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## Ginger (Ed.): Minimizing Racism in Jury Trials

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### Recommended Citation

Leigh H. Taylor, *Ginger (Ed.): Minimizing Racism in Jury Trials*, 19 DePaul L. Rev. 821 (1970)  
Available at: <https://via.library.depaul.edu/law-review/vol19/iss4/11>

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## BOOK REVIEW

*Minimizing Racism in Jury Trials.* BY ANN FAGAN GINGER (ED.). Berkeley, Cal.: The National Lawyers Guild, 1968. Pp. xxv, 247. \$10. (\$6. for Students and New Lawyers)

Kingman Brewster, the President of Yale University, recently stated that he did not believe that a black radical could receive a fair trial in the United States.<sup>1</sup> Many share this belief and would further contend that no black can receive a fair trial under the present system of criminal justice.<sup>2</sup> Such cynicism is not difficult to understand in a country where slavery was enforced for over 300 years; where two sets of civil rights acts, a century apart, were needed and are still not adequately implemented; where black children who were born in 1954, the year of the promise of integrated education, remain in segregated schools.

Indeed, in 1968 the Kerner Commission acknowledged the existence of racism throughout our society.<sup>3</sup> If it is true that most white Americans share in this racism, how many white judges, attorneys, court officials and jurors must be racist? Law is a white man's profession<sup>4</sup> and whites do not shed their racism, nor do they leave it in their homes, union halls or country clubs, simply because they are judges, jurors, or lawyers and are supposed to be "color blind" and "fair." Chief Judge Rives of the Fifth Circuit Court of Appeals, in dealing with the question of whether the black petitioner's white attorneys had waived his rights regarding systematic exclusion of Negroes from the jury that convicted him, stated:

As Judges of a Circuit comprising six states of the deep South, we think it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of

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1. "I am appalled and ashamed things should have come to such a point that I am skeptical of the ability of black revolutionaries to achieve a fair trial anywhere in the United States." *Behind the Turmoil at Yale: "Black Power" and the Courts*, U.S. NEWS & WORLD REPORT, LXVIII: No. 19, May 11, 1970, at 41-42.

2. "There is no equal justice for black people today; there never has been. To our everlasting shame, the quality of justice in America has always been and is now directly related to the color of one's skin as well as to the size of one's pocket-book. Our constitution and the entire body of our written law say it shall not be that way, but our judges have made it that way." Crockett, *A Black Judge Speaks*, 53 JUDICATURE 360, 361 (1970).

3. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 91-93 (1968).

4. The National Bar Association estimates that there are only 3,845 black attorneys (not all are in practice) and 214 black judges at all levels including only 19 federal judges. National Bar Assn., *Judiciary Committee Report* (July 24, 1970). See Brown, *Racial Discrimination in the Legal Profession*, 53 JUDICATURE 385 (1970); Gellhorn, *The Law School and the Negro*, 1968 DUKE L.J. 1069; Assoc. of Amer. Law Schools, 1967 *Proceedings*, Pt. I, 160; *Report of the National Advisory Commission on Civil Disorders*, 165-66, 169 (1968).

Negroes from juries.<sup>5</sup>

Certainly, the prosecutor, who used a mature black woman's first name after she requested that he address her correctly as Miss Hamilton, and the judge, who held her in contempt when she became insistent, were racist.<sup>6</sup> It is clear then, that the racism of society is mirrored in the administration of the judicial system.<sup>7</sup>

Whatever the reason, intentional or fortuitous, blacks do not sit on juries, especially when the case involves a black defendant.<sup>8</sup> Apparently, Nathan Taylor did not agree with Mr. Justice White's attitude that a jury is "essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants,"<sup>9</sup> for Taylor demanded that he be allowed to waive this valuable right because feelings against Negroes were running high in the community.<sup>10</sup> Taylor was apparently correct,<sup>11</sup> but Charles R. Garry would prefer to try a case "before 13 prejudiced people than before just one"<sup>12</sup> and apply his legal skills to produce as representative a jury of fair and impartial jurors as possible. *Minimizing Racism in Jury Trials*<sup>13</sup> describes Garry's efforts to deal with racism in defending Black Panther Party leader Huey P. Newton, on trial for his life, against the charge that he had murdered officer John Frey in October, 1967.

There are several levels of attack on the process which eventually produces a given jury and Garry used them all. The defense "wanted a jury that would be part of the 'peer' group of Huey Newton. We wanted men

5. *U.S. v. Harpole*, 263 F.2d 71, 82 (5th Cir. 1959), *cert. denied*, 361 U.S. 838 (1959).

6. *Hamilton v. State*, 275 Ala. 574, 156 So.2d 926 (1963); *rev'd per curiam*, 376 U.S. 650 (1964).

7. See, Broeder, *The Negro in Court*, 1965 DUKE L.J. 19. It is important to remember that racism manifests itself in greater conviction rates, conviction of higher degrees of crime and more severe sentences for the black defendant. See Morgan, *Dual Justice in the South*, 53 JUDICATURE 379 (1970).

8. Exclusion by statute is unconstitutional, *Strauder v. West Virginia*, 100 U.S. 303 (1880), as is exclusion through discriminatory administration of the selection process, but exclusion resulting from the prosecutor's exercise of his peremptory challenges is permissible. *Swain v. Alabama*, 380 U.S. 202 (1965). Racial exclusion results as a secondary effect of removal of a juror for cause based on his opposition to the death penalty. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 COLO. L. REV. 1, 17-20 (1970).

9. *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968).

10. *State v. Taylor*, 391 S.W.2d 835 (Mo. 1965). One wonders if Taylor took into account the suggestion that the defendant tried before a judge alone is nearly twice as likely to be convicted as one tried before a jury. KALVEN & ZEISEL, *THE AMERICAN JURY*, 58-59 (1966).

11. The jury found him guilty and assessed punishment at twelve years which was reduced by the trial judge to ten years.

12. Garry, *Attacking Racism in Court Before Trial*, in *Minimizing Racism in Jury Trials*, xvii (A. Ginger ed. 1969).

13. A. Ginger ed., *Minimizing Racism in Jury Trials* (1969).

and women who came from the same groups he did: economic, social, environmental, age, language, and political groups, with the same behavioral background and understanding."<sup>14</sup> Thus, Garry challenged the entire master panel and jury venire contending that the use of voter registration lists, without supplementation, as the basis of selection of jurors resulted in a master panel which was not representative of the community because of the disproportionate exclusion and underrepresentation of racial minorities and the poor.<sup>15</sup> He lost.

Faced with a panel that the defense felt was not truly representative, Garry attempted through the voir dire to produce as fair and impartial a jury as possible by eliminating the most prejudiced. With the exception of the motion challenging the panel and the appellate brief, most of the book is concerned directly with the voir dire and its effect on the selection<sup>16</sup> of the jury, the reasons behind challenges for cause by both the prosecution and defense and some useful insights by members of the defense team regarding the exercise of peremptory challenges.

The basic voir dire questions number 290. One wonders whether the average trial judge, in an average criminal trial, would permit or even stand for much beyond the normal questions which typically relate to bias and produce a general declaration by the juror of his impartiality.<sup>17</sup> But this was Huey Newton; black, militant and radical; the leader of a political group that had, at the very least, been labelled by government officials and the press as "dangerous," all of which seemed to make an extensive voir dire more desirable and necessary to preserve the image of a fair trial. While many of the voir dire questions relate to the jurors' attitudes toward police, black power, militancy, and the views of the Black Panther Party, which were particularly applicable in this case, most of the questions deal with the kind of racism that would prejudice any black defendant<sup>18</sup> and, if necessary to protect Huey Newton, are necessary, and should be permitted in the trial of any non-white defendant.<sup>19</sup>

14. *Supra*, note 12 at xix.

15. Challenge to Method of Selecting Names for Jury Panel, in *Minimizing Racism in Jury Trials*, 3-12 (A. Ginger ed. 1969).

16. Selection is a misnomer. Counsel has merely the right of rejection for cause or peremptorily.

17. While debate continues regarding whether the voir dire should be conducted by the judge or the attorneys or some combination of all, it is certainly true that the voir dire and the impanelling process are time-consuming; the selection of the jury in some cases being longer than the trial. See Note, *Judge Conducted Voir Dire as a Time-Saving Trial Technique*, 2 RUTGERS · CAMDEN L.J. 161 (1970).

18. "You know as well as I that the jury is going to bring prejudices into the courtroom. No matter what the judge says to them, they are going to use them and apply them to the facts.

When a juror walks into a courtroom hating Negroes, he is going to hate them walking out." Harrington & Dempsey, *Psychological Factors in Jury Selection*, 37 TENN. L. REV. 173 (1969).

19. The law is not altogether clear as to whether white jurors may be queried on racial bias at all. Even if this type of voir dire is permissible, its scope might be limited to prevent detailed questions. See Amandes, *Jury Challenge in Criminal*

Garry not only used the voir dire to obtain information to challenge for cause and as a basis for exercising peremptory challenges, he used it to "educate," "intimidate" and "influence" prospective jurors and other panelists.<sup>20</sup> Though the intensive voir dire produced many challenges for cause based on prejudice on the case, the questions dealing with racism effected the removal of only two prospective jurors for their anti-black attitudes, including a woman "whose honesty and openness might have made her a more fair and impartial juror than the average."<sup>21</sup>

But how can a woman who had testified that she moved to a nearly all-white suburb because the area in which she lived was becoming predominantly black be less of a racist than a juror who denies that he has any feeling of bias? Perhaps it is, as Garry says, that "every white person has a certain degree of racism within himself. If people are honest and have given the matter serious consideration, they will admit this. Such people may be able to struggle within themselves and come to a fair verdict."<sup>22</sup> Few white Americans admit racial prejudice, for it is now socially unacceptable to appear biased. Public officials no longer demand the "preservation of racial integrity" or the "prevention of a mongrel breed of citizens" or the "obliteration of racial pride;"<sup>23</sup> they now demand that the "neighborhood school" remain inviolate or that school children not be "bussed."<sup>24</sup> But even if these are not euphemisms for racism, the point is that racial bias has become hidden within many whites and is often subtle, sophisticated and difficult to find unless it is searched for in a methodical and concerned way. An example will make the point.

From the commentary, Judge Monroe Friedman, the trial judge in the case, appeared to be a cut above the average trial judge; liberal, fair and flexible, yet determined to presume the impartiality of every juror until proven otherwise. Consider the following exchange:

The Court: Now, tell me this: You moved out because of the fact that you say there were too many black people moving in where you lived before.

The Juror: The whole village moved for that cause.

\* \* \* \* \*

The Court: Why did that make you move, because there were too many black people? Why did you move, on that account? *Did you have children, or something?* (Emphasis added.)<sup>25</sup>

Certainly the fact that a white moved to avoid living near blacks would

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*Cases: When, How, and Group Membership Bias as a Basis Therefor*, 3 WAYNE L. REV. 106, 116-18 (1957).

20. "[H]is questions were asked as much to influence the person to see the case as he saw it, rather than to find out more about the person's state of mind." Blauner, *Sociology in the Courtroom: The Search for White Racism in the Voir Dire*, in *Minimizing Racism in Jury Trials*, 60 (A. Ginger ed. 1969).

21. *Id.*, at 61.

22. *Supra* note 12, at xix-xx.

23. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

24. These arguments were seldom made when "bussing" and "non-neighborhood schools" were utilized to perpetuate segregated education.

25. *Voir Dire by Defense (Extracts)*, in *Minimizing Racism in Jury Trials*, 158-59 (A. Ginger ed. 1969).

be a manifestation of racism which would not change simply because the juror had "children or something." Yet Judge Friedman offered the juror an excuse that would still be racist but perhaps more understandable. White Americans must come to terms with their internal racism; first by acknowledging its presence and then by working and making allowances to overcome it. This is the central theme of the work, but the goal will certainly be a difficult task in an increasingly racially polarized society.

Nine blacks were passed for cause and the prosecutor exercised eight peremptories, leaving only one black, a loan officer for the Bank of America, who served as a "token"<sup>26</sup> yet was acceptable to the prosecutor because of that juror's middle class economic status. If this exercise of peremptories was based on the prosecution's supposition "that the Negro juror may be sympathetic to the Negro defendant, by the same token it must be assumed that a white (juror) may be sympathetic to the white victim; thus, when the prosecutor challenges a Negro to get a white juror in his place, he does not eliminate prejudice in exchange for neutrality, he secures a friendly juror in place of a hostile one."<sup>27</sup> Racism prevents the black defendant from receiving a fair trial, for racial prejudice implies white superiority and black inferiority; prejudice connotes a lack of understanding; and bias suggests that the mind has an inclination towards a party and is not open to what the evidence might produce.

It is difficult to believe that white jurors could ever understand the hostility many blacks feel toward police oppression or ever realize the necessity for black men to patrol the streets of the ghetto to provide a "conscience" for the police.<sup>28</sup> Such jurors must necessarily react to the use of the word "pig" to describe the police, the clenched-fist raised to symbolize black power and unity, or an "Afro" hair style to celebrate blackness. When there is a dispute in the evidence, a conflict between a white prosecution witness and a black defense witness, it is entirely reasonable to suspect that a white juror's racism, subjective or overt, will manifest itself in deciding those facts. The white life style is different; how can he believe that the police, whom he sees as school crossing guards and protectors of his property and person, could or would ever physically attack a black man. If this is the defense, it will probably fall on deaf white ears.

Even with a predominantly white jury, the presence of some blacks may help the white jurors to reach a more impartial decision. Garry describes the trials of another Panther, Warren Wells, who was tried three times:

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26. Although the Supreme Court has sustained peremptory challenges by a prosecutor which were or seemed to be exercised to purposely exclude blacks, Justice White stated: "If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome." *Swain v. Alabama*, 380 U.S. 202, 224 (1965).

27. Stender, Appellate Brief on Jury Selection, in *Minimizing Racism in Jury Trials*, 234 (A. Ginger ed. 1969).

28. This was the factual context in which Officer Frey died. Brief Statement of Facts, in *Minimizing Racism in Jury Trials*, 1 (A. Ginger ed. 1969). Police practices are one of the primary grievances of blacks. *Supra* note 3, at 80-83.

The first time the vote was 10-2 for acquittal on two counts, and 6-6 for acquittal on two counts, with two black jurors sitting. In the second trial, the jury stood 11-1 for acquittal on all charges, with two black jurors sitting. In the third trial, the D.A. purposely and intentionally used a peremptory challenge on every black juror. After 27 hours of deliberation, the all-white jury found the defendant guilty . . . . The foreman of the third jury said afterward that, if there had even been one Negro juror sitting with them, he probably could have explained some of the things the jurors were concerned about in the jury room . . . .<sup>29</sup>

Although it is pure conjecture to speculate on the number of black jurors who are necessary to offset racial prejudice, it might be wise to reconsider the constitutional standard that a black defendant does not have a right to representation of his race on the jury panel in his case,<sup>30</sup> or to devise some other adjustments to insure that jurors are able to understand the black perspective.<sup>31</sup>

The use of voir dire to minimize racism was at best only a partial success. Sociologist Robert Blauner, a member of the defense team describes its strengths and weaknesses:

[T]he voir dire and the challenge system—may be reasonably effective in eliminating those members of the panel who are very strongly biased toward a particular side of the case. But the experience in the Newton trial . . . suggests that this process is quite ineffective in achieving a jury that is most free of racial bias.<sup>32</sup>

If such an extensive voir dire, which would probably not be permitted in the average case, is unproductive in eliminating racism, where should the attack lie? Blauner observes that "the very procedures by which the twelve final members are selected from the original panel would appear to impose obstacles on the seating of a non-racist or anti-racist jury."<sup>33</sup> Ziesel, in a slightly different context, describes these procedures as "the link in a fatal chain."<sup>34</sup>

Rather than dismiss jurors because of racial bias, demonstrated by their answers on voir dire, Blauner proposes a positive test that he feels should be applied to prospective jurors to produce the "least racist whites." He lists four criteria for such an evaluation:

1. [T]he least racist person would not deny racial prejudice, but would be aware that he reflected elements of the society's pervasive racism. He would be sensitive to his racist tendencies, would keep them in his consciousness rather than suppress them, and would strive of course to reduce their impact.

29. *Supra* note 12, at xx.

30. *Bush v. Kentucky*, 107 U.S. 110, 117 (1882). *But see*, *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966) *cert. denied*, 386 U.S. 975 (1966).

31. Note, *Instructions to Jury to Insure Racial Impartiality*, 8 WYO. L. REV. 161 (1953-54); *Brooks v. Beto*, *supra* note 30 (purposeful inclusion of black jurors).

32. *Supra* note 20, at 66. Another example of the limits of the voir dire and challenge system is demonstrated in the failure to disqualify any grand juror in the case of *New York v. Lumumba Abdul Shakur*. Lefcourt, *Voir Dire of New York Grand Jury*, 28 GUILD PRAC. 78, 85 (1969).

33. *Supra* note 20, at 66.

34. Ziesel, *Dr. Spock and the Case of the Vanishing Women Jurors*, 37 U. CHI. L. REV. 1, 9 (1969).

2. [K]nowledge. To effectively combat racism, a white person should not see blacks as "invisible" but be attuned to the social circumstances of the present and the forces in the past which have produced our racial crisis.
3. [C]ontact and experience with members of the minority group. Since the social and cultural barrier between whites and blacks is a keystone of the racist system, leading a life that is primarily segregated in terms of work, residence, and friendship in itself reflects and maintains white racism.
4. [A] non-racist must be involved in efforts to combat discrimination and prejudice. . . . Some personal project toward the goal of racial justice.<sup>35</sup>

No one can quarrel with Blauner's test; it *might*, if administered by psychologists, measure and distinguish between whites in terms of their racism. But, as a test for jury duty, Blauner is being totally unrealistic. Few whites could measure up to his standard and this means that to apply effectively it would either greatly overburden an already overburdened system of judicial administration, or exclude most whites from juries sitting on cases involving black defendants. If the latter is the result, why not adjust the selection process in other, more efficient ways, that more adequately reflect the notions of a "cross-section of the community" and preserve the traditional function of the jury as a "political institution."

To this point, the discussion has been primarily concerned with the impact of the all-white jury on the black defendant's right to a fair and equal trial. But there are other valuable social interests which the jury traditionally serves. "Just as popular election helps to legitimize legislatures to members of a society, lay participation on juries provides legitimation for the judicial process."<sup>36</sup> Juries inject "the values of the lay community into the adjudicative process (which) impose in the name of justice a needed restraint upon the inexorable logic of the law."<sup>37</sup> Although there are alternatives which touch on one or more of the aspects of the jury, the black defendant, and the black community, one of the best appears to be the development of all-black juries.<sup>38</sup>

This proposal consists of redrawing districts "so that each black community would constitute a jury district, or vicinage, the other vicinages being predominantly white."<sup>39</sup> This would incorporate the benefits of the jury as a social and equitable process, while minimizing the degree of actual or imagined racism felt by the black defendant. Minimizing, because blacks share in the white racism that pervades society. Blauner contends that

"[a]lthough people of color have also been influenced by the racist assumptions of American culture, their experience as victims of discrimination still make them more aware of the totality of circumstances which motivate black and other non-white

35. *Supra* note 20, at 67-68.

36. Note, *The Case for Black Juries*, 79 *YALE L.J.* 531 (1970).

37. Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 *VA. L. REV.* 1069, 1111-1113, n. 229 (1966).

38. *Supra* note 36.

39. *Supra* note 36, at 548.

defendants."<sup>40</sup>

Such a jury will be fairer to the black defendant, but "is not fundamentally defendant-prone, rather it is non-rule minded; it will move where the equities are. And where the equities are at any given time will depend on both the state of the law and the climate of public opinion."<sup>41</sup> One additional problem may arise:

[T]o those concerned (perhaps in earnest) that this alternative may perpetuate racial polarization, it can be pointed out that as the society becomes less racist—if it ever does—the different vicinages become less all-white or all-black. The vicinage solution goes directly past the "racism in reverse" argument, and puts the burden of eradicating racism in this country squarely where it belongs. As society itself becomes less racially polarized, so will juries. Call it a test of good faith.<sup>42</sup>

One cannot read *Minimizing Racism* without sharing in the deep feeling of frustration that the defense team must have felt. Garry's attacks on the jury selection process were vigorous, and it is apparent that he used his skills with a degree of competence and insight that few lawyers possess. Yet, like the mechanic whose wrench is too small for the bolt, Garry was using the wrong tool to attack the problem. The defense team recognized this. The problem of the jury selection in *People of the State of California v. Huey P. Newton*<sup>43</sup> generalized basic questions about the very foundations of justice—how do we insure that *all*, especially those who are non-white, feared or hated, realize the promise of the sixth amendment. The voir dire is a valuable and necessary device to attack and expose racism in the current setting, but the lawyer who seeks to apply the "Garry voir-dire" should be careful that he is not providing the appearance of fairness and, thus, further vindicating the present jury selection process. By focusing on the voir dire, rather than on the processes which make this "last ditch" effort necessary, he may fail to face up to the fundamental problems and not articulate realistic solutions, such as all-black juries.

LEIGH H. TAYLOR\*

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40. *Supra* note 20, at 67.

41. KALVEN & ZEISEL, *supra* note 10, at 495.

42. *Supra* note 36, at 549.

43. Conviction reversed and new trial granted, *People v. Newton*, 8 Cal. App. 3d 359 (1st Dist. 1970).

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