A COMPARISON OF JURY SELECTION PROCEDURES FOR CRIMINAL TRIALS IN NEW SOUTH WALES AND CALIFORNIA

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> *When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are due to historical accident or temporary social situation. . . . To see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study . . . phenomena of our own country.* ‡

I. Introduction

Even though its value has recently been the subject of some questioning, trial by jury in criminal cases remains a central feature of both Australian and American jurisprudence. Both countries consider the jury — a group of ordinary people assembled to decide the guilt or innocence of an accused — the fairest instrument of justice available. Community participation, rather than decision-making by "legal experts", is acknowledged as the best means of eliminating the possible bias of a single judge. Thus, traditional Anglo-Saxon jurisprudence has guaranteed a criminal defendant the right to a trial before a jury of "peers".

The meaning of the word "peers", however, has differed in both countries over the past two centuries. Historically, juries were chosen from the better educated, land-owning men of the community. During the last few decades, though, observers and participants have begun to criticize the jury as not being representative of the community. These people argue that if the jury is to truly reflect the values of the community, then the whole community, not just a special part, must share in it. They contend that jurors should be selected from a cross section of the community, not merely a segment of it.

In response to this growing criticism changes have taken place in the jury selection procedures of Australia and the United States.[1] For example, citizens who do not own property or who are female are now liable for jury

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‡Lepaulle, "The Function of Comparative Law" (1922) 35 *Harv. L.R.* 838 at 858.

[1] E.g., New South Wales made sweeping reforms in 1977 while California revised its procedures in 1975 and again in 1980.

service in both countries. Nevertheless, while these reforms have made great strides toward obtaining panels that more accurately represent the community, a need still exists for further revisions in selection systems to ensure that fair, independent juries can be assembled and that the possibility of bias is minimized.

This paper will examine procedures for selecting jurors for criminal trials in New South Wales and California, two states whose methods are indicative of those currently in use in the countries where they are located. For the purposes of this paper, the procedure of each state has been divided into one of the following three stages: (1) compiling the list of prospective jurors, (2) determination of excuse from jury service, and (3) empanelling the jury. Each of these stages will be surveyed and analyzed in light of the goal of a jury which is impartial and representative of the community.

II. The First Stage: Compiling a List of Prospective Jurors

A. New South Wales Procedure

In New South Wales the voter registration list serves as the sole source of names for potential jurors. Because all eligible voters are required by law to register to vote, the voter registration list includes almost all persons over eighteen in New South Wales. Although the list of prospective jurors was historically compiled by the police,[2] the Jury Act of 1977 shifted primary responsibility for selecting persons for jury duty to the sheriff.[3]

Every three years the sheriff is required to prepare a "jury roll" for each jury district which lists the names of the persons eligible for jury duty during the period.[4] These names are selected at random by computer.[5] However, before arriving at a final jury roll the sheriff first prepares a "draft jury roll". By deleting from the draft jury roll the names of those persons who are either disqualified, ineligible, or electively exempted from jury service, the sheriff arrives at the final jury roll.[6]

When jurors are needed for a criminal trial, an authorized officer issues a "jury precept" directing the sheriff to summon jurors for the trial.[7] The jury precept is an order specifying the number of jurors needed and the time and place of the trial. Upon receipt of the precept the sheriff selects at ran-

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[2] Parl. Deb. N.S.W. 4475 (*Hansard* 1977).

[3] Attorney-General F. J. Walker stated the following during the parliamentary debate on the 1977 Jury Bill:

> We believe the police, because of their direct association with the prosecution process, should not be involved in the selection of persons for inclusion on a jury roll at all. Not because there have been many suggestions of malpractice but because justice must manifestly be seen to be done.

Parl. Deb. N.S.W. 4476 (*Hansard* 1977).

[4] Jury Act, 1977 (N.S.W.) s. 10.

[5] S. 12. Prior to the 1977 Act selections were not made at random by computer. Because selections were made based on the prior jury roll, essentially the same persons were included on the jury roll each year. See Parl. Deb. N.S.W. 4475-76 (*Hansard* 1977).

[6] See Jury Act, 1977 (N.S.W.) s. 12.

[7] S. 23. In the Supreme Court Criminal Jurisdiction, a Judge of the Supreme Court or the Prothonotary of the Supreme Court may issue a general jury precept. In the District Court Criminal Jurisdiction, a Judge of the District Court, the Clerk of the Peace or a Deputy Clerk of the Peace are authorized to issue a general jury precept. See also *New South Wales Sheriff's Office Manual of Instructions* (1982) at 173 (unpublished manuscript).

dom, from the jury roll of the particular jury district, the number of jurors required to be summoned. The jurors summoned by the sheriff will make up the jury panel, and twelve persons from the panel will eventually make up the actual jury for the trial.

B. California Procedure

The method presently employed in California for selecting prospective jurors does not substantially differ from that used in New South Wales. The methodology currently in use in California was originally enacted in 1980[8] and is primarily based on the Uniform Jury Selection and Service Act.[9]

Under California law each county has a jury commissioner who is under the management and supervision of the local court and is responsible for the initial selection of jurors.[10] The jury commissioner commences the jury selection process by compiling "source lists", which the statutes define as "lists used as the source of potential jurors".[11] California traditionally used only the voter registration list as its source primarily because it was the most administratively convenient.[12] In response to recent studies which have shown that some groups, especially nonwhites, the poor, and the young, register to vote at a much lower rate than the national average,[13] California in 1975 began requiring that voter registration lists be supplemented with other lists. Source lists of potential jurors now contain the names of all licensed drivers as well as the names of all registered voters.[14] Because of such supplementation, a larger pool of possible jurors is now available.[15]

After compiling a source list, the jury commissioner uses a computer to randomly draw a sufficient number of names from the source list to make up a "master jury list".[16] The master jury list is prepared at least once every twelve months, and it contains enough names to meet all needs for jurors in the county for that period.[17] The jury commissioner then edits the master jury list to arrive at a "qualified jury list". In making the selections for the

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[8] Before 1980 California did not have a statewide plan of selection of prospective jurors; therefore, procedures differed among California's 58 counties. After receiving reports from the National Center for State Courts which favoured a statewide approach, the California Legislature altered the jury selection system in 1980. See *National Center for State Courts Western Regional Office, A Report to the California Judicial Council on Ways to Improve Trial Jury Selection and Management* (April 28, 1978).

[9] Uniform Jury Selection and Service Act, 13 U.L.A. 323 (1975). See generally, McKusick and Boxer, "Uniform Jury Selection and Service Act" (1971) 8 *Harv. J. on Legis.* 280.

[10] Cal. Civ. Proc. Code s. 204.1 (West 1983). In some counties the court administrator performs the functions of the jury commissioner.

[11] *Id.* s. 193.2(i).

[12] Voter registration lists are on computer tapes and thus lists of names can be obtained in a matter of minutes. J. Van Dyke, *Jury Selection Procedures* (1977) at 86.

[13] *Id.* 88-93. Registration to vote is not required by law in California. Whereas an average 94 percent of eligible Australians actually voted in the elections of the early seventies, only 55 percent of eligible American adults voted in the 1972 elections. See *id.* 91.

[14] Cal. Civ. Proc. Code s. 204.7 (West 1983). As of 1975 seventeen states in the United States were using these "multiple" source lists in compiling their pool of jurors. M. Graham and R. Pope, "One Day/One Trial or a One Week Term of Jury Service: The Misleading Marketing of Modern Jury Management Systems" (1980) 45 *Mo. L.R.* 255 at 265.

[15] In California the number of persons comprising the master jury list almost doubled when the state also began using the driver's licence list. *Id.* 266.

[16] Cal. Civ. Proc. Code s. 204.5(b) (West 1983). Section 255 authorizes selection by computer.

[17] S. 204.5(a).

qualified jury list the jury commissioner omits the names of those persons on the master jury list who are not "in possession of their natural facilities", of "fair character and approved integrity", and of "sound judgment".[18] The commissioner is also required to leave off the names of persons who are incompetent to serve as jurors or who are exempt from serving.[19]

Whenever a jury is necessary for a criminal trial, the Judge of that court orders the sheriff or marshall to draw a jury and summon it to attend.[20] The order specifies the number to be drawn and the time which the jurors need attend. The sheriff or marshall, after he receives the order from the court, then uses a computer to select the required number of jurors from the qualified jury list and summons them to appear.[21]

III. The Second Stage: Excuse From Jury Service

Despite the fact that jury service is supposed to be a right and a privilege of citizenship, not all members of the community are required to serve as jurors. To a certain extent in New South Wales and especially in California, jury service is disliked because it is time consuming, inconvenient, and sometimes a financial hardship.[22] In fact, most people welcome the possibility of being excused from jury service. Excusing some types of people more than others, however, can seriously damage the representative nature of the jury.

The excuse stage in New South Wales and in California can roughly be divided into three distinct procedures: disqualifications, automatic exemptions, and excuses (which are either at the election of the person or at the discretion of a public official). Moreover, excuses may be given at one of three different points during the jury selection process. First, they may be granted when persons are selected from the "draft jury roll" or the "master jury list". Second, if their names make it onto the "final jury roll" or "qualified jury list", excuses might be granted when persons are sent a summons for jury duty. Third, if they make it past the first two hurdles and are required to go to the courthouse, excuses might be granted before the jury is empanelled.

A. New South Wales Procedure

Jury selection procedure in New South Wales is founded on the principal that all persons who are registered to vote are qualified and liable to serve as jurors.[23] Nevertheless, the Jury Act, 1977 (N.S.W.) further states that persons who are disqualified, ineligible, electively exempt, or excused for good cause are not liable to serve as jurors.[24]

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[18] S. 205.

[19] Persons who are blind, deaf, or handicapped are not considered incompetent to serve and are included on the qualified jury list. S. 205(b).

[20] *Id.* s. 214.

[21] *Id.* s. 225.

[22] See *op. cit. supra* n. 12 at 111-34.

[23] Jury Act, 1977 (N.S.W.) s. 5.

[24] *Id.* ss. 6, 7, 38. Persons who are disqualified or ineligible are required by law to notify the sheriff of this fact immediately upon receipt of a notice of the inclusion of their names on the draft jury roll. Interview with Sheriff's Office of N.S.W. in Sydney (June 17, 1983).

(i) Persons Disqualified

In general, the present law of New South Wales disqualifies from jury service those persons who have been convicted of certain offenses.[25] The disqualifications vary in length depending on the type of offense and the time in which it was committed.[26] In speaking on this subject during the Parliamentary debate of the 1977 Jury Bill, Attorney General F. J. Walker stated that "people who have come into conflict with the law, particularly those who have served gaol sentences, could bear some ill will to the Crown and so increase the probability of disagreement in criminal proceedings".[27] He stated that the only practical method of gauging the seriousness of the particular offense which might disqualify the person is to look at the actual penalty imposed by the court.[28] The court, he stated, knows all the facts when it decides the appropriate sentence.

Most of the disqualifications found under New South Wales law are typical of those found in other states of Australia and of the United States. The disqualification for five years of a person who has been found guilty of driving under the influence of alcohol and has, as a result, lost his driver's license is, on the other hand, a somewhat novel approach. This disqualification was the subject of disagreement during the debate of the Jury Act, 1977 (N.S.W.). Some legislators believed that the persons who are convicted of driving while intoxicated are in reality honourable members of the community who have made a small error in judgment and that these people should still be allowed to serve on juries. The government's view, and the one that eventually passed, was that "it is better to err on the side of caution in respect to these persons [who drive under the influence] than to err on the side of indulgence".

(ii) Persons Ineligible to Serve as Jurors

The New South Wales Jury Act lists twenty-two different categories of persons who are ineligible to serve as jurors.[29] This list, according to the Government, consists of three different classes of people.[30] First, it deems ineligible those persons who are closely associated with the administration of justice and who, therefore, would possibly be biased against the accused. This first group includes among others the following persons: Judges and their spouses, legislators and their spouses, policemen and their spouses, persons employed in the Attorney General's office, Crown prosecutors and their spouses, public defenders and their spouses, and barristers and solicitors. Second, the list includes those persons whose occupation or profession is so vital to the community that it would be wasteful to use their

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[25] See Appendix I.

[26] New South Wales based its legislation regarding disqualification on the conclusions of the 1965 Morris Committee in England. That Committee found that any disqualification should be in relation to the penalty imposed and, where it is appropriate to disqualify, the disqualification should not, except in serious cases, be lifelong. See Law Reform Commission of Western Australia, *Report on Exemption from Jury Service* (June 25, 1980) at 39-41.

[27] Parl. Deb. N.S.W. 4478-79 (*Hansard* 1977).

[28] *Id.* 4477.

[29] See Appendix II.

[30] See Parl. Deb. N.S.W. 4647 (*Hansard* 1977).

time as jurors. Examples of this group are Commonwealth employees, firemen, policemen, certain railroad employees, persons engaged in emergency services, and prison officers. Third, persons who are seriously ill or infirm are deemed ineligible.

(iii) Exemption by Election or For Good Cause

Some persons in New South Wales do not serve on juries because they are granted the right to elect to be exempt because of their profession, age, place of residence, family responsibility, or prior lengthy jury service.[31] Thus, doctors, clergymen, elderly persons, pharmacists, dentists, pregnant women and others are exempt if they exercise their right when they receive a notice of inclusion on the draft jury roll.[32] Moreover, persons whose names are on the current jury roll can elect not to serve during the three year existence of the next jury roll.

New South Wales law also provides for procedures whereby persons who are not otherwise released from jury service may be excused for "good cause". Prior to 1977 only the court could grant excuses;[33] today both the sheriff and the court are empowered to excuse those persons who have reasonable explanations why they should not serve.[34] Although the Jury Act does not specify what constitutes "good cause", it does state that a person who fails to claim an exemption granted to him as of right cannot later request to be excused for good cause based on this unclaimed exemption.[35]

Despite the fact that the Jury Act does not define good cause, the sheriff's office does consider several situations as grounds for excusal. Temporary and unavoidable absence from the jury district, temporary illness, or probable severe damage to a sole business are all recognized as good cause.[36] Moreover, if the trial is expected to be an abnormally long one, the sheriff's office will normally excuse those persons who would suffer undue hardship from such lengthy service.

(iv) Critique of New South Wales Excuse Procedure

During the debate of the Jury Act, 1977 (N.S.W.) great pains were taken to make sure that the policy behind the Act was pointed out. This policy is evident from the statement that:

> . . . [t]he Government considers that as a distinct element in the process of law, the concept of juries drawn from the community at

[31] See Appendix III.

[32] The notice comes accompanied with an application for removal from the draft jury roll and a pre-paid, self-addressed envelope for easy return. Interview with Sheriff's Office of N.S.W. in Sydney (June 17, 1983).

[33] Because only the court could grant excuses, persons with good reasons for being excused were forced to attend before the judge the actual day that they needed off. Since the necessity of going to the court to get excused caused great inconvenience, many people were quite vocal in complaining about the excuse process. See Parl. Deb. N.S.W. 4483 (*Hansard* 1977).

[34] Jury Act, 1977 (N.S.W.) s. 38. Application for excusal to the sheriff is called a "statutory" declaration while application to the judge is called a "personal" declaration. The statutory declaration is used most often.

[35] S. 38(2).

[36] Interview with Sheriff's Office of N.S.W. in Sydney (June 17, 1983).

> large is a most important fundamental, and because of this the net has been spread as widely as possible.[37]

In an effort to fulfil this policy, the Jury Act, 1977 (N.S.W.) withdrew the exemption for women[38] and for other certain occupations.[39] It is submitted, however, that the government's stated policy of "spreading the net" has fallen significantly short of its goal of a jury from a cross section of the community. According to the sheriff's office an average of between forty and fifty percent of those persons summoned for jury end up not serving due to either their disqualification, ineligibility, exemption, or excuse for good cause.[40] Although some of this reduction is both desirable and necessary, elimination of too many people substantially reduces the representative nature of the jury.

For example, the legislature's determination that spouses of some ineligible persons should also be ineligible is highly questionable. Under the present law of New South Wales the spouses of judges, policemen, prison officers, legislators, coroners, crown prosecutors, and public defenders are deemed ineligible. The logic behind this is that these spouses share the attitudes of the person they are married to and could possibly be biased; therefore, their inclusion on a jury would destroy the appearance of an independent jury.[41] Although shared attitudes may sometimes exist, it is doubtful that they exist to such a large degree that spouses would not be as capable as any other member of the community of rendering an impartial decision. If spouses of those in ineligible occupations are to be deemed ineligible, is the next step to also make ineligible their children, parents, relations or close friends? An argument could be made that these people are just as capable of sharing the ineligible person's attitude of mind as is their spouse.[42] Because discarding spouses of ineligible persons results in an unwarranted loss of possible jurors and thus injures the representative nature of the jury, this ineligibility should be withdrawn.

Likewise, there are many other exemptions and ineligibilities which should be reconsidered because they damage the jury's representativeness. New South Wales has a large number of persons who are employed by the Commonwealth, and their ineligibility should be discontinued unless persuasive evidence is found to justify it. Barristers and solicitors, moreover, should not be ineligible solely because of their association with the administration of justice; these people change back and forth between the prosecution and the defense and do not develop a prejudice either in favour or against the accused.[43]

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[37] Parl. Deb. N.S.W. 4818 (*Hansard* 1977).

[38] The Jury (Amendment) Act 1947 had provided for women to serve as jurors, but service was optional and women had to apply to be included on the jury roll. In 1968 women were included on the jury roll in a few districts, but were still given an exemption as of right. *Id.* 4476.

[39] Before 1977 public servants and bank officers were also exempt. *Id.* 4478.

[40] Interview with the Sheriff's Office of N.S.W. in Sydney (June 17, 1983).

[41] See Parl. Deb. N.S.W. 4750-53 (*Hansard* 1977).

[42] See generally Law Reform Commission of Western Australia, *Report on Exemption from Jury Service* (June 25, 1980) at 23-26.

[43] Member of Parliament D. P. Landa voiced this opinion, to no avail, during the debate of the Jury Act, 1977. See Parl. Deb. N.S.W. 4752 (*Hansard* 1977).

The legislature of New South Wales should re-examine the excuse stage of its jury selection procedure to ensure that a cross section of the community remains after all excuses have been granted. By removing those excuses which are not absolutely necessary to guarantee an impartial jury, the legislature could do much to improve the public opinion of jury service. The sentiment of those summoned for jury service would be bettered if those people were assured that all persons in the community were participating in that duty.

B. California Procedure

The statutes of California, which were modeled on the Uniform Jury Selection and Service Act, clearly set out the policy of the state regarding jury selection. This policy is as follows:

> . . . that all persons selected for jury service shall be selected at random from a fair cross section of the population of the area served by the court, and that all qualified persons have the opportunity . . . to be considered for jury service when summoned for that purpose.[44]

To implement this policy the statutes strictly limit disqualifications, restrict automatic exemptions, and confine excuses to individual cases of undue hardship.

(i) Persons Disqualified

Under California law a person is "competent", or qualified, to serve as a juror if he is a citizen of the United States, over eighteen, a resident of California, in possession of his "natural faculties", and of "ordinary intelligence".[45] In addition, to be competent he must possess a "sufficient knowledge of the English language".

On the other hand, a person is "incompetent", or disqualified, to act as a juror if he fails to meet any of the above requirements or if he "has been convicted of malfeasance in office or any felony or other high crime".[46] The actual punishment given by the judge is not determinative; as long as the offense is classified as a felony by law, the person is deemed incompetent. There is no requirement that the conviction be a recent one. It should be noted that while California limits its disqualification to conviction for a felony, New South Wales law disqualifies some persons convicted of offenses which would be misdemeanors under California law. For example, since driving under the influence of alcohol is normally not a felony in California, a conviction for such an offense would not make the person incompetent to serve. A conviction for the same offense in New South Wales would render the person disqualified for five years.

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[44] Cal. Civ. Proc. Code s. 197 (West 1983). Section 197.1 provides that "[n]o person shall be excluded from jury service in the state of California on account of race, color, religion, sex, national origin, or economic status".

[45] Cal. Civ. Proc. Code s. 198 (West 1983).

[46] *Id.* s. 199.

(ii) Persons Exempt from Service

Prior to 1975 the jury selection procedure of California included exemptions for certain occupations and professions. Attorneys, ministers, teachers, doctors, police officers, judges, firemen, and others were exempt from liability to act as a juror.[47] By 1973 a movement had arisen to abolish occupational exemptions. In that year the California Court Administrators-Jury Commissioners Association called for the removal of *all* statutory exemptions because "the administration of justice in California requires that juries be constituted from the broadest possible spectrum of the citizens of this State", and because "the statutory exemptions from jury service for certain privileged occupational and professional classes tends to defeat the time-honored principle that the duties and obligations of citizenship should be equally shared".[48]

The California Legislature heeded this advice and in 1975 withdrew all statutory exemptions.[49] However, two years later the legislature reconsidered its policy on statutory exemptions and decided to grant exemptions to active judges and police officers.[50] The determination to exempt police officers and active judges has since been criticized because it reintroduces categorical exemptions and thereby allows persons to evade jury service without having to show hardship to the court.[51]

(iii) Persons Excused from Jury Service

When California repealed its statutory exemptions in 1975 it substituted a system whereby individual excuses may be granted by the court. The statutes provide that "[t]he court shall excuse a person from jury service upon finding that the service would entail undue hardship on the person or the public served by the person".[52] Both the jury commissioner and the judge are empowered to grant excuses to prospective jurors.[53]

Establishing a procedure that requires jurors to request an excuse is not an answer in itself to the problem of unrepresentative juries. Because some judges and jury commissioners were granting excuses to all persons who requested them,[54] the progress made by the 1975 repeal of statutory exemptions was slowed. In an effort to ensure that jury commissioners and judges would not alter the representative qualities of the jury by the wholesale granting of excuses, the legislature provided that written

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[47] Cal. Civ. Proc. Code s. 200 (repealed 1975). See generally "Jury Selection in California" (1953) 5 *Stan. L.R.* 247.

[48] *Op. cit. supra* n. 12 at 131.

[49] See Cal. Civ. Proc. Code s. 200 (West 1983).

[50] S. 202.5.

[51] See National Center for State Courts Western Regional Office, *A Report to the California Judicial Council on Ways to Improve Trial Jury Selection and Management* (April 28, 1978).

[52] Cal. Civ. Proc. Code s. 200 (West 1983).

[53] Ss. 201(a), 246. The person is allowed to request an excuse by mail without having to make an appearance before the judge.

[54] Some of these judges were excusing all elderly persons, students, blue collar workers, self-employed persons with sole businesses, and city employees. Other judges granted only very limited excuses. J. Van Dyke, *op. cit. supra* n. 12 at 111-37. It is interesting to note that a 1953 law review article predicted that "excuses . . . will probably remain the greatest problem of jury selection": *supra* n. 47.

guidelines would be drawn up to govern the granting of excuses.[55] These guidelines set out that a person should be excused only if it is not possible to defer that person's jury service to a time during the year when no undue hardship would result. The circumstances which may constitute "undue hardship" are framed in such a way as to limit excusal to situations where the person would suffer extreme financial burden, where the person is physically or mentally disabled, where the person lives an excessive distance from the court, or where the person has an obligation to care for another and it is not feasible to make other arrangements for that care.[56]

(iv) Critique of California Excuse Procedure

California has recognized that only through the elimination of occupational exemptions and the strict granting of excuses can the community's representation on juries by assured. Nevertheless, additional changes in the area of juror compensation may be necessary to ensure that these advancements are not offset. As long as economics continues to significantly affect who ends up sitting in the jury box, juror frustration will increase and potential jurors will attempt to be excused. At present, New South Wales pays its jurors a minimum of $A42.50 per day plus a set amount for travel expenses;[57] in contrast, California pays its jurors only $5 a day plus a small mileage allowance.[58] Few people in California can serve on juries without having to take a drastic cut in pay. This potential loss of income, aside from prompting potential jurors to request unwarranted excuses, can only add fuel to the fire of dislike which many citizens already have for jury service.

California has refused to raise jury compensation because of the drastic increase it would have on state expenditures. Instead, the legislature has decided to limit the number of days a person is required to serve in any one year in an effort to make jury duty more attractive for citizens. A 1978 bill states that no juror is required to serve more than ten days during any twelve month period, except when it is necessary to complete a trial.[59] Limiting the length of jury service will especially improve the opinion about jury duty of professional and business men. In fact, this may be the only method of raising the opinion of business and professional men because increasing juror pay in itself would do little to change these people's views.[60]

Although the limitation of required days of jury service is a significant improvement in California's procedure, it is not a complete substitute for adequate pay for jurors. California should increase its juror compensation

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[55] Cal. Civ. Proc. Code s. 201(a) (West 1983). These guidelines were prepared by the Judicial Council of California.

[56] *Op. cit. supra* n. 51.

[57] Interview with Sheriff's Office of N.S.W. in Sydney (June 17, 1983). Jurors are paid a larger amount for each day served. After forty days of service, jurors are paid $A64.70 per day. Criminal jurors are also given lunch on days which they serve. *Ibid.*

[58] Cal. Civ. Proc. Code s. 196 (West 1983). These fees are paid by the county rather than the state: s. 196.1.

[59] *Id.* s. 239(b).

[60] McKusick and Boxer, *supra* n. 9 at 291.

to at least the average of that paid by other states.[61] The increased cost of higher juror compensation seems relatively small compared to the probable improvements in the jury system that would result.

IV. The Third Stage: Empanelling the Jury

The third stage of jury selection, during which the jury is empanelled and thereafter ready to hear the case, is particularly noteworthy because it is the stage where the greatest variation between procedure in New South Wales and California occurs. The following account, although it deals specifically with English and American procedure, adequately illustrates the difference between New South Wales and California procedure in this regard:

> The story is told of an English barrister and an American trial lawyer who were discussing their respective court proceedings. The American asked the barrister when a trial began under the English system. "When the jury is accepted by counsel and sworn to try the issues," he replied. "Hell," said the American, "in the United States the trial is over by that time."[62]

During the third stage prospective jurors can be challenged, the purpose of such challenges being to eliminate jurors who may be biased about the case in some way. In both New South Wales and California challenges take the form of either *challenges for cause* or *peremptory challenges.*[63] Challenges for cause are made based on a specific indication of partiality and are unlimited in number. Conversely, peremptory challenges may normally be exercised without giving any reason but are of limited number. Although both states allow challenges, the method in which they are exercised is dissimilar.

A. New South Wales Procedure

(i) Method of Empanelling Jury

After the accused has entered his plea, a jury of twelve persons is empanelled out of the approximately forty-eight prospective jurors summoned to the court.[64] Before any jurors are chosen, the judge first considers any requests to be excused from jury service. Moreover, in country courts only, the judge asks a few short questions to the entire panel to see if any prospective jurors are friendly with the accused or are in any other way obviously

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[61] California is one of the lowest paying states in the United States. See *op. cit. supra* n. 12 at 112.

[62] Comment, "The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies" (1976) *S. Cal. L.R.* 597 at 597.

[63] It should be noted here that the discussion in this article concerning challenges is limited to challenges to individual jurors. No attempt is made here to analyze the third form of challenge — the challenge to the array. A challenge to the array seeks to sweep aside the entire panel based on the allegation that the proper standards, whether constitutional or statutory, were not followed in obtaining jurors for the trial. For a discussion of the lack of success of the challenge to the array in criminal trials in New South Wales, see Forgie, "Challenge to the Array" (1975) 49 *A.L.J.* 528. See also Jury Act, 1977 (N.S.W.) s. 41; Cal. Penal Code ss. 1055-65 (West 1970).

[64] This number is greater than forty-eight if there is more than one accused or if the length of trial is expected to be so long that many people will request to be excused. Interview with N.S.W. Sheriff's Office in Sydney (June 17, 1983).

prejudiced about the case.[65] Any juror who answers in the affirmative will normally be excused.

A card containing the names of each of the remaining prospective jurors is then placed in a box. The clerk of the court proceeds to draw twelve cards, and each person whose name is called takes his place in the jury box. When all twelve persons are seated in the jury box, the clerk informs the accused of his right of challenge.[66]

New South Wales law provides that the accused or the Crown may peremptory challenge or challenge for cause. The peremptory challenge is exercised first and is the most frequent. Unless the charge is an offense that is capital or murder, in which case twenty peremptory challenges are allowed,[67] the accused is limited to eight peremptory challenges.[68] There is no reduction in the number of peremptory challenges if two or more persons are tried jointly; each accused is still allowed to individually exercise his allotted number of challenges.[69] Even though the Crown has the same right of peremptory challenge as the accused,[70] in practice it rarely utilizes its right of peremptory challenge. Some Crown Prosecutors will not peremptory challenge a juror unless specifically advised that the person is disqualified, ineligible, or otherwise unfit to be a juror in the case.[71]

The challenge for cause is used much less frequently than the peremptory challenge because, unlike the peremptory challenge, a definite reason must be indicated before the judge will permit it. In addition, because so many peremptory challenges are allowed each side and because they are exercised first, the challenge for cause is of importance in only exceptional cases.[72] A challenge for cause may be based on the fact that the prospective juror is disqualified or is biased.[73] Bias may be shown if the potential juror is a relative or close friend of the prosecutor, accused or a witness, if he is manifestly prejudiced against the accused, if he has been convicted of a serious crime, or if he was a member of the jury at a prior trial of the accused.[74] If a potential juror is challenged for cause, the person making the

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[65] Interview with Mervyn Finlay, Q.C., in Sydney (June 15, 1983). This practice is thought to be unnecessary in city areas because the greater population reduces the chances of jurors being closely connected with the participants in the case. *Ibid.*

[66] J. Bishop, *Criminal Procedure* (1983) at 242.

[67] Jury Act, 1977 (N.S.W.) s. 42(a). More challenges are in fact exercised in murder trials than in other cases. Interview with Mervyn Finlay, Q.C., in Sydney (June 15, 1983).

[68] See s. 42(b).

[69] *Op. cit. supra* n. 66 at 244.

[70] Jury Act, 1977 (N.S.W.) s. 43(1). Before 1977 the Crown also had the right to direct jurors to "stand by for the Crown", which effectively postponed the need for the Crown to show cause until the entire panel was exhausted. The juror who "stood aside" was called again only if all other jurors on the panel had been challenged. Because it saw no reason why the Crown should be allowed to both challenge jurors and to stand them aside, the legislature of New South Wales abolished this practice in 1977: s. 43(2). See also Parl. Deb. N.S.W. 4484 (*Hansard* 1977); Findlay and Duff, " 'Jury Vetting' — Ideology of the Jury in Transition" (1982) 6 *Crim L.J.* 138 at 141.

[71] Interview with Mervyn Finlay, Q.C., in Sydney (June 15, 1983).

[72] One noted barrister has stated that he has seen only one or two challenges for cause during his thirty years of practice. Interview with Mervyn Finlay, Q.C., in Sydney (June 15, 1983).

[73] *Op. cit. supra* n. 66 at 244.

[74] *Ibid.* An example of "manifest prejudice against the accused" would be where a juror, looking at the accused, is heard to call him a "damned rascal". *Ibid.*

challenge must then set out a *prima facie* case in support of his challenge.[75] It is not until this foundation of fact is properly laid, through extrinsic evidence if needed, that any right of cross examination arises. The person making the challenge for cause is prohibited from questioning potential jurors in an effort to locate possible grounds to support the challenge. Assuming that the challenger can establish a *prima facie* case of challenge in the absence of the juror's own testimony, the judge then tries the issue on "*voir dire*".[76] During *voir dire* the potential juror is examined under oath, and if disqualification or bias is shown, the judge will remove the person from the jury panel.

The process in which challenges are exercised in New South Wales courts is as follows.[77] After informing the accused of his right of challenge, the clerk of the court again calls the name of each of the twelve persons sitting in the jury box and places the Bible in the person's hand. Any challenge to the person must be made during the slight pause between the calling of the name and the placing of the Bible in his hand.[78] The challenge is made by saying the word "challenge" in a loud voice. The barrister or solicitor representing the accused may make the challenge for that person[79] and may, with court permission, stand close to and consult with him while the jury is being empanelled. Those persons who are challenged are removed from the jury box and others are called to replace them.[80] If the accused or the Crown fails to properly challenge a prospective juror, that person is sworn. When a total of twelve persons have gone unchallenged and have been sworn, those persons constitute the jury and are ready to hear the case.[81] However, if, after challenges have been exercised, an insufficient number of persons are available to complete the jury, the trial must be adjourned unless additional persons can be obtained from another court in the same jury district.[82]

(ii) Critique of New South Wales Jury Empanellment Procedure

It has been said that Australian legal counsel spend about as many minutes in selecting a jury as their American counterparts spend hours.[83] Although this statement is of questionable accuracy, it does point out the best attribute of the New South Wales method of empanelling the jury — it

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[75] *Ibid.*

[76] Jury Act, 1977 (N.S.W.) s. 46. See *op. cit. supra* n. 66 at 244. The term *voir dire* figuratively means "to speak the truth". M. Bloomstein, *Verdict: The Jury System* (rev. ed. 1972) at 66. *Voir dire* rarely occurs in the courts of New South Wales because the judge usually postpones hearing the reasons for the challenge for cause until all peremptory challenges are exhausted. Unless the person challenging for cause uses up all of his peremptory challenges, there is no need to determine if cause in fact exists. Interview with W. H. Gregory, Crown Prosecutor, in Sydney (June 20, 1983).

[77] Jury Act, 1977 (N.S.W.) s. 48. See also *op. cit. supra* n. 66 at 243.

[78] Jury Act, 1977 (N.S.W.) s. 45(1).

[79] S. 44.

[80] S. 48(4).

[81] S. 48(5).

[82] S. 51. Before the Jury Act, 1977 (N.S.W.) was passed the court, if faced with an insufficient number of jurors, was empowered to command any person in the street outside the courthouse to present himself for jury service. Thus, sheriffs could snatch people from their businesses and force them to be jurors. This practice was called "praying of tales". Because of the injustice and imposition praying of tales caused, the practice was discontinued. See Parl. Deb. N.S.W. 4484 (*Hansard* 1977).

[83] Jenkyn, "Improvements to the Judicial System" (1953) 27 *A.L.J.* 145 at 150.

consumes very little time. The average amount of time spent picking a jury in New South Wales is less than thirty minutes.[84] When juries can be empanelled quickly, criminal trials take less time and the back-log of cases waiting to be heard is therefore reduced.

In addition, aside from being time efficient, the jury empanellment procedure of the state is of some assistance in helping to obtain unbiased jurors. Since potential jurors may not be questioned until a *prima facie* case of bias has been shown, the possibility of having jurors develop ill feelings toward the accused or the Crown in response to being asked sensitive questions is minimized. Justice comes closer to being done when jurors are not swayed by personal opinions and are able to render a verdict based on the facts presented them.

All this is not to say that reform to the system of jury empanellment is unnecessary. Although the present system in New South Wales allows for a prompt empanelling of a jury, speed should not be the main consideration. The goal, it should be remembered, is to empanel an *impartial* jury which is representative of the community. Existing procedures fail to give the accused or the Crown any information about prospective jurors which could be used to intelligently exercise challenges. In criminal trials the accused and the Crown are forced to challenge in the absence of relevant facts about the juror's possible friendship with or relation to participants in the trial. The juror's occupation is not even disclosed to the accused and the Crown. In reality, lack of knowledge about prospective jurors renders challenges for cause almost valueless; furthermore, lack of knowledge is the principal reason why peremptory challenges are usually based on the juror's sex, age, race, dress, or appearance.[85]

It is submitted that New South Wales should consider setting aside a brief period of time for the Crown and the representative of the accused to question a potential juror to see if he is obviously biased or if he is disqualified from serving as a juror.[86] This procedure would greatly increase the value of the challenge. However, if this revision is considered as too drastic a reform, an alternative is available. An announcement could be made to the jury panel which would help eliminate those persons whose independence and impartiality is questionable. This announcement should state that if any of the following conditions exists, the person should notify the court: (1) relation to the accused, (2) friendship with the accused or with any relation of the accused, (3) relation to the judge, (4) relation to or employment by any of the legal counsel, or (5) any other reason why the person may feel he may be biased in that particular trial.[87] Even though an an-

[84] Interview with Sheriff's Office of N.S.W. in Sydney (June 17, 1983).

[85] In 1981 there were two examples of peremptory challenges being exercised strictly on the basis of sex or race. In one case the Crown challenged all Aboriginals on the jury panel. The second case concerned peremptory challenges being used to exclude women. See "Trial by a Jury of One's Peers" (1982) 56 *A.L.J.* 209.

[86] This same proposal was made by an Australian attorney some fifty-five years ago. See "Examining the Jury" (1928) 2 *A.L.J.* 83. A short period of questioning was again proposed in 1953. See Jenkyn, *supra* n. 83 at 152.

[87] A similar announcement was proposed recently by the Law Reform Commission of Western Australia. Law Reform Commission of Western Australia, *op. cit. supra* n. 26 at 43.

nouncement of this type would probably not guarantee that all possibly biased persons are removed from the jury panel, it would be a step in that direction. In addition, its implementation would neither significantly increase the length of jury empanellment nor damage its overall efficient operation.

B. California Procedure

(i) Method of Empanelling Jury

The first step in California's jury empanellment is very similar to that used in New South Wales. The clerk of the court draws twelve cards containing the names of prospective jurors on the jury panel, and those persons are directed to be seated in the jury box. At this point the parallelism between the practices of the two states ceases. The process of picking a jury in California is centred around a procedure known as *voir dire*. Initiating after twelve potential jurors have been selected, *voir dire* is a preliminary examination of each prospective juror to determine his qualifications and to reveal any hidden bias he may have that would render him unfit to serve on this particular jury.[88] California *voir dire* is conducted in turn by counsel for the defendant and state under the supervision of the trial court, who has broad discretion to decide what questions should be asked. Because it is considered an instrumental part of the justice process, *voir dire* by counsel is a right protected by statute.[89]

It is during *voir dire* that challenges for cause and peremptory challenges are exercised. Having been informed before any jurors were called of his right to challenge individual jurors, the defendant is aware that he must make his challenges before the juror is sworn.[90] In contrast to its use in New South Wales, the challenge for cause is actively exercised in California courts by both the defendant and the prosecutor. A challenge for cause can be either *general* or *specific*.[91] A general challenge for cause must be based on one of three grounds: (1) prior conviction of a felony, (2) failure to meet statutory jury qualifications, or (3) a physical impairment which would disable the prospective juror from participating in the trial.[92] Specific challenges for cause are based on actual or implied bias.[93] To establish actual bias counsel must demonstrate to the satisfaction of the court that the state of mind of the potential juror will prevent him from acting impartially; in other words, he must show that the juror has a preconceived notion about the guilt or innocence of the defendant. Implied bias is found when it has been shown that the prospective juror has a special relationship with one of the participants in the trial[94] or that his unequivocal opposition to the death

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[88] M. Bloomstein, *op. cit. supra* n. 76 at 66.

[89] Cal. Penal Code s. 1078 (West 1970 and Supp. 1983).

[90] See s. 1066. The court has power to permit a challenge to be made after the juror has been sworn: s. 1086.

[91] S. 1071.

[92] S. 1072.

[93] S. 1073.

[94] S. 1074. The relationship must be one of those included in s. 1074. Examples of a special cause for implied bias are being related to the defendant of victim; having been an adverse party to the defendant in a civil action; having served as a juror in a civil action based on the same act of defendant; or standing as employee, attorney, client, guardian, landlord, or tenant to the defendant or victim. *Ibid.*

penalty will preclude his finding the defendant guilty.[95] Although in New South Wales the peremptory challenge is normally exercised first, the practice in California is that challenges for cause are made and ruled upon before counsel resorts to using a peremptory challenge. In fact, the California Penal Code requires that all general challenges for cause precede specific challenges for cause.[96] Moreover, the Code mandates that the defendant must conduct *voir dire* of prospective jurors before the prosecution and that it must make all challenges for cause before the prosecution begins.[97]

While being questioned during *voir dire*, the potential juror is normally not under oath and no record is made of questions and replies.[98] However, the juror is under a duty to truthfully answer every question asked of him. Restrictions have been placed, though, on the type of questions which may be asked. The general rule, as laid down by the California Supreme Court, is that questioning by counsel is restricted to areas relevant to the challenge for cause and may not be used for the sole purpose of laying the foundation for the exercise of a peremptory challenge.[99]

After both counsel for the defendant and for the prosecution have challenged for cause all prospective jurors who have displayed grounds for such during *voir dire*, each counsel is then permitted a certain number of peremptory challenges. California law allows the defendant and the state ten peremptory challenges in a normal trial.[100] If the offense charged is punishable by death or life imprisonment, each side has twenty-six peremptory challenges. Conversely, if the offence charged is punishable by imprisonment for ninety days or less, each side is granted only six peremptory challenges. Special rules govern joint trials of more than one defendant; in such a case the defendants must exercise their allotted challenges jointly.[101] Each defendant is, however, entitled to exercise up to five more peremptory challenges separately, and the state is granted additional challenges equal to the total of the separate challenges allowed the defendants.

Since the peremptory challenge normally needs no explanation, it is especially useful when an attorney suspects a prospective juror of being biased but was unsuccessful at convincing the judge of that fact. Many judges will accept at face value a statement by a juror that he has no bias against the accused; nevertheless, the attorney may still suspect bias but be unable to prove it.[102] Peremptory challenges may also be used to exclude those jurors whose personality, as revealed during *voir dire*, is such that the attorney believes the juror would be sympathetic to the other side. The juror's dress, appearance, or age may also suggest that a peremptory

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[95] S. 1074(8).
[96] S. 1087.
[97] S. 1086.
[98] For a sample *voir dire* in a California criminal trial see Appendix IV.
[99] See e.g., *People* v. *Crowe*, 8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973). See also *supra* n. 12 at 145-46.
[100] Cal. Penal Code s. 1070 (West 1970 and Supp. 1983).
[101] *Id.* s. 1070.5.
[102] *Op. cit. supra* n. 12 at 146.

challenge would be advisable. On the other hand, in spite of the fact that traditional Anglo-Saxon jurisprudence in no way limits the exercise of peremptory challenges,[103] California courts have recently chosen to place restrictions on their use. Although an attorney is allowed to peremptorily challenge a juror for bias concerning the particular trial, parties, or witnesses, the attorney may not exclude jurors simply because of their membership in a "cognizable group".[104] Thus, jurors cannot be eliminated by peremptory challenge solely because of their race, sex, or ethnic membership, and the use of peremptory challenges in this manner could deprive a defendant of his right to an impartial jury.

Peremptory challenges are first exercised by the prosecution and then by the defendant.[105] Each party is entitled to insist on a full panel of twelve in the jury box before it makes its peremptory challenges. When both parties pass consecutively or when they have exhausted their challenges, the jury is sworn. Upon being sworn, the jury is ready to begin the trial.

(ii) Critique of California Procedure

In theory, the procedure known as *voir dire* is invaluable because it is the only real method of picking jurors who are truly impartial. Unless the juror volunteers information to the court, *voir dire* is the sole means of assuring that he is not related to the accused or acquainted with the victim, and that he is free of personal feelings which would influence his decision. The problem with the procedure of *voir dire*, however, is that in practice it is too easily subject to abuse. First, *voir dire* is all too often used by attorneys to seek a favourable rapport with potential jurors, to suggest what evidence will likely be introduced and what it will show, and to gain commitments from jurors to vote a certain way with a particular set of facts. Some studies have indicated that rather than sifting out unwanted jurors, lawyers spend most of their *voir dire* time indoctrinating the jury.[106] It is doubtful that *voir dire* was intended for this purpose. Second, the recent trend toward utilizing pre-*voir dire* investigations of jurors[107] in order to secure a biased jury in

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[103] *Id.* 139-40.

[104] See e.g., *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). See also "Comment, A New Standard for Peremptory Challenges" (1979) 32 *Stan. L.R.* 189.

[105] Cal. Penal Code s. 1088 (West 1970).

[106] Note, "*Voir Dire*: Establishing Standards to Facilitate the Exercise of Peremptory Challenges" (1975) 27 *Stan. L.R.* 1493 at 1508 n. 63. See also Fried, Kaplan and Klein, "Jury Selection: An Analysis of Voir Dire" in *The Jury System in America* (R. Simmon, ed. 1975) at 49-51.

[107] See "The Constitutional Need for Discovery of Pre-*Voir Dire* Juror Studies" (1976) 49 *S. Cal. L.R.* 597 at 600-601, 606:

> With the growth of the social sciences, trial practitioners have increasingly enjoyed the benefit of scientific technique with which to reinforce and supplement their hunches regarding prospective jurors. Studies are available on the effects on juror behavior of nationality, sex, social status, occupation, family status, the role of the foreman, education, prior jury experience, and other socioeconomic factors. In addition, government prosecutors have had at one time or another the aid of police reports, F.B.I. investigations, and I.R.S. reports in gaining specific information about potential jurors. Similarly, private defense counsel have utilized the services of private detectives in this endeavor. . . . Often the jury panel is observed in the courtroom and rated by psychologists or psychiatrists on authoritarianism scales, or by kinesiologists in terms of body language. All of this information is finally assembled in a fashion which rates each member of the jury panel on a scale of desirability. After all challenges for cause have been exhausted, these ratings are employed to determine the most effective use of peremptory challenges.

criminal trials is a threat to the impartial jury as we know it.[108] Often this information is not available to opposing counsel. Moreover, because obtaining jury data is expensive, poor defendants are usually denied the equal right to share in its possible assistance. Third, intensive and time consuming questioning of prospective jurors by attorneys may have the effect of alienating fair-minded jurors and discouraging them from serving. Since the aim of *voir dire* should be to exclude biased jurors, not create them, highly personal questions should be strictly controlled.

Despite the fact that *voir dire* today is time consuming and costly,[109] it is necessary to ensure that disinterested jurors are empanelled. Close supervision should be made of *voir dire* to confirm that it is not being subjected to abuse such that the representative nature of the jury is altered or the jury's impartiality is questioned. As long as abuse is not present, *voir dire* will remain a valuable asset of the criminal procedure of California.

V. Conclusion

In most criminal cases in New South Wales and California a trial by jury is a fundamental right of every defendant. Each state has realized that justice can best be obtained through the use of ordinary citizens as decision-makers. Furthermore, each state has an established policy of gathering persons from all sectors of society in an effort to empanel a jury which reflects the community's attitudes. A close examination of the jury selection procedures of both states reveals, however, that these policies have yet to be firmly instituted.

Although the initial stage of jury selection in New South Wales and California has been reformed to enable a list of prospective jurors which is representative to be compiled, stages two and three have been in some ways neglected. At present, the process of jury selection results in an unnecessary reduction of the pool of prospective jurors and creates disproportionate representation of some segments of the community. Because of their impact upon representation, excuses should be granted only in cases of extreme hardship. It needs to be recognized that all members of the community should be eligible for jury duty and should be adequately compensated for performing that task. Moreover, the questioning of jurors, although needed to reveal bias, should be restricted so that valuable time is not wasted and so that prospective jurors are not alienated. Through these further revisions in the jury selection procedures of New South Wales and California it is hoped that both the jury system and the opinions of prospective jurors will be improved.

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[108] One commentator has stated that the "jury's impartiality is threatened because defense attorneys have discovered that by using social science techniques, they can manipulate the composition of juries to significantly increase the likelihood that their client will be acquitted". "Science: Threatening the Jury Trial", *Washington Post*, May 26, 1974, at C3, col. 1, quoted in Babcock, "Voir Dire: Preserving Its Wonderful Power" (1975) 27 *Stan. L.R.* 545.

[109] *Voir dire* has been known to take up to six weeks.

APPENDIX I

Schedule 1 of the Jury Act of New South Wales lists the persons who are disqualified from serving as jurors in New South Wales as follows:

1. A person convicted in New South Wales or elsewhere of — (a) treason; (b) an offence carrying a penalty of imprisonment, or penal servitude, for life; or (c) any offence and sentenced to imprisonment, or penal servitude, for a term exceeding 2 years.
2. A person who at any time within the last 10 years in New South Wales or elsewhere — (a) has served any part of a sentence of imprisonment or penal servitude or has been on parole in respect to such a sentence; or (b) has been found guilty of an offence and detained in an institution for juvenile offenders.
3. A person who at any time within the last 5 years in New South Wales or elsewhere — (a) has been convicted of any offence which may be punishable by imprisonment or penal servitude; (b) has been bound by recognizance to be of good behaviour or to keep the peace; (c) has been the subject of a probation order made by any court; or (d) has been disqualified by order of a court from holding a licence to drive a motor vehicle or omnibus for a period in excess of 6 months.

APPENDIX II

Schedule 2 deems the following persons ineligible:

1. Judges (including Judges of the Industrial Commission of New South Wales and The Workers' Compensation Commission of New South Wales), Masters of the Supreme Court and their spouses.
2. Members and officers of the Executive Council and Legislative Council and Legislative Assembly and their spouses.
3. Barristers and solicitors.
4. Coroners, stipendiary magistrates, special magistrates and their spouses.
5. A person who is a member of the Corrective Services Commission of New South Wales or is employed in the Department of Corrective Services.
6. Members of the Police Force and their spouses.
7. A person employed in the Department of the Attorney-General and of Justice.
8. A person, being an officer of the Public Service, employed in the Police Department.
9. Permanent heads within the meaning of the Public Service Act, 1902.

10. Chairman, Deputy Chairman and Members of the New South Wales Public Service Board.
11. A person who is unable to read or understand the English language.
12. A person who is unable because of illness or infirmity to discharge the duties of a juror.
13. A person employed by the Board of Fire Commissioners of New South Wales.
14. A person employed by the State Emergency Services and Civil Defence Organisation.
15. A person employed by the Health Commission of New South Wales in connection with ambulance services.
16. A person exempted by the Jury Exemption Act 1965 of the Parliament of the Commonwealth.
17. The Ombudsman and Deputy Ombudsman.
18. Crown prosecutors and their spouses.
19. Public Defenders and their spouses.
20. A person who holds a commercial agent's licence, a private inquiry agent's licence or a subagent's licence, under the Commercial Agents and Private Inquiry Agents Act, 1963.
21. A person who is the spouse of a person employed as a prison officer in the Department of Corrective Services.
22. Members of the staff of the Security Service of the State Rail Authority of New South Wales.

APPENDIX III

The following persons may, under Schedule 3 of the Jury Act,7 (N.S.W.) claim exemption from jury service as of right:

1. Clergymen in holy orders, ministers of religion having established congregations and vowed members of any religious order.
2. Dentists registered under the Dentists Act, 1934, and actually practising.
3. Legally qualified medical practitioners, actually practising.
4. A person of or above the age of 65 years.
5. Pregnant women.
6. A person having the care, custody and control of children under the age of 18 years (other than children who have ceased to attend school) but not including more than one person having the care, custody and control of the same children.

7. A person residing with, and having the full-time care of, a person who is aged or in ill-health.
8. A person notified of his inclusion on the draft jury roll for a jury district who is on the existing jury roll for that jury district or for any other jury district.
9. A person who is entitled to be exempted under section 39 on account of previous lengthy jury service.
10. A person who resides more than 56 kilometres from the place at which he is required to serve.
11. Members and secretaries of all statutory corporations, boards and authorities.
12. Pharmacists registered under the Pharmacy Act, 1964, and actually practising.
13. Mining managers and under-managers of mines.
14. Members of a permanent rescue corps established under section 14(1) of the Mines Rescue Act, 1925.
15. Former members of the Police Force.
16. A person who holds the office of (a) Manager, Maintenance; (b) Assistant Manager, Maintenance; or (c) Operating Trouble Officer, in the Mechanical Branch of the State Rail Authority of New South Wales.
17. A person who holds the office of (a) Superintendent or Assistant Superintendent of; or (b) instructor at, a central rescue station under the Mines Rescue Act, 1925.

APPENDIX IV

An illustration of *voir dire* of a prospective juror in California is found in A. Ginger (ed.), *Minimizing Racism in Jury Trials: The Voir Dire Conducted by Charles R. Garry in People of California v. Huey P. Newton* (1969) at 90-94, reproduced in "*Voir Dire*: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges" (1975) 27 *Stan. L. Rev.* 1493 at 1509. The following quotation from that trial shows how *voir dire* can expose hidden prejudices:

> [MR. CARRY]: Now, it's a fact, is it not, that you already had an opinion before you came here for this case?
>
> [PROSPECTIVE JUROR]: Well, to a certain extent, yes.
>
> **Q:** All right. Now, is your opinion that you had about this case before you got here such that it would take the tremendous amount of evidence to overcome that opinion?
>
> **A:** No it wouldn't. If — what evidence will show, that I will evaluate and see who is right and who is wrong.

Q: It is not a question so much as to who is right and who is wrong. As you sit there, Mr. S., in your opinion, right now while you are sitting there this minute, is Huey P. Newton guilty or not guilty?

A: Well I don't know for sure whether he shot the officer or not, but the officer is dead.

Q: And by what standard, just because the officer is dead, you are going to say that Huey Newton did it; is that right?

A: Well, that's got to be proven.

Q: Well my question is: As you sit there right now, do you believe that Huey Newton shot and or stabbed, whatever it was, Officer Frey?

A: I don't know whether he shot him or not. That I can't say.

THE COURT: Mr. S., you see, under our law there is a presumption of innocence to start with. When you start the case the defendant is presumed to be innocent, and it is up to the People, the prosecution, to prove to you beyond a reasonable doubt that the defendant is guilty. Do you understand that?

THE JUROR: Yes.

THE COURT: So, now, not having heard any evidence, you must start with a presumption of innocence. Do you know what I mean by presumption? You must say, "As far as I know the man is innocent." Do you understand that?

THE JUROR: Yes.

THE COURT: "And it is up to the prosecution to prove to me that he is guilty." Do you understand that?

THE JUROR: Yes.

THE COURT: So, therefore, as it stands now, do you believe he is guilty before you hear any evidence?

THE JUROR: No.

MR. CARRY: Well, do you really believe that as Huey Newton sits here right now next to me, that he is innocent of any wrongdoing of any kind.

A: No. That I don't believe.

MR. CARRY: Mr. S., again I ask you that same question which you have answered three times to me . . . As Huey Newton sits here next to me now, in your opinion is he absolutely innocent?

A: Yes.

Q: But you don't believe it, do you?

A: No.

THE COURT: Challenge is allowed.