising that discretion would be appropriate.

As to general policy, the court pointed out that in England aliens could not become citizens, and so the privilege was proper compensation for this disability, particularly in light of a policy to encourage immigration. The court argued that in this country things were different. Aliens could become citizens; they were scattered all over the countryside and not grouped or confined to certain places as they were in England; three-fourths of the aliens spoke our language; the continued flow of immigration led to no prejudice against aliens. Furthermore, there would be practical problems. The sheriff would find it difficult to summons aliens, since they were dispersed and since he had no easy way of knowing who was an alien and who a citizen.<sup>67</sup>

In addition to policy issues and practical problems, the court went on to discuss what it called "anomalies" of the jury *de medietate*. A citizen was tried by a jury whose members have met a property qualification, which is supposedly a test of fitness, but if *de medietate* were used, an alien could have a jury one-half of whom would be "fugitive and vagabonds, the 'scum of the old world cast upon our shores.'"<sup>68</sup> Furthermore, such a jury would not be impartial and interested in justice since one-half of the jurors would be "aliens, probably his countrymen, peradventure his associates, men like himself, with no

---

<sup>66</sup> Judge Duncan's opinion states the matter in a highly technical fashion. In England, the common law rule had been that aliens could get a mixed jury only by way of a discretionary exercise of the royal prerogative. Such statutes as 28 Edw. III, ch. 13, and 8 Hen. VI, ch. 29, gave the alien a right to have a mixed jury. The Virginia statutes adopt the common law rule of discretion. *Id.* at 692-93.

<sup>67</sup> *Id.* at 695. *Cf.* the text *supra* at note 61.

<sup>68</sup> *Id.* at 696; the court gave no source for its quotation 'scum . . . shores.'

interest in the country, indifferent to its laws, and reckless of its peace."<sup>69</sup>

Robertson, J., dissented. He pointed out that the word "may" in the present code was copied from earlier versions and could be traced back through successive revisions to 1788;<sup>70</sup> he appears to have been concerned that the word "may" was not used in a technical sense in those days. He noted that we can not know when and how the jury *de medietate* was used in earlier times, but that in the modern days he understood that it had been awarded several times, and he himself saw Judge Brockenbrough order it.<sup>71</sup> The inference is apparently that this institution was reasonably well established in Virginia practice. Finally, Judge Robertson argued that discretion was particularly undesirable in a matter such as this; it would be least likely to be exercised when most needed.<sup>72</sup>

In subsequent cases in which the matter was discussed, the courts were brief in their treatment.<sup>73</sup> The right is denied, and the issue dies. Chief Justice Hughes summed up our history when he said by way of dictum:

Although aliens are within the protection of the Sixth Amendment, the ancient rule under which an alien might have a trial by jury *de medietate linguae* . . . no longer obtains.<sup>74</sup>

A review of the arguments about the jury *de medietate linguae* will show that only Judge Duncan of Virginia expressed prejudice against the alien. The expressed reason for denying to aliens this ancient right was that things had changed. In America, unlike in England, an alien was not permanently an alien; by the exercise of his own free will he could become a citizen. Consequently, he did not need this ancient special privilege, or perhaps, did not deserve it. Possibly those who believe that exclusion of blacks from juries is bad but inclusion is unnecessary have an argument like this one in mind. Exclusion *de jure* of blacks from juries would make blacks, like aliens in England, permanent outsiders. However, once this formal exclusion is eliminated, there is no need for any special treatment. Consequently, it can be argued that Judge Field's obscure reference to the

---

<sup>69</sup> *Id.* at 697.

<sup>70</sup> 12 HENING 730, § 44.

<sup>71</sup> *Richard v. Commonwealth*, 38 Va. at 701.

<sup>72</sup> *Id.* at 708.

<sup>73</sup> *State v. Fuentes*, 5 La. Ann. 427 (1850); *People v. Chin Mook Sow*, 5 Cal. 597 (1877); *Wendling v. Commonwealth*, 143 Ky. 587, 137 S.E. 205 (1911).

<sup>74</sup> *United States v. Wood*, 299 U.S. 123, 145 (1936).

jury *de medietate* illuminates the political dynamics argument very nicely. Politics involves many things, but one of the things it involves is putting together coalitions so that a decision can be made on public issues. In this context, one of the fundamental questions is whose views must be taken into account, who is eligible to be a member of a coalition, or in other words, who is a citizen. An alien can become a citizen by complying with certain general laws; the Negro has been made a citizen by the Civil War amendments. Therefore, there is no political reason for special juries. Of course, there is an unstated major premise, i.e., that formal political equality is not merely necessary but is also sufficient.

The arguments pro and con as to the jury *de medietate linguae* did not occur in a vacuum; other arguments were developing on related topics. Perhaps the best summary of the arguments in this area is David Rothman's book *The Discovery of the Asylum* (1971). The first paragraph of the introduction states the crux of the book:

The question this book addresses can be put very succinctly: why did Americans in the Jacksonian era suddenly begin to support institutions for deviant and dependent members of the community? Why in the decades after 1820 did they all at once erect penitentiaries for the criminal, asylums for the insane, almshouses for the poor, orphan asylums for homeless children, and reformatories for the delinquents? Although interpretations of the cause may differ, there can be no disputing the fact of the change. Here was a revolution in social practice.<sup>75</sup>

I will discuss only the parts of Rothman's book that talk about criminals, but the quoted passage shows that what happened in criminal law was typical of nineteenth century social practice, not exceptional.

During the eighteenth century, crime was part of the natural order of things; crime, like sin, was a product of man's depravity. To search for other causes would be silly; to hope for its elimination would be daft.<sup>76</sup>

In the years immediately after the revolution, Enlightenment ideas spread; for the criminal law, this meant Cesare Beccaria's treatise *On Crimes and Punishments*. Beccaria's thesis was that if laws were simple, if punishment were certain and humane, then crime would be reduced. Eliminate the barbarism inherited from feudal-

---

<sup>75</sup> D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* xiii (1971).

<sup>76</sup> *Id.* at 14-20.



ism, embrace the humane rationalism of the Enlightenment, and all would be well. As an explanatory scheme about crime, it moved the cause of deviance away from the criminal's depravity and into the legal system.<sup>77</sup>

Laws were reformed, but by 1820 most people no longer were persuaded of Beccaria's thesis; despite reforms, crime remained. Rothman illustrates the next change by citing appendices of a set of reports made by the inspectors of New York's Auburn penitentiary to the New York state legislature in 1829 and 1830. The appendices were short biographical sketches of inmates. The implicit premises in these sketches were that adult deviance could be related to some significant event in childhood, and the significant event was always the collapse of family control. The logic of causation was without family control, no discipline; without discipline, susceptibility to the temptations of the world; and to yield to temptation leads to crime.<sup>78</sup>

Given this diagnosis, the cure was evident; remove the criminal from temptation and inculcate discipline. Once disciplined, he would be able to return to the world and resist temptation. Given that the prisoner was not inherently depraved, there were no limitations to what a well managed prison environment could achieve.<sup>79</sup> These were the sorts of arguments that the reformers made when they lobbied for new penitentiaries. Whether the legislators and their constituents were persuaded by these arguments or whether they gave their support for different reasons is perhaps impossible to know. The reformers dream, of course, failed. Whatever the reason for the failure, the discipline of the penitentiary became an end in itself, the penitentiary became a place of mere custody, and the prisoners were mostly lower class and alien.<sup>80</sup> While this was happening, aliens lost their right to a jury *de medietate linguae*.

Not only was there a change in the way we dealt with criminals, but the institution of the jury changed in some fundamental ways during the nineteenth century. In 1794, Chief Justice John Jay instructed a jury that although courts were "the best judges of law" that the jury had the "right to take upon . . . [themselves] to judge of both, and to determine the law as well as the fact in controversy."<sup>81</sup> In 1895, the U.S. Supreme Court repudiated this position.<sup>82</sup> The Su-

<sup>77</sup> *Id.* at 59-61.

<sup>78</sup> *Id.* at 64-68.

<sup>79</sup> *Id.* at 80.

<sup>80</sup> *Id.* at 252-57.

<sup>81</sup> *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

<sup>82</sup> *Sparf v. United States*, 156 U.S. 51 (1895).

preme Court was not the innovator in this change; it merely puts its imprimatur upon changes made by other judges. If anyone deserves the claim of innovator, it is Lemmanuel Shaw, who as Chief Justice of the Massachusetts Supreme Judicial Court wrote in 1855 the opinion<sup>83</sup> that the majority of justices on the U.S. Supreme Court relied upon.

The exclusion of juries from questions of law was part of a general change in attitudes toward the jury. In the early days of the Republic, legal writers adopted without reservation Blackstone's view that the jury was the "palladium of liberty."<sup>84</sup> The colonial experience of colonial juries and royal judges had added patriotic fervor to such declarations. In this context, the jury's right to decide questions of law was the technique by which the natural rights of citizens could be protected. By the end of the nineteenth century, the judges agreed that the jury's proper role was to decide facts. Nor was there solid confidence in the jury's reliability for this job, for the nineteenth century also saw the development of techniques of jury control such as directed verdicts.<sup>85</sup>

These two trends, the growth of the penitentiary and the decline of the jury, may be related to each other. The reformers' diagnosis of the immediate cause of crime was lack of discipline, with the more remote cause being the weakened family. The social reality of crime is that criminals are for the most part lower class. A possible explanation of this is that for many of those who are lower class, a life of crime is a rational, perhaps the best available, use of their talents. However, if we are to believe Rothman, the apologists for the penitentiary believed that the lower classes were undisciplined. If the judges were persuaded by this sort of talk, their attitudes toward jurors might be affected. The judges would believe that deciding cases "on the law and the evidence" requires a disciplined mind, the sort of mind the judge believes himself to have. A temptation that seduces the judge is for him to say that the best juror is a person who is just like himself.<sup>86</sup> In so far as the jurors are not just like the judges, and in so far as the difference is perceived by the judges as a lack of discipline, then to that extent the judges will use their power to try to curb the jurors.

---

<sup>83</sup> Commonwealth v. Anthes, 71 Mass. (5 Gray) 185 (1855).

<sup>84</sup> See text accompanying notes 45-46 *supra*.

<sup>85</sup> See generally, Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L. J. 170 (1964). St. George Tucker had warned that this development was likely; see text at note 46 *supra*.

<sup>86</sup> This elitist view remains popular. For a recent expression of it, see Redish, *Seventh Amendment Right to Jury Trial*, 70 Nw. U. L. REV. 486, 502-08 (1975).

The jury *de medietate linguae* is merely a special case of the problem. The alien is most likely to be lower class and his crimes to be lower class crimes.<sup>87</sup> The power and status of the jury was going down, and so it is no surprise that the alien's special privilege went down also. By 1880, the date of *Virginia v. Rives*, all of these changes were substantially complete. In this context, it is not surprising that the court held the way that it did: blacks may not be excluded from the jury, but they need not be included in the jury. What would be surprising would have been a holding that blacks must be included. It would be rational to set out to affirmatively include blacks on juries if one intended to give the jury an expansive role and further saw the value of having divergent insights brought to the jury, yet this was not the policy that was being followed. The role of the jury was being limited, not expanded. Nor is it likely that the men of the nineteenth century would have seen the inclusion of blacks as bringing a valuable special insight; by the ideology of the day, disorder and lack of discipline would have been the result.

The tone of the last several paragraphs is critical of the ideology that supports the decision in *Virginia v. Rives*. However, a rejection of the old ideology is not a sufficient reason for overruling the case of *Virginia v. Rives*. We mean by ideology a theory that is held for reasons other than the truth of the theory, generally for reasons of power. If we reject the old ideology, how can we make sure that the theory that we substitute for it is a theory that is true and not merely a new ideology? And if we get a new theory that is true, will it follow from it that *Virginia v. Rives* should be over-ruled or re-affirmed? These abstract questions can be put in concrete terms. A more concrete way of asking these questions is to ask: If we establish a principle that blacks should be affirmatively included on juries, what will be the consequences? Will they be better, and how can we know? Take, for example, the actual case set out above of the pimp, his woman, and the victim. Would the accused, the pimp, have been helped by the requirement that there be blacks on the jury? Probably not. Most of the blacks who live in Onslow County, North Carolina are also fundamentalist in their religion.<sup>88</sup> This particular group of blacks would not likely be sympathetic to the accused and many of them might be more harsh than whites, in that they would regard him as a particular disgrace and embarrassment to them.

---

<sup>87</sup> See text at note 80 *supra*.

<sup>88</sup> I make this observation from my own memory of Onslow County from the days when I was stationed at Camp Lejeune.

In trying to find a solution to a problem one ought not forget what the problem is. We ought to have a reasonable number of the accused's peers on the jury. By "peers", I mean those who have enough in common with the accused, or who have enough sympathy for the accused, to be able to give a realistic evaluation of his story. How are we to know who might be able to do this? Who is going to make such decisions?

Perhaps the way to begin to answer these questions is to look at current practice in jury selection. By reputation, the maestro is Charles Garry. Consequently, we can count ourselves fortunate that Garry's *voir dire* in the Huey Newton trial has been published.<sup>89</sup> We are doubly fortunate in that the volume contains an essay<sup>90</sup> on the problem by Prof. Robert Blauner, a sociologist at Berkeley. Professor Blauner served as an expert on the defense staff in two capacities; he testified in support of defense challenges to the master jury panel by saying that the method of selecting the panel aggravated rather than minimized the exclusion of blacks from the jury; he also advised the defense during *voir dire* as to selection criteria that would minimize racism. As to the first, the relevant fact was that in Alameda county the jury list was drawn up by selecting from the list of registered voters. Professor Blauner's testimony, together with that of other experts, was that the "registered voter" criteria was not neutral with regard to race or class and that a jury drawn in this way could not be a representative cross-section of the community.<sup>91</sup>

As to the second, his advice to the defense during *voir dire*, Professor Blauner does not tell us very much about his own contributions. Instead, he gives us a thoughtful description of the way counsel questioned prospective jurors and exercised their challenges. At the end of the essay, he makes suggestions.

Blauner is quick to see that rational strategy for a trial lawyer is inconsistent with the goal for a jury as stated in constitutional norms.<sup>92</sup> The norms state that the jury ought to be a representative cross-section of the community. However, some parts of a community may be hostile to one side or the other in any given case. Counsel will try to exclude this part from the jury; the obvious reason is that it is easier to persuade a juror who is not hostile than a juror who is hostile, and counsel's job is persuasion. Huey Newton was charged with murdering a policeman; the witnesses for the prosecution were

---

<sup>89</sup> A. GINGER, ed., *MINIMIZING RACISM IN JURY TRIALS* (1969) [hereinafter cited as GINGER].

<sup>90</sup> *Id.* at 43-73.

<sup>91</sup> *Id.* at 220-29.

<sup>92</sup> *Id.* at 53.

all white policemen, and the witnesses for the defense were all blacks. Garry, for the defense, wanted to exclude any white who had a policeman for a friend, while Jensen, the prosecutor, wanted to exclude every black who lived in the ghetto. Each was rather successful in his strategy, and thus the panel became non-representative; or rather, to be more precise, a panel that was not representative became even less representative.

Let us turn to the details of Garry's conduct, since it is relevant to our theme, beginning with Blauner's description of Garry's style.

Garry . . . often made his decisions [about challenges] on the basis of an intuitive hunch about the prospective jurors . . . Garry's quick intuition is aided by the force of his personality. Unlike Jensen, whose neutral, bland style evokes a response in kind, Garry relates to prospective jurors quite personally. Expressing feelings freely, his strong presence makes it difficult for the other to maintain a neutral stance. Thus while many are 'won over', the hostility of some became explicit and this aided the counsel in sizing them up.<sup>93</sup>

It is reasonably clear from Blauner's account that the prospective juror's answers to questions were less important to Garry than the way the question was answered, all the subtle clues and demeanor by which we reveal ourselves. Indeed, the questions themselves were at times not designed to get information, but for some other purpose:

An elderly woman who was to become one of the regular jurors admitted that she had some subjective feelings of racism. Instead of following this up with the obvious query—"Tell me what some of those feelings are," he continued: "And because of these subjective—some subjective feelings you have, do you make allowances for your own shortcomings in that regard?" She answered "yes," and although a graduate student would flunk a test in social research for such an obvious error, Garry's method may have been the successful one for his purpose. The woman turned out to be one of the "best" jurors from the defense standpoint. Perhaps the persuasive effect of Garry's "too-direct" question was more valuable in "educating" this woman than the information that a "better" wording might have gleaned.<sup>94</sup>

---

<sup>93</sup> *Id.* at 52.

<sup>94</sup> *Id.* at 60.

I would add a surmise that Garry had probably determined from her demeanor in answering the first question that she was able to set-aside or compensate for whatever prejudice that she might have, so he asked the second question not only to "educate" but also to strike up a rapport. His question was a compliment to her, and she probably appreciated it.

If we turn for precedent to the classical rhetoricians and use their terminology, we can say that Garry relies on *ethos* instead of *pathos* or *logos*. The persuasiveness of Garry's own arguments will depend upon his character and presence, i.e., his *ethos*, and so he is concerned with the character, the *ethos*, of the jury.<sup>95</sup> Consider the following excerpt:

A retired small businessman first referred to black people as "colored," an old-fashioned expression which often indicates a prejudiced orientation. But because he was old and foreign-born, we attributed this usage to the norms of his generation. Later he spoke of an unfortunate experience with a "colored boy" who turned out to be 25 years old. When Mr. Garry pointed out that Negro adults don't particularly appreciate being called boys, the man seemed genuinely surprised. Rather than acting defensively, he appeared to understand and to have learned something from the exchange.<sup>96</sup>

Garry did not challenge him.

For a further example of character analysis, consider the following:

A similar [referring to the above] openness and honesty was conveyed by a middle-aged saleslady . . . Though by no means politically left or even "liberal," she appeared to be a woman who had thought about racial matters, someone who habitually wrestled with her conscience. She admitted being very upset when a Black Panther spokesman appeared before her church discussion group and accused all white Christians of being racists. His speech and her anger had made her think quite a bit.<sup>97</sup>

People who expressed "liberal" views were not automatically accepted. If the expression of "liberal" views had about it "a quality of

---

<sup>95</sup> For a recent and imaginative commentary on this classical trichotomy, see J. WHITE, *THE LEGAL IMAGINATION* 806-821 (1973).

<sup>96</sup> GINGER, note 89 *supra*, at 64.

<sup>97</sup> *Id.*

smugness,"<sup>98</sup> if the liberal seemed overly righteous about his views, then Garry was likely to challenge.

Toward the end of his essay, Professor Blauner summarizes his own views as to how one can minimize racism in a jury comprised largely of whites; he offers "four tentative criteria."<sup>99</sup> The first criterion is self-consciousness: a white should not deny and suppress his prejudices, but rather should be aware of them and try to reduce their impact. The second criterion is knowledge: a white should know about black history and the circumstances of black life in America. The third criterion is experience: the white should have contact with blacks in work, friendship and residence. The fourth criterion is activity: the white should be engaged in some activity to combat prejudice.<sup>100</sup> Professor Blauner does not suggest which, if any, of these criteria are the more important.

How do Blauner's criteria compare with Garry's practice? Both are directed toward finding out about the *ethos*, the character, of the prospective juror. Blauner's criteria sound on first reading as though they are objective, in comparison to Garry's subjective and intuitive practice, but they are not. Of course, it is possible to argue about how such words as "subjective" and "objective" should be used. The word "objective" can be used to mean that observers agree in their description of what they see. If we turn to Garry's practice in his interrogation of prospective jurors, we can recall that two characteristic features of it were: one, he wanted jurors who were open, rather than closed, in their views; and two, he wanted jurors with whom he could strike a rapport, rather than someone who was distant or cold. This is the sort of thing that observers could witness and then agree upon. When we watch two people talk, we can and do agree about such things as their hostility or openness or friendliness towards each other. Of course, it is also fair to say that Garry's methods were intuitive. We often use the word "intuitive" to describe actions that are made quickly, without calculation, and Garry made decisions in that way. Furthermore, it is fair to say that Garry's methods were subjective. We often use the word "subjective" to describe actions for which one cannot state reasons, and Garry might not be able to state why he made his judgments the way that he did. Indeed, our observers, objective in that they agree, might be subjective in this sense. A smile might accompany an answer, and we might characterize it as snide, or rueful, or knowing, or reluctant. We might agree as to which

---

<sup>98</sup> *Id.* at 65.

<sup>99</sup> *Id.* at 67.

it was, but be unable to give a geometrical description of the coordinates of the edges of the lips and other features and so distinguish it by unambiguous description. Note that there are similar problems with Blauner's criteria. What is to count as activity, experience, or knowledge? And how much? As for self-consciousness, how will we determine this? Not only whether certain things are said, but whether they are also said *sincerely*. In short, whatever the differences, and I suspect there are none, such words as "objective" or "subjective" won't mark them out. More importantly, there is a striking similarity; Blauner's criteria also require a "hearing." That is, there is no way to administer Blauner's criteria without calling the prospective juror into the jury box, with judge and both counsel present, and asking questions, and making judgments about close cases. We could not tell a sheriff to go out and apply the criteria, and bring in the jury. Consequently, this way of avoiding racism has administrative consequences that are quite different from proposals about mixed juries; for the latter the sheriff could do most of the job.

As I stated above,<sup>101</sup> Garry's practice does not generate a jury that accords with our constitutional norms. The most recent re-statement of those norms is found in *Taylor v. Louisiana*.<sup>102</sup> In that case, the court re-iterated the rule that the jury must be drawn from a representative cross-section of the community and held that the exclusion of women from the jury violated that rule. In the course of his opinion for the court, Justice White discussed the Federal Jury Selection Act of 1968:<sup>103</sup>

In passing this legislation, the Committee Reports of both the House and the Senate recognized that the jury plays a political function in the administration of law and that the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American sense of justice.<sup>104</sup>

In a footnote, Justice White quoted from the following:

It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross-sectional goal, biased juries are the re-

---

<sup>100</sup> *Id.* at 67-68.

<sup>101</sup> See text at note 92 *supra*.

<sup>102</sup> 95 S. Ct. 692 (1975).

<sup>103</sup> Pub. L. No. 90-274, 28 U.S.C. §§ 1861 *et seq.* (1970).

<sup>104</sup> 95 S. Ct. at 697.



sult—biased in the sense that they reflect a slanted view of the community they are supposed to represent.<sup>105</sup>

Justice White summarized the matter by saying:

The purpose of the jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecution and in preference to the professional or perhaps overconditioned or biased response of a judge.<sup>106</sup>

Of course, Justice White put a caveat on the norm in a passage that re-iterates the logic of *Virginia v. Rives*, a duty not to exclude does not entail a duty to include:

It should be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition . . . , but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.<sup>107</sup>

Is this conclusion wise? Should we require the trial jury to be a representative cross-section of the community? The answer to this question is not easy, but it is relevant to ask: if we did make such a requirement, would it do any good? My position is that a good jury is a jury that can make a fair evaluation of the testimony. I would further argue that a jury that is sympathetic yet not partisan can best do the job. There remains only one problem: how do we get such a jury in a reasonable number of cases. Any rational person, given a choice between a jury selected by the maestro or a jury that is a random cross-section, would choose the former. There is only one Charles Garry, so the problem is whether the average lawyer using normal *voir dire* will get a better jury than some randomizing scheme. To be candid, I know of no way to prove anything about this matter one way or another. My instincts are to prefer human judgment, but I can not be confident of anything because I do not know what the

---

<sup>105</sup> *Ibid.*, n.7, quoting from H.R. Rep. No. 1076, 90th Cong., 2d Sess, p. 8.

<sup>106</sup> *Id.* at 698.

<sup>107</sup> *Id.* at 702.

future holds for the practice of *voir dire*. Current practice differs widely from place to place, the matter has become controversial, and we are sure to see many proposals for changes in the near future.<sup>108</sup>

The recent case of *Ristaino v. Ross*<sup>109</sup> leaves future developments of this area of law open for experiment. The court pulled back from any extension of its precedents on *voir dire* so as to create constitutional standards that the states must observe, but it stated that it would go further in creating standards of *voir dire* that federal courts must observe. In particular, the court stated that the *voir dire* question that it would not require a state court judge to ask in the *Ristaino* case would be a required question in a federal court.<sup>110</sup> In short, the Supreme Court has refused to constitutionalize this part of the law and has instead left it open to ordinary statutory and decisional development. Consequently, there is no way to predict how the law of *voir dire* will develop, but there is a substantial risk that *voir dire* will be emasculated in the name of efficiency. What is the alternative to the uncertain prospects for *voir dire*? Suppose we have a master list that is a representative cross-section of the community. Is it possible to assure that the trial jury is also a representative cross-section? How could it be done? First of all, one would have to curtail sharply, and perhaps eliminate entirely, the currently used challenge procedures.<sup>111</sup> As long as counsel can play a role, they will be rational and try to change the skew away from a representative cross-section to a non-representative cross-section, favorable to one side. It is folly to expect counsel to behave in any other way. However, eliminating challenges, or at least peremptory challenges would be unpopular with many people and might even raise constitutional problems. As a substitute for challenges, the judge would have to exercise enough control over the selection of the trial jury to make sure that the trial jury was as representative a cross-section of the community as the master list. The problem is that the master list is a cross-section in the statistical sense. As a statistical matter, we can be confident that the differing perspectives on life that the community contains are represented on the jury without knowing who on the list represents what. Yet if we try to pick twelve people from this list, we can not be confident that the statistics will preserve the representation; we need to know who represents what.

---

<sup>108</sup> See, e.g., Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493 (1975).

<sup>109</sup> 96 S. Ct. 1017 (1976).

<sup>110</sup> *Id.* at 1022.

<sup>111</sup> See text at notes 92 and 101 *supra*.

More specifically we must be clear about what we mean by the phrase: "a representative cross-section." The master list or the trial jury could be a cross-section of the community in at least two different ways. We might have a cross-section of ideas or a cross-section of social characteristics. It is clear enough from Garry's practice<sup>112</sup> that he believes that the jurors' attitudes and ideas are what are important. The House Report on the Federal Jury Selection Act of 1968<sup>113</sup> stated that the goal was a jury that would "reflect the community's sense of justice" and that a biased jury is a jury that reflects "a slanted view of the community." Thus, those who purport to know are interested in a cross-section of ideas. However, even if our master jury lists are made up properly, the only thing we can be sure of is that they are a cross-section of social characteristics.

Our hope is that a socially diverse master list will also be ideologically diverse. As a statistical proposition, this is a fair assumption. However, if the trial judge were to draw from this list a jury of twelve that would resemble the classic New York City "balanced ticket"—one Jew, one Italian, one Irish, one Negro, one Puerto Rican, and so forth—there is no reason to believe that the resulting jury would be ideologically diverse. The "balanced ticket" has ethnic diversity, but it does not have occupational diversity. Surely no one would believe that an ethnically diverse group of bank clerks would be ideologically diverse.

The alternative of letting the trial judge go directly to ideological diversity is unacceptable. This alternative would require that we give the trial judge the power to question jurors about their attitudes and then select a jury of diverse attitudes. I can't imagine that many judges would want such an awesome responsibility, and I would be suspicious of any judge that did.

The only feasible compromise would be to seek a jury with occupational diversity, but this would present technical problems. We would have to take the standard tricotomy of white collar, blue collar, unemployed, and break it down into a finer set of categories. Assuming that this could be done, the main problems would be political. The occupational exemptions of our present statutes would have to be eliminated,<sup>114</sup> and there would be opposition to the change. Most importantly, the change would require public acceptance of the Marxist proposition that class determines beliefs. For worse or for

---

<sup>112</sup> See text at notes 89-98 *supra*.

<sup>113</sup> See text at notes 103-05 *supra*.

<sup>114</sup> See, e.g., CODE OF VIRGINIA, § 8-208.6. (Supp. 1975).

better, it would be a wrenching change for our lawmakers to offer an allegiance to Karl Marx.

Another possibility is for the prosecutor and the defense counsel to agree to have a diverse jury. For example, in the case presented at the beginning of this article, why not have a jury comprised of half customers and half entrepreneurs? More generally, why could not the prosecution and the defense agree to a jury one-half of which was representative of the victim and one-half of which was representative of the accused? The only prerequisite is trust and good faith, but to state the prerequisite is to demonstrate its non-existence.

If none of these alternatives is chosen, we shall have to continue with the *voir dire* techniques that we now know. It would be possible to speculate on the comparative merits of the several alternatives, but it would probably be useless to do so. There is no evidence that changes in jury practice in the past have ever been made on the basis of comparative merit, and there is no reason to believe that things will be different in the future. Changes in jury practice have been a function of more profound changes in political belief. What changes might be ahead? Which of these changes might be relevant to jury practice?

The most important change that could occur would be a change in the way we understand the criminal. The criminal has been thought of as depraved and sinful. Alternatively, the criminal has been thought of as a product of his environment. Consider the following:

[A] criminal is someone who has chosen to engage in criminal activity because the expected utility of such activity to him, net of expected costs, is greater than that of any legitimate alternative activity.<sup>115</sup>

To Posner, everyone is a utility maximiser, and so the ultimate point of the excerpt is that the criminal is just like the rest of us. The Posner excerpt is applicable here because he says, in his own peculiar way, what may be becoming the new belief—the criminal is a person, a human, just like any one else.

There is no way to predict what changes will occur, particularly what the details might be. However, the most significant change that could occur would be a change that would regard criminals as ordinary humans. This sort of change would be an abandonment of elitism, and if we were not elitists we would also admit the jury into a

---

<sup>115</sup> R. POSNER, *ECONOMIC ANALYSIS OF LAW*, 365 (1972).

larger role in our system. If this were so, we could find ways to see that the community was represented in all of its richness. One suspects that all of the technical problems could be overcome if there were a fundamental change in our political ideology. However, I have no clues as to the likelihood of such a change.