DePaul University
University Libraries

DePaul Law Review

Volume 6
Issue 2 *Spring-Summer 1957*

Article 14

Juries - Failure to Select Women for Jury Panel Does Not Deprive Male Defendant of Fair Trial

DePaul College of Law

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
DePaul College of Law, *Juries - Failure to Select Women for Jury Panel Does Not Deprive Male Defendant of Fair Trial*, 6 DePaul L. Rev. 297 (1957)
Available at: https://via.library.depaul.edu/law-review/vol6/iss2/14

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

The above criteria amplify the spirit of previous decisions, all of which have adhered to the proposition that "[a] confession by which life becomes forfeit must be the expression of free choice."[22]

[22] Watts v. Indiana, 338 U.S. 49, 53 (1949).

JURIES–FAILURE TO SELECT WOMEN FOR JURY PANEL DOES NOT DEPRIVE MALE DEFENDANT OF FAIR TRIAL

Sylvester Winfield was convicted of transporting liquor to a dry area with punishment set at two years in jail and a fine of $2,000. Defendant contended that error was committed because no women were selected for the jury panel. The court affirmed the conviction, ruling that regardless of any discrimination defendant did not show that he was prejudiced by it. The dissenting judge, however, thought that to have anything less than a cross-section of the community represented in the jury list was to deny defendant of his constitutional right to a fair trial and was a violation of Texas statute. *Winfield v. State*, 293 S.W. 2d 765 (Tex., 1956).

Alleged error based on discrimination in jury selection appears with increasing frequency as a basis for appeal. Intentional and systematic exclusion based on race,[1] national origin,[2] and occupational status[3] have been the contentions in most of the cases. The problem concerning women jurors is relatively new.

The common-law definition of "jury" or "trial by jury" did not concern itself with the problem as to whether women were qualified as jurors.[4] In regard to sex, the general definition was twelve men.[5] It was inconceivable any woman needed to serve, could serve,[6] or indeed, wanted to serve as a juror. But the modern concept of "man" as a generic term has pervaded the law so that women are now generally recognized as qualified jurors.[7] In *Ballard v. United States*,[8] the United States Supreme Court has gone so far as to say that in cases originating in the federal courts, women *must* be on the jury lists. It has adopted a "cross-section of the

[1] Norris v. Alabama, 294 U.S. 587 (1935).

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

[3] Thiel v. Southern Pacific Company, 328 U.S. 217 (1946).

[4] In rare instances women sat in judgment to determine whether a convicted defendant was pregnant. Anne Wycherly's case, 8 C. & P. 262.

[5] Smith v. Times Publishing Company, 178 Pa. 481, 36 Atl. 296 (1897); N. Wagman & Company v. Schafer Motor Freight Service, 167 Misc. 681, 4 N.Y.S. 2d 526 (1938); In re Opinion of the Justices, 237 Mass. 591, 130 N.E. 685 (1921).

[6] People v. Moe, 381 Ill. 235, 44 N.E. 2d 864 (1942), wherein the defense unsuccessfully contended that the inclusion of women would prejudice him.

[7] People v. Barltz, 212 Mich. 580, 180 N.W. 423 (1920).

[8] 329 U.S. 187, 192 (1946).

community" standard. That is, the jury list must represent a cross-section of the community with no distinction because of sex. In the *Ballard* case, it was held reversible error to exclude women from jury lists. The court said that the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Failure of the jury list to conform to this standard resulted in reversal regardless of non-membership in the excluded class and without the showing of prejudice.

Since the *Ballard* decision this cross-section standard is continuously being drawn upon in the state courts for justifying reversal on constitutional grounds. But the overlooked or ignored fact is that this standard is not the result of an interpretation of the 14th Amendment.[9] Indeed, the constitution is not mentioned in the opinion of the court. The cases to which the cross-section standard does apply must originate in the federal court because its authority is derived from its right to supervise the administration of justice in the federal courts. This was explained in *Fay v. People* when the court said:

> But those decisions were not constrained by any authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process.[10]

These federal cases,[11] therefore, do not hold that discrimination per se is a violation of due process. They merely set up a standard for the federal courts, one of the forty-nine jurisdictions, which must be used in drawing up jury lists.

This cross-section standard is not imposed conclusively on the state courts as an interpretation of due process. The various attempts to extend what the court called their notions of good policy to such an interpretation have been rejected.[12] A Delaware court,[13] recognizing the problem, approved of the public policy attribute of non-discrimination between the sexes, but expressly refused to say that it is anything more than a good idea, refusing to reverse on the point.

A companion to the claim that the exclusion of women is unconstitutional is the assertion that it violates statutes prescribing qualifications for

[9] State v. Jones, 57 A. 2d 109, 44 Del. 372 (1947).

[10] 332 U.S. 261, 287 (1947).

[11] Thiel v. Southern Pacific Company, 328 U.S. 217 (1946); Glasser v. United States, 315 U.S. 60 (1941); Ballard v. United States, 329 U.S. 187 (1946).

[12] State v. Taylor, 356 Mo. 1216, 205 S.W. 2d 734 (1947); State v. Neff, 169 Kan. 116, 218 P. 2d 248 (1950); Rowland v. State, 213 Ark. 780, 213 S.W. 2d 370 (1948).

[13] State v. Jones, 44 Del. 372, 57 A. 2d 109 (1947).

jurors. The dissenting judge in the *Winfield* case cites cases[14] holding that disregard of mandatory requirements in the appointing of a jury commission is reversible error. A distinction, however, must be drawn between those statutes which make certain conduct mandatory and those which are by nature merely permissive. In *Logan v. State*,[15] the statute[16] prescribed the procedure for appointing a jury commissioner, which procedure was disregarded by the county judge. The court reversed and remanded because of the county judge's disregard of a legislative mandate. But the fact that a statute permits a class to serve as jurors does not *ipso facto* require the panel to be a representative group.[17] In *Bailey v. State*,[18] the court said that because the Arkansas constitution allows women to serve, it does not mean that they must serve, and failure to have them on jury lists is not reversible error.

The Illinois decisions seem to follow the holding in the *Winfield* case. In *People v. Thurman*,[19] a prosecution for mayhem, the defendant alleged that the statute[20] setting out jurors' qualifications was violated because no women were on the jury lists. The court said of this statute: ". . . This act, in defining qualifications for jury service, neither prohibits nor requires the inclusion of women as an essential to a valid grand or petit jury."

Illinois has also declared, as does the *Winfield* case, that the exclusion of women is not a valid objection unless some prejudice is shown. The prejudice must be such that the defendant was denied a fair trial.[21] The Illinois legislature has dealt with harmless errors by providing that a party must show actual and substantial injustice before any objection will be entertained.[22] The jury system is prone to give rise to the harmless error situation and every conviction could be reversed on some minute ground if it were not necessary to show actual and substantial injustice. There is no reason why exclusion of women should not come under this provision. It appears, therefore, that in Illinois, as in most jurisdictions, the fact that a jury list does not include members of a class qualified as jurors violates no statute.[23]

[14] Newberry v. State, 140 Tex. Cr. 186, 143 S.W. 2d 962 (1940); Logan v. State, 154 Tex. Cr. 164, 226 S.W. 2d 121 (1950).

[15] 154 Tex. Cr. R. 164, 226 S.W. 2d 121 (1940).

[16] Tex. Stat. Art. 2109 R. C. S. (1925).

[17] Alexander v. State, 160 Tex. Cr. 460, 274 S.W. 2d 81 (1954); Bailey v. State, 215 Ark. 53, 219 S.W. 2d 424 (1949); People v. Thurman, 377 Ill. 453, 36 N.E. 2d 747 (1941).

[18] 215 Ark. 53, 219 S.W. 2d 424 (1949). [19] 377 Ill. 453, 36 N.E. 2d 747 (1941).

[20] Ill. Rev. Stat. (1941) c. 78, §§ 1, 2, 9, providing that twenty-three persons, regardless of sex be selected.

[21] People v. Fognini, 374 Ill. 161, 28 N.E. 2d 95 (1940).

[22] Ill. Rev. Stat. (1931) c. 78, § 35.

[23] People v. Lieber, 357 Ill. 423, 192 N.E. 331 (1934); People v. Switalski, 394 Ill. 530, 69 N.E. 2d 315 (1946).

The violation of the 14th Amendment is also frequently cited as ground for reversal. The decision in *Norris v. Alabama*[24] is invariably alluded to for authority. The court held there that the trial was unfair because of the intentional and systematic exclusion of Negroes. Two main features distinguish that decision from the facts in the *Winfield* case. The first is that the defendant was a Negro, a member of the class discriminated against, and second, the discrimination resulted in the denial to defendant of a fair trial. In the *Winfield* case the defendant was not a woman and it was not shown that he was denied a fair trial. No mention is made of the "cross-section of the community" concept in *Norris v. Alabama.* The court did not indicate either by holding or dictum that a jury must be a representative group from the community. But the cross-section requirement has subsequently found its way into the federal courts[25] and it should prove interesting to observe what progress, if any, it makes in the state courts.

The courts have refused as of now to find a constitutional violation without a showing that: (1) qualified members of defendant's class were excluded;[26] (2) the exclusion was intentional, arbitrary, and systematic;[27] (3) the exclusion was made in order to deny defendant a fair trial;[28] or, (4) defendant, in fact, did not have a fair trial.[29] It is not enough to show that no members of the class were on the jury, nor is it enough to show that they were intentionally excluded; but rather, it is essential to show that the action of the jury commissioners resulted in depriving the defendant of a fair trial.

[24] 294 U.S. 587 (1935).

[25] Authorities cited note 11 supra.

[26] Alexander v. State, 160 Tex. Cr. 460, 274 S.W. 2d 81 (1954).

[27] Ibid; People v. Fognini, 374 Ill. 161, 28 N.E. 2d 95 (1940); People v. Peters, 382 Ill. 549, 48 N.E. 2d 352 (1943).

[28] State v. Taylor, 356 Mo. 1216, 205 S.W. 2d 734 (1947).

[29] Cases cited notes 26–28 supra.

WILLS–DIRECTION TO EXECUTOR TO APPOINT ATTORNEY HELD BENEFICIAL INTEREST

Luella George, deceased, appointed one Haines to be the executor of her will. The instrument, which was witnessed by Homer D. McLaren, an attorney, and two other persons, contained the following provision: "It is my will that Homer D. McLaren, an attorney, be the attorney for said executor." The executor did appoint McLaren attorney. The will was admitted to probate upon a hearing at which McLaren and one of the other attesting witnesses testified. Plaintiff, the executor, asked to be credited in the amount of $1,500 for fees he paid to McLaren as attorney. The beneficiaries under the will objected, contending that under the Probate