

NOTES

PSYCHOLOGICAL TESTS AND STANDARDS OF COMPETENCE FOR SELECTING JURORS

CONSTITUTIONAL provisions make trial by jury a fundamental part of the legal system in every American jurisdiction.¹ Yet in recent decades intense criticism has been leveled at jury trial, and many commentators have urged that it be eliminated entirely.² In large part this criticism has been based on the belief that jurors generally are unable to perform the fact-finding duties assigned to them.³ At the root of this inadequacy lies a basically weak structure for juror selection, the result of poorly defined statutory qualifications and antiquated selection methods.

Statutory qualifications for jury service vary considerably from one jurisdiction to another and have in common the vice of vagueness. A substantial number of jurisdictions mention some combination of the following requirements: minimum age, citizenship, voting registration, residence within the jurisdiction, good moral character, absence of criminal record, ability to read, write, speak or understand the English language, enrollment as a taxpayer, good health, mental capacity and a fair education.⁴ A few statutes define qualifications in even more general terms, requiring as criteria that the jurors be "esteemed in their communities as of good character and sound judgment,"

1. BUSCH, *LAW AND TACTICS IN JURY TRIALS* 24-26 (1949); see James, *Trial by Jury and the New Federal Rules of Procedure*, 45 *YALE L.J.* 1022 (1936). For a discussion of the constitutional guarantees of jury trial see, generally, BUSCH, *op. cit. supra*, at 16-77.

2. See FRANK, *COURTS ON TRIAL* cc. 8, 9 (1949) for a criticism of the functioning of the jury system. See also STALMASTER, *WHAT PRICE JURY TRIALS?* (1931); SUTHERLAND, *A DEBATE HANDBOOK ON THE LAW'S DELAY AND THE JURY TRIAL* (1929).

Frank and Green both recommend abolition of the jury. FRANK, *op. cit. supra*, at 145; Green, *Why Trial by Jury?*, in SUTHERLAND, *op. cit. supra*, at 162-63. Frank also discusses suggestions for correcting defects in the jury system. FRANK, *op. cit. supra*, at 141-45. In addition to the improvement of jury selection methods, the more constructive recommendations for improving the performance of juries relate to better orientation of jurors to their tasks, and clearer and more concise court instructions to jurors on the essentials and alternatives to be considered in arriving at verdicts. See Miner, *The Jury Problem*, 37 *J. CRIM. L., C. & P.S.* 1 (1946).

3. See OSBORN, *THE MIND OF THE JUROR* 8, 15-16 (1937); cf. FRANK, *COURTS ON TRIAL* 118-19 (1949).

4. The various qualifications required by the states are set forth in *JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, REPORT OF THE COMMITTEE ON SELECTION OF JURORS* 33-35 (1942); BUSCH, *op. cit. supra* note 1, at 86-88. Several states, Nebraska, Tennessee and Virginia, for example, impose by statute a large number of specific qualifications, whereas other states, notably Massachusetts, Ohio, Delaware, New Hampshire and Maine, list no more than three. Uniform qualifications for federal jury service are prescribed by 28 U.S.C. § 1861 (1952). See Note, 64 *YALE L.J.* 1059, 1060-61 (1955).

"sober and intelligent, of good reputation," or "sober, healthy and discreet."⁵ Many of the statutory qualifications have no direct relevance to adequate jury performance.⁶ Those which do seek to insure competence are too vague to indicate either the precise characteristics of competence or the extent to which a given qualification must be possessed by a competent juror.

Once the legislature has established the qualifications for jury duty, individuals who meet these standards must be found and appointed to the jury panel through a process of "selection."⁷ Selection procedures and techniques relating to competence are generally not prescribed by statute. However, requirements are established for persons who, under the supervision of the court, are to serve as jury selectors. They are usually called commissioners and are given the duty of choosing qualified jurors on the basis of fair geographical representation.⁸ It is a traditional practice of jury commissioners to base their choices upon the solicited advice of members of the community whom they consider prominent and reputable.⁹ This usually unverified advice, representing judgments as to which citizens are qualified for jury duty, is often the sole basis for selection. Today, in some jurisdictions, eligibility for jury duty is determined from responses to written questionnaires designed to elicit information regarding such qualifications as age, citizenship and years of education.¹⁰ When uncertain responses are given, the jury commissioner may re-

5. See WIS. STAT. § 255.01 (1953); MO. ANN. STAT. § 494.010 (Vernon 1952); PA. STAT. ANN. tit. 17, § 1235 (Purdon 1930). Federal District Judge Merrill E. Otis sets out these and other beautiful phrases of many state qualifications statutes as evidence of high purpose in the selection of jurors. See Otis, *Selecting Federal Court Jurors*, 14 PA. B. ASS'N Q. 136, 138-39 (1943).

6. These statutory qualifications serve policy purposes largely unrelated to the competent fulfillment of jury duty. For instance, the requirement of local residence is concerned primarily with administrative convenience, while the demand for payment of a poll tax may serve solely a policy of racial or class exclusion.

7. For a review of current selection techniques and an analysis of each step in the jury selection process, see JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, REPORT OF THE COMMITTEE ON SELECTION OF JURORS 78-89 (1942); BUSCH, *op. cit. supra* note 1, at 79-83.

8. See, *e.g.*, 28 U.S.C. §§ 1864-65 (1952); IND. STAT. ANNOT. § 4-3301-04 (Burns 1946); VA. CODE § 8-180-84 (1950). Under the Indiana statute, for example, each circuit court must appoint two persons as jury commissioners for a period of one year. The appointees must be residents of the place in which terms of court are held, freeholders and voters of that county, known to be of opposite politics, and characterized by intelligence, morality and integrity. They must take an oath or affirmation to perform their duties, and upon failure to perform these duties may be held in contempt of court. In order to guarantee that prospective jurors possess certain qualifications, the commissioners are required to choose only from among those persons whose names appear on the tax lists. The commissioners must then "proceed to select" those qualified for jury duty, and must deposit their names in a box provided by the court clerk.

9. See JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, REPORT OF THE COMMITTEE ON SELECTION OF JURORS 15-18 (1942).

10. *Id.* at 66. The committee report discusses the use of questionnaires and related problems, *id.* at 66-77, and sets forth a sample form of a questionnaire for prospective

quire a personal interview before making his selection. The interview technique, regularly used in few jurisdictions, ranges from superficial questioning and observation to the more intensive and systematic evaluation of juror qualifications which is practiced in certain larger New York municipalities.¹¹ In some California counties the commissioners employ tests of knowledge and vocabulary to screen prospective jurors.¹² The most advanced procedures are used in Los Angeles County where standardized group intelligence examinations and tests of memory and perception are administered.¹³ These techniques, though more comprehensive than any others now in use, still are limited to the assessment of intellectual competence, only one type of juror qualification.

Selections made by the jury commissioner are subject to review by the trial court.¹⁴ The commissioner is restrained by requirements that he be non-discriminatory¹⁵ and that his selections substantially comply with the vaguely

jurors, *id.* at 71-73. In a very few jurisdictions the use of a questionnaire is specifically required by statute. *E.g.*, CONN. GEN. STAT. § 7912 (1949).

11. In New York a personal interview by the county clerk is required of prospective jurors in counties within cities having a population of one million or more. N.Y. JUDICIARY LAW § 595. See Schechter & Affron, *Selecting Persons for Jury Service*, 26 CORNELL L.Q. 677, 682 (1941); *cf.* *Fay v. New York*, 332 U.S. 261 (1947).

12. Note, *Jury Selection in California*, 5 STAN. L. REV. 247, 260 (1953). In San Francisco County jurors are given a multiple choice examination containing twenty-five common legal terms. A representative question asks whether *larceny* means escape, tension, theft or market. *Id.* at 260 & n.83. San Diego County uses an oral true-false test to measure a prospective juror's response to legal situations. The juror must answer true or false to the following type of question: "In civil actions between individual persons and corporations, jurors should give greater consideration to the rights of individual persons than to those of corporations." *Id.* at 260 n.82.

Despite the augmentation of these juror assessment techniques by questionnaires and interviews, they still fall short of a comprehensive and systematic evaluation of the complex of qualifications necessary for jury duty. See text at p. 534 *infra*.

13. Letter from James H. Chadbourn, Professor of Law, University of California, Los Angeles, to the *Yale Law Journal*, Feb. 25, 1955, on file in Yale Law Library. See also Martineau, *The Los Angeles Plan of Juror Selection*, 15 L.A. BAR BULL. 55, 58 (1939).

14. *United States v. Sferas*, 210 F.2d 69, 75 (7th Cir.), *cert. denied*, 347 U.S. 935 (1954); *Tarrence v. Commonwealth*, 265 S.W.2d 40, 48 (Ky. 1953), *cert. denied*, 348 U.S. 899 (1954); *Ritz v. Kingdon*, 79 S.E.2d 123, 125 (W. Va. 1953); *Good v. Farmers Mut. Ins. Co.*, 265 Wis. 596, 599, 62 N.W.2d 425, 427 (1954).

15. The jury commissioner's selections must "comport with the concept of the jury as a cross-section of the community." *Glasser v. United States*, 315 U.S. 60, 86 (1942). The deliberate and systematic exclusion by the jury commissioner of any class of people on the basis of social or economic distinctions has been held a denial of due process and equal protection under the Fourteenth Amendment to the Federal Constitution, due process under the Fifth Amendment, and the right to a "fair trial" granted by the Sixth Amendment. *Ballard v. United States*, 329 U.S. 187 (1946) (exclusion of women); *Thiel v. Southern Pac. Ry.*, 328 U.S. 217 (1946) (exclusion of daily wage earners); *Smith v. Texas*, 311 U.S. 128, 130 (1940) (exclusion of Negroes); *Kentucky v. Powers*, 139 Fed. 452 (E.D. Ky. 1905), *rev'd on other grounds*, 201 U.S. 1 (1906) (exclusion on basis of political affiliation); *Juarez v. State*, 102 Tex. Crim. 297, 277 S.W. 1091 (1925); *accord*, *Searle v. Roman Catholic Bishop*, 203 Mass. 493, 89 N.E. 809 (1909) (exclusion on basis of religion).

defined statutory qualifications.¹⁶ It is the voir dire examination, however, that ultimately determines the acceptability of his nominations.¹⁷ As a practical matter the examination seeks primarily to discover the existence of bias. But the jury commissioner's selections may also be rejected in the voir dire because of other objections to competence based upon prior investigation by the parties' attorneys or upon fortuitous revelations of lack of qualification.¹⁸

Clearly, present qualification statutes and selection procedures provide no assurance of adequate jurors. Prerequisite to the improvement of jury performance is the adoption of a minimum standard of juror competence and the employment of precise and objective selection devices, notably the psychological test, to assess the qualifications of prospective jurors.

In order to merit selection the juror should possess a stated degree of the following combination of traits: (1) physical integrity—adequate vision, hearing and stamina; (2) fund of general information—sufficient for an elementary understanding of things and events; (3) critical thinking ability—the use of logic in evaluating argument, making inferences and arriving at conclusions; (4) fund of information about legal institutions—no marked ignorance and misinformation about commonly known legal processes and personnel; (5) personal stability—freedom from severe mental illness, marked emotional instability and morbid pre-occupations; (6) critical behavior judgment—freedom from marked naivete in judging behavior; (7) fair and reasonable attitudes—a willingness to weigh honestly and carefully all the evidence. Each of these categories is definite enough to be accurately measured and can therefore serve as a guide in an improved process of jury selection.

Objective psychological tests can determine the existence of these qualifications better than any techniques of selection now in use.¹⁹ They provide a

16. *Harrison v. State*, 231 Ind. 147, 165, 106 N.E.2d 912, 921 (1952); *Walter v. State*, 208 Ind. 231, 236, 195 N.E. 268, 270 (1935); *People v. Johnson*, 2 Ill. 2d 165, 168, 117 N.E. 2d 91, 94 (1954) (dictum).

17. The purpose of the voir dire examination is to permit further inquiry into the qualifications and attitudes of the prospective jurors prior to their being impaneled and sworn to try a case. See BUSCH, *op. cit. supra* note 1, at 113-31; KEETON, *TRIAL TACTICS AND METHODS* 243-52 (1954). The scope and conduct of the examination are matters usually left to the discretion of the court. *Tarrance v. Commonwealth*, 265 S.W.2d 40, 48 (Ky. 1953), *cert. denied*, 348 U.S. 899 (1954); *Putnam v. Pacific Monthly Co.*, 68 Ore. 36, 53, 130 Pac. 986, 992 (1913); *Commonwealth v. McGrew*, 375 Pa. 518, 526, 100 A.2d 467, 471 (1953); *Parker v. Hoefler*, 118 Vt. 1, 5, 100 A.2d 434, 438 (1953). Customarily, opposing counsel question prospective jurors on matters relating to their competence and bias, but the court in its discretion may take over the questioning of jurors and conduct the entire examination itself. *United States v. Mesarosh*, 116 F. Supp. 345 (W.D. Pa. 1953); *FED. R. CRIM. P.* 24(a).

18. On the problem of selecting a jury from the point of view of adversary parties, see GOLDSTEIN, *TRIAL TECHNIQUES* 152-201 (1935), LAKE, *HOW TO WIN LAWSUITS BEFORE JURIES* 16-29 (1954); Arado, *Selecting a Jury*, 35 CHI. B. REC. 54 (1953). See also OSBORN, *THE MIND OF THE JUROR* c. 8 (1937).

19. Objective tests give a succinct evaluation of particular traits of behavior, which for the purpose of study are abstracted from the total complex of behavior operations. Such

yardstick for measuring the competence of the prospective juror and thus enable the commissioner to set a specific standard as a prerequisite to nomination.²⁰ This standard should be based on the minimum level achieved by a large percentage of comparable individuals who have taken the test and established the range of scores.²¹ Utilization of psychological tests will largely eliminate subjectivity and uncertainty in the commissioner's selection procedures.²²

tests provide estimates of these traits more quickly, more briefly and more accurately than do the subjective judgments and personal estimates which are characteristic of present selection techniques.

"Objective" psychological tests are to be distinguished from "projective" psychological techniques. Projective techniques make an infinitely more complex and more comprehensive assessment of an individual's personality and behavior. They are, however, heavily dependent for their success on the skill and judgment of the examiner. Though potentially more informative, projective techniques are probably not feasible at the present time for use in the process of screening large numbers of prospective jurors. See FREEMAN, THEORY AND PRACTICE OF PSYCHOLOGICAL TESTING cc. 19, 20 (1955). For a brief exposition on objective psychological tests, written for lawyers, see Hunt, *The Uses and Abuses of Psychometric Tests*, 35 KY. L.J. 38 (1946).

20. Objective tests undergo a process known as standardization. A single test is administered to large groups of individuals and the scores of these individuals, who may number in the hundreds or thousands, are accumulated. The range of scores provides a comparative scale against which may be placed the scores of persons who subsequently take the test and who are comparable in general characteristics to the sample population. The place where a particular person's score falls along the range of scores is most often called a percentile. It is that point which represents the percentage of sample scores exceeded by the person taking the test. See ADKINS, CONSTRUCTION AND ANALYSIS OF ACHIEVEMENT TESTS 144 (1947); FREEMAN, *op. cit. supra* note 19, c. 2.

21. The problem of deciding upon a critical score or level of competence below which persons will be considered unqualified for jury duty can be resolved systematically through the use of statistical criteria. Those concerned with establishing a fixed minimum passing score may base their estimate on the extent to which a given score falls outside the range of scores which most people are likely to achieve. Statistical methods establish numerous procedures and criteria for determining that point. Such statistical techniques as "the middle 80 per cent range," "the standard deviation" and "the semi-interquartile range" provide for a systematic determination of those scores, and hence those individuals who fall at the extremes—notably here the lower extreme—in any distribution of scores. For an elaboration and fuller explanation of the statistical process, see GUILFORD, FUNDAMENTAL STATISTICS IN PSYCHOLOGY AND EDUCATION cc. 3-6 (1942); WALKER, ELEMENTARY STATISTICAL METHODS cc. 3, 5, 8 (1943). The setting of a critical test score can also be accomplished roughly and more arbitrarily by the jury commissioner. He can decide, for example, that the lowest twenty scores in one hundred, or the lowest ten or five, will fail to qualify. This enables the commissioner to vary the qualification level in relation to the need and availability of jurors, but such arbitrary choice may not lend assurance that the critical level set corresponds to that which will, on a better considered and statistically more accurate basis, separate qualified from unqualified persons.

22. Commonly, a subjective judgment as to the existence of a particular trait in another individual is a crude guess. Persons making such judgments do not systematically use objective criteria or a standardized scale for assessment. In contrast, objective psychological tests undergo research procedures the essential characteristics of which are objectivity and certainty. Scores achieved on a test which measures a particular trait are compared to manifestations of that trait which have been evident in the previous behavior

Proof of their unique value in the assessment of intelligence and personality qualifications is provided by the reliance placed upon them for the screening of personnel in the armed forces, in business and industry, and in medical and educational institutions.²³

Many presently used and carefully developed objective tests of intelligence and personality are suitable for use in this field,²⁴ and others can be designed which are specifically adapted to the purpose of jury selection. These tests may be employed either in batteries to measure a wide range of qualifications or individually to assess a single trait.²⁵ The better known tests have undergone extensive experimental evaluations. They are carefully and elaborately examined to determine whether they accurately measure what their creators claim they measure, and whether they do so consistently.²⁶ Stringent professional

of the individual taking the test, or to the results of other tests measuring the same personality factors. Upon completion of this try-out process the test will provide a criterion of the existence of the trait independent of the judgment of both the test constructor and the examiner. See note 20 *supra*.

23. Objective psychological tests were widely used initially in the first World War. See FREEMAN, *op. cit. supra* note 19, at 241; PSYCHOLOGICAL EXAMINING IN THE UNITED STATES (Yerkes ed. 1921). Subsequently, they have been adopted in a variety of enterprises. Many businesses and industries depend heavily on them in the screening of job applicants for personality stability and capability, and the tests are also used to assess interest level and potential suitability for particular positions. See H. MOORE, PSYCHOLOGY FOR BUSINESS AND INDUSTRY cc. 5-8 (2d ed. 1942). They are widely used by schools to measure intelligence, vocational aptitudes and entrance qualifications. See EDUCATIONAL MEASUREMENT pt. 1 (Lindquist ed. 1951); GREENE, MEASUREMENT OF HUMAN BEHAVIOR pt. 2 (1941); CRAWFORD & BURNHAM, FORECASTING COLLEGE ACHIEVEMENT pt. 1 (1946). Psychiatry and medicine have adopted the tests for use as diagnostic aids and in the evaluation of treatment progress and recovery. See 2 CONTRIBUTIONS TOWARD MEDICAL PSYCHOLOGY pt. 4 (Weider ed. 1953). In World War II every soldier was required to take an objective test of general ability upon entrance into service, and some branches relied heavily on specially developed objective tests to evaluate the existence of particularly desired abilities. See PRINTED CLASSIFICATION TESTS (Rep. No. 5, U.S. Gov't Printing Office, Guilford ed. 1947); U.S. ARMY AIR FORCES, AVIATION PSYCHOLOGY PROGRAM RESEARCH REPORTS 1-19 (1947-48); O.S.S. STAFF, ASSESSMENT OF MEN (1948). Objective tests are used as an instrument of selection in many branches of the federal government today. See MOSHER & KINGSLEY, PUBLIC PERSONNEL ADMINISTRATION c. 9, particularly at 182 (4th ed. 1941); H. MOORE, *op. cit. supra*, at 106. YODER, PERSONNEL MANAGEMENT AND INDUSTRIAL RELATIONS 194-95 & n.16 (1943).

24. A brief description and assessment of nearly all psychological tests which have been developed is contained in THE FOURTH MENTAL MEASUREMENTS YEARBOOK (Buros ed. 1953). This compendium lists for each test its purpose, time and method of administration, and a critical evaluation of it by psychologists. For each test there is also a listing of literature reporting the use and value of the test in the different situations where it has been applied, and a catalogue of published reports discussing limitations, modifications and suggested improvements of the test.

25. For a discussion of examination administrative procedures and consideration of the merits of the use of tests singly and in groups, see THORNDIKE, PERSONNEL SELECTION: TEST AND MEASUREMENT TECHNIQUES (1949).

26. Objective psychological tests attain the highest percentage of accuracy in their

standards of statistical precision must be met²⁷ before any test is commercially marketed by the better known suppliers of psychological tests.²⁸

Objective tests are also administratively feasible for the screening of jurors. A single test is usually brief, varying in time limit from ten minutes to an hour. The tests are easily administered, requiring true-or-false, yes-or-no, or single word answers which can be scored quickly. They can be given to large groups simultaneously and at a cost ranging from one to ten cents per person. With only a simple orientation as to procedure, the jury commissioner, court clerk or assistants can conduct the testing program.²⁹ And the judge and jury commissioner, relying upon competent psychological counsel, can make the choice of tests to be used.³⁰

Should a jury commissioner decide to adopt the suggested qualifications and psychological test procedures, existing statutory or court requirements would ordinarily present no obstacle. Often the qualifications can be interpreted to lie within the purview of present, broadly defined legislative mandates, so that new legislation is unnecessary.³¹ If statutory change is unavoidable, en-

assessments of large numbers of subjects. The results achieved on these tests will be correct for most individuals, but will, theoretically, be in error in assessing a small percentage of persons. Tests are not perfect estimates of any given attribute, but they are considerably more specific and more precise than common subjective judgments in the evaluation of selected personal characteristics. Caution must be exercised to interpret the results of tests only within the limits of what they purport to measure, with full recognition that there is likely to be a small percentage of error in the evaluation of any large group of persons.

27. A joint committee of the American Psychological Association, the American Educational Research Association and the National Council on Measurements Used in Education has established specific standards for test construction and test publication. See *TECHNICAL RECOMMENDATIONS FOR PSYCHOLOGICAL TESTS AND DIAGNOSTIC INSTRUMENTS* (1954), printed as a supplement to 51 *PSYCHOLOGICAL BULL.* No. 2, pt. II (1954).

28. The Psychological Corporation, 522 Fifth Avenue, New York, N.Y., for example, requires that the members of its board of directors and officers be members of the American Psychological Association. (Membership in this national organization requires a minimum of a master's degree in psychology from a recognized college or university, and creditable experience in the profession of psychology varying according to the level of membership sought, but no less than one year.) The corporation abides by and fosters the scientific and professional recommendations set forth by that association. See *THE PSYCHOLOGICAL CORPORATION, 1955 CATALOG OF THE TEST DIVISION* inside back cover.

29. Each objective psychological test is normally distributed with a handbook or manual of instructions for guidance in the use of the test. Requirements and cautions for its administration are specifically set out, the technique of scoring is explained, and data and standards are given to aid in correctly assessing the significance of the results.

30. Psychological test corporations generally provide a consultation service to advise organizations who may have use for psychological tests. The psychology departments of large universities are able to provide expert counsel in the selection and use of tests. Firms of consulting psychologists are also available to give advice on the choice and use of tests or to handle the entire process of test selection, administration, scoring and interpretation. See, *e.g.*, *THE PSYCHOLOGICAL CORPORATION, 1955 CATALOG OF THE TEST DIVISION* inside front cover.

31. The canons of statutory construction authorize the interpretation of ambiguous or

actment of the entire set of qualifications would provide a concise and comprehensive minimum standard for competent jurors.³² It is clear that use of psychological tests to implement existing standards requires no new legislation. Such improved methods of selection can be put into practice by a rule of court or by the commissioner in the exercise of the discretion now granted him by statute.³³

Three legal arguments are likely to be urged against adoption of the proposed program. Most noteworthy is the probable assertion that a disproportionate number of prospective jurors from certain races or social and economic groups will be disqualified as a result of the application of minimum standards of qualifications and psychological tests for their evaluation. This disproportionality would be denounced as a violation of the constitutional requirement announced in *Glasser v. United States*, that juries must be selected so as to "comport with the concept of . . . a cross-section of the community."³⁴ How-

generally worded jury qualifications statutes in a manner that will best effectuate the legislative aim of securing qualified jurors. Therefore, the employment by the commissioner of more precise standards and better methods for their assessment should be construed as a valid effort to comply with presently existing statutory requirements. See 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4503 (3d ed., Horack 1943) (ambiguous statutes); 3 *id.* §§ 5501-06 (liberal or strict construction).

In California, for example, the juror qualifications statute requires that only those persons can serve "who are in the possession of the natural faculties, and not infirm or decrepit, of fair character and approved integrity, and of sound judgment." CAL. CODE CIV. PROC. § 205 (1953). And the statute governing juror selection requires that the jury commissioner "diligently . . . inquire and inform himself in respect to the qualifications" of prospective jurors. *Id.* § 204c. Specific requirements of knowledge, vocabulary and intelligence have been subsumed under the qualifications statute, and the possession of these traits has been measured by means of objective examinations without any known legal objection. See notes 12, 13 *supra* and accompanying text; note 33 *infra*.

32. See text at p. 534 *supra*.

33. *People v. Hess*, 104 Cal. App. 2d 642, 669, 234 P.2d 65, 83 (1951). In this case, the jury commissioner notified 35,000 prospective jurors to report for examination. After completion of a personal data sheet and personal interview by the jury commissioner or by a judicial secretary, 3,500 were selected for jury duty. The court upheld the jury commissioner in this designation of only about ten per cent of the available individuals. *Cf. Fay v. New York*, 332 U.S. 261, 270-72 (1947); text following note 7 *supra*.

34. *Glasser v. United States*, 315 U.S. 60, 86 (1942). In this case defendant contended that he was denied an impartial trial because of systematic exclusion from the jury panel of all women who were not members of the Illinois League of Women Voters. The Court upheld the contention that this procedure, if proved, would be a denial of the right of jury trial.

The "cross-section" idea stated in *Glasser* has been asserted to be fundamental to the constitutional right of jury trial. See *Ballard v. United States*, 329 U.S. 187, 191 (1946); *Thiel v. Southern Pac. Ry.*, 328 U.S. 217, 220 (1946); *cf.* note 15 *supra*. A "cross-section" of the community would appear to have reference to the proportional representation of individuals from all classes and groups in the community. However, the rule has been interpreted to forbid only exclusions made systematically and intentionally, not to require that all "classes" or "groups" must in fact be represented on each jury array. *Fay v. New York*,

ever, since *Glasser* a majority of the Court has approved the setting of high qualification standards and the use of systematic questioning to assess intelligence and literacy, even though these procedures resulted in the disqualification of a disproportionate number of a particular group.³⁵ Thus, it appears that the cross-section rule is not a limitation on the establishment of a suitable level of juror qualifications unless the requirements are designed to secure arbitrary or discriminatory aims.³⁶ Although a four justice minority took the position that the tests and standards were subjective and discriminatory, and resulted in the selection of a jury which failed to satisfy the cross-section rule,³⁷ even this minority agreed that a minimum standard could be established for all prospective jurors.³⁸ Furthermore, neither the majority nor the minority opposed the use of objective test methods to assess whether jurors are adequately qualified.

It may also be asserted that jury qualifications and selection procedures, as an integral part of the right to trial by jury, were permanently fixed at the time that right was adopted into the constitution.³⁹ This argument is based on the unanimous judicial opinion that the guarantee of trial by jury preserves intact the common law right and forbids alteration except by constitutional

332 U.S. 261, 284 (1947); *Thiel v. Southern Pac. Ry.*, *supra* at 220; *United States v. Local 36, International Fishermen*, 70 F. Supp. 782, 795-97 (S.D. Cal. 1947).

35. *Fay v. New York*, 332 U.S. 261, 291 (1947), upheld the so-called special or "blue ribbon" jury. The defendants had objected that persons fully qualified for general jury duty had been discriminatorily eliminated from the blue ribbon panel. They alleged that the qualifications and selection techniques failed to give proportionate representation to laborers, Negroes and women—in fact no laborers had been nominated for the panel. The Court refused to accept this contention and affirmed their conviction as having been made by a lawfully constituted jury. On the *Fay* case and the problem of blue ribbon juries, see Notes, 60 HARV. L. REV. 613, 21 SO. CALIF. L. REV. 102 (1947).

36. "The rule is that a violation of the [Fourteenth Amendment due process] clause occurs if in the jury there is a systematic or arbitrary exclusion of, or a discrimination between, persons of a particular race." *Wong Yim v. United States*, 118 F.2d 667, 669 (9th Cir. 1941). See *Smith v. Texas*, 311 U.S. 128, 130 (1940); *Martin v. Texas*, 200 U.S. 316, 319-21 (1906); *cf. Glasser v. United States*, 315 U.S. 60, 86 (1942) (commissioner may use discretion to obtain competent jurors). See also notes 15, 34 *supra*.

37. *Fay v. New York*, 332 U.S. 261, 298-99 (1947) (dissenting opinion of Justices Murphy, Black, Douglas and Rutledge).

38. Justice Murphy, who wrote the dissenting opinion in the *Fay* case, stated that the jury "is a democratic institution, representative of all *qualified* classes of people." *Id.* at 300. (Emphasis added.) In *Moore v. New York*, 333 U.S. 565, 569 (1948), another opinion upholding the New York blue ribbon jury system, the *Fay* dissenters agreed that certain persons below a minimum level of competence were not qualified to serve on juries, and indicated their approval, as consistent with the "cross-section" rule, of the adoption of measures calculated to weed out these persons. Justice Murphy, speaking for the dissenters, declared: "it is from that welter of *qualified* individuals, who meet specified *minimum* standards, that juries are to be chosen." *Moore v. New York*, *supra*, at 570. (Emphasis added.)

39. See notes 41-42 *infra* and accompanying text.

amendment.⁴⁰ However, the courts have universally held that, since qualifications and selection methods had always been legislatively determined and therefore were not crystallized as a part of the common law, these features of the jury system continue to be subject to modification by statute.⁴¹ In short, the constitution guarantees a fundamental mode of trial but does not determine procedural details.⁴²

Psychological testing may be opposed as an unlawful delegation of the commissioner's statutory responsibility for the selection of jurors.⁴³ It can be argued that the judgments and criteria used in the development of tests are those of other persons, and that these, in effect, become substitutes for the jury commissioner's own judgment and choice of jurors. Opponents may also claim that because persons other than the commissioner administer and score the tests, it is these individuals who are making the determinations of qualification. The commissioner is charged by statute with the duty of selecting qualified jurors,⁴⁴ and courts have held that he violates the law if he does not himself decide which jurors will be chosen.⁴⁵ It may be said in rebuttal that the jury commissioner

40. *Patton v. United States*, 281 U.S. 276, 288 (1930); *Pomeroy v. Collins*, 198 Cal. 46, 70, 243 Pac. 657, 667 (1926); *Booth v. State*, 67 Okla. Crim. 413, 419, 94 P.2d 846, 849 (1939); *Spurgeon v. Worley*, 169 Tenn. 697, 701, 90 S.W.2d 948, 949 (1936). The constitutional right to a jury trial may be asserted to mean that the identical kind of common law jury trial is preserved. So interpreted, trial by jury would mean trial by jurors having the same qualifications and selected in the same manner as at common law at the time the constitutional provision was adopted. Cf. BUSCH, *LAW AND TACTICS IN JURY TRIALS* 27-60 (1949); CLARK, *CODE PLEADING* 91-92 (2d ed. 1947).

41. *Commonwealth v. Maxwell*, 271 Pa. 378, 114 Atl. 825 (1921); *Dixon v. State*, 167 So. 340, 348 (Ala. Ct. App.), *cert. denied*, 167 So. 349 (Ala. 1936); *People ex rel. Denny v. Traeger*, 372 Ill. 11, 14, 22 N.E.2d 679, 681 (1939).

42. In *Dixon v. State*, *supra* note 41, at 348, the court stated:

"It is the universal and unvarying rule of all common-law jurisdictions that legislative regulations touching the manner in which jurors shall be selected, or the mode of procuring and impaneling a jury, do not infringe a constitutional provision that the right of jury trial shall remain inviolate so long as the essential elements of number, impartiality, and unanimity are preserved."

43. It is sometimes said that a delegated power may not be further delegated by the person to whom such power is given by the legislature. 42 AM. JUR., *Public Administrative Law* § 73 (1942). However, the rule does not preclude the use of subordinates who are directed by the officer with the delegated power to investigate and report the facts and give recommendations. See *People v. Delaware and Hudson Canal Co.*, 165 N.Y. 362, 364-65, 59 N.E. 138, 139 (1901) (statutory requirement that commissioners may recommend repairs upon railroads "after a careful personal examination" does not prevent the utilization of and reliance upon expert inspectors to make examinations for them); GELLHORN, *ADMINISTRATIVE LAW* 315-23 (1st ed. 1940). A distinction is made between a delegation of power to another and the use of others as assistants in the discharge of the delegated duty. See notes 45-46 *infra* and accompanying text.

44. See note 8 *supra*.

45. *Chance v. State*, 115 Fla. 379, 381, 155 So. 663, 664 (1934); *Dow v. Carnegie-Illinois Steel Co.*, 100 F. Supp. 494, 498 (W.D. Pa. 1951) (dictum); cf. *State v. Tate*,

does exercise the full power and control contemplated by the legislature,⁴⁶ since the weight which he gives to the psychological test results is entirely within his discretion. Furthermore, the custom of utilizing outside judgments has long been a jury selection procedure and the tests are no more than a necessary modern replacement for the accepted practice of depending on reputable members of the community for opinions as to who would make competent jurors.⁴⁷

Strengthened jury selection processes have broad implications for the improved operation of the jury system and the effectiveness of law in society. Less of the court's time may be spent in the voir dire examination of competence and jury calendar congestion partially eliminated when jurors are initially selected with greater care. A more competent jury may force a change in the tactics of advocacy, so that attorneys will put greater emphasis on rational rather than emotional appeals. Parties may also be dissuaded from taking weak cases to court in the hope of achieving an unjustified result. Exclusionary rules of evidence, evolved to protect litigants from inept juries,⁴⁸ can be liberalized. Juries held in higher esteem will restore respect for the right of trial by jury, and even, perhaps, for jury duty. The discoveries and techniques of psychology should be pressed into the service of the judicial system, for they

185 La. 1006, 1022, 171 So. 108, 113 (1936). In the *Chance* case, under a statute requiring the county commissioners to "*personally* select and make out a list" of the names of qualified jurors, the commissioners allowed other persons to assist in the selection of the names from the registration books. The court held this practice a violation of the specific statutory requirement of *personal* selection by the commissioners, but implied that the use of necessary clerical assistants in the selection process would not constitute a violation. *Chance v. State*, *supra* at 380, 155 So. at 665.

46. See *Walker v. United States*, 93 F.2d 383 (8th Cir.), *cert. denied*, 303 U.S. 644 (1937). In this case, the court clerk, who along with the jury commissioner was authorized to select jurors, solicited the names of qualified jurors by means of a letter asking such information from persons in the community who were considered reliable. The argument was made that this was an unlawful delegation of the duties of selecting jurors imposed on the court clerk and jury commissioner by statute. The court said: "The method of selection employed was not a delegation, but a discharge of duty. The clerk and jury commissioner did not authorize nor empower any one to act for them, and we apprehend the law does not contemplate that they must acquire personal knowledge of or acquaintance with prospective jurors so that they may act on their personal knowledge. The manner of acquiring information is for them to determine." *Id.*, 93 F.2d at 391.

47. See notes 9, 46 *supra* and accompanying text. Clearly, the maintenance of the older selection system is not feasible in areas of large population where anonymity and a lack of familiarity with neighbors and persons living in the community are common. Nor is it feasible where there is a substantial amount of family mobility and change in community membership over relatively short periods of time, nor in "commuter" communities where the average individual spends a relatively brief period of time in the community of his residence.

48. See FRANK, COURTS ON TRIAL 123 (1949); GREEN, JUDGE AND JURY 400 (1930); OSBORN, THE MIND OF THE JUROR 53 (1937); WIGMORE, PRINCIPLES OF JUDICIAL PROOF 960 (2d ed. 1931).

offer an unprecedented opportunity to promote the efficient administration of justice.⁴⁹

49. In this note, juror qualifications and selection have been discussed without direct reference to the question of jury function. The minimum qualifications suggested herein, see text at p. 534 *supra*, are deemed essential regardless of one's concept of jury purpose and function. A critical minimum of competence is necessary for any rationally-based decision-making process. For a presentation and discussion of theories relating to jury function, see Broeder, *Functions of the Jury: Fact or Fictions?*, 21 U. CHI. L. REV. 386 (1954); FRANK, COURTS ON TRIAL 110-11 (1949).