

1978

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Recommended Citation

Pearl Zuchlewski, *Challenging New York Grand Jury Composition: The Barrier of the "Systematic and Intentional Exclusion" Requirement*, 6 Fordham Urb. L.J. 317 (1978).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol6/iss2/7>

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NOTES

CHALLENGING NEW YORK GRAND JURY COMPOSITION: THE BARRIER OF THE "SYSTEMATIC AND INTENTIONAL EXCLUSION" REQUIREMENT

I. Introduction

Commentators have criticized the grand jury system, of New York and other states,¹ as "an alter ego of the prosecutor"² and "an administrative arm of the office of the public prosecutor."³ Its critics argue that it has not fulfilled its historical function, which is to serve as a buffer between an accused citizen and an overzealous, mistaken, or politically motivated prosecutor.⁴ Although commentators cite many reasons for its supposed failings,⁵ they frequently note the apparent racial, sexual, and class discrimination in the selection of the grand jurors.

In a recent *Hastings Law Journal* article, Professor Jon Van Dyke concluded: "The grand juries of the most populous state in the east [New York] are selected through a conscious and sophisticated attempt to gather together the most established people of the com-

1. Alexander & Portman, *Grand Jury Indictment vs. Prosecution by Information*, 25 *Hastings L.J.* 997 (1974); Campbell, *Eliminate the Grand Jury*, 64 *J. Crim. L. & Criminology* 174 (1973); Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 *J. Crim. L. & Criminology* 157 (1974); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 *Am. Crim. L. Rev.* 701 (1972); Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 *N. M. L. Rev.* 141 (1972); Van Dyke, *The Grand Jury, Representative or Elite?*, 28 *Hastings L. J.* 37 (1976); See also Younger, *The Grand Jury Under Attack*, 46 *J. Crim. L. & Criminology* 26 (1955) for an overview of earlier criticisms of grand juries.

2. Campbell, *supra* note 1 at 178-79.

3. Shannon, *supra* note 1 at 146.

4. Helene Schwartz found one of the primary reasons for that failure was that "most grand jurors are white, middle class men, conservative in outlook and with little concern for protecting the rights of their fellow citizens." *Supra* note 1 at 759. In his article, James Shannon, *supra* note 1, profiles several grand jury investigations, including the Kent State shootings and the deaths of Fred Hampton and Mark Clark, to illustrate his thesis that the grand jury has become so identified with the prosecution that it should be eliminated.

5. In their recent book, *THE GRAND JURY* (1977), Marvin P. Frankel and Gary P. Naftalis discuss problems in the federal grand jury system, including: harassment of citizens, the absence of counsel for witnesses, the possibility of self-incrimination, and information leaks.

munity."⁶ He found that the selection procedure resulted in "the virtually total exclusion of non-whites and the poor, and the absolute exclusion of the young."⁷

The most frequent challenges to the composition of the grand jury have focused on exclusions of racial minorities and women, although some panels have been challenged for religious and age discrimination.⁸

This Note will examine the statutory law which provides for a grand jury in New York, the background of federal constitutional requirements, and New York court decisions which have interpreted the statutes when defendants or witnesses have challenged a grand jury for failing to conform to "the very idea of a jury," which is a body "composed of the peers or equals of the persons whose rights it is selected or summoned to determine; . . . his neighbors, fellows, associates"⁹

II. Grand Jury Independence

New York's first grand jury assembled in 1681.¹⁰ Like most United States legal institutions, it was derived from English common law.¹¹ The grand jury had a particular appeal to the colonists because it was viewed traditionally as a protection against the British authorities' arbitrary enforcement of the law. Any proposed indictment would have to be screened by a panel of citizens¹² who would examine the charges and determine whether to issue an indictment (true bill).¹³

In 1681, the cases of Anthony, Earl of Shaftesbury, and Stephen Colledge, established the grand jury's reputation as "protector against unfounded charges and oppressive government."¹⁴ When Charles II of England tried to indict the two Protestants who opposed his attempt to reestablish the Catholic Church, the grand jury in England refused to issue the true bill.¹⁵

6. Van Dyke, *supra* note 1 at 54-55.

7. *Id.* at 55.

8. *See* note 1 *supra*.

9. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

10. J. GOEBEL & T. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 334 (1944).

11. II F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 649 (2d ed. 1959).

12. L. CLARK, *THE GRAND JURY* 16 (1975).

13. *Id.*

14. Frankel & Naftalis, *supra* note 5 at 9-10.

15. *Id.*

There have been several especially well known historic examples of New York's grand jurors' independence. In 1735 grand jurors twice refused to indict John Peter Zenger for libel after he had scorned the Royal Governor in his *Weekly Journal*.¹⁶ Again, in 1872, a grand jury exposed the political corruption of New York City's Tweed Ring.¹⁷ More recently, Special Prosecutor Thomas E. Dewey's investigation of organized racketeering was facilitated by another vigorous New York County grand jury.¹⁸

III. The Grand Jury in New York Today

New York's state constitution and statutes set out the authority of grand juries.¹⁹ The state constitution provides: "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury . . .,"²⁰ but the selections, qualifications, and duties of the grand jurors are detailed in the criminal procedure and judiciary laws.²¹

A. Selection

Because New York grand juries consist of volunteers from the list of petit, or trial, jurors, their qualifications are the same.²² Jurors must be United States citizens and county residents, aged 18-75, without physical infirmities, and of good character.²³ They must understand English, and be free from a conviction of a misdemeanor

16. Clark, *supra* note 12 at 18; See also G. J. EDWARDS, *THE GRAND JURY* 32 (1906).

17. Frankel & Naftalis, *supra* note 5 at 15.

18. Clark, *supra* note 12 at 29.

19. *People v. Stern*, 3 N.Y.2d 658, 661, 148 N.E.2d 400, 401, 171 N.Y.S.2d 265, 267 (1958); N.Y. CONST. art. I, § 6; N.Y. CRIM. PROC. LAW art. 190 (McKinney 1971); N.Y. JUD. LAW §§ 531, 609, 684 (McKinney 1975).

20. N.Y. CONST. art. I, § 6.

21. N.Y. CRIM. PROC. LAW art. 190 (McKinney 1971); N.Y. JUD. LAW §§ 531, 609, 684 (McKinney 1975).

22. *People v. Mincey*, 81 Misc. 2d 407, 411-12, 365 N.Y.S.2d 702, 705-06 (Sup. Ct. 1975); *People v. Henry*, 55 Misc. 2d 134, 134-35, 284 N.Y.S.2d 726, 727 (Dutchess County Ct. 1967).

23. N.Y. JUD. LAW §§ 504, 596, 662 (McKinney 1975). One New York court has interpreted "physical infirmities" in connection with "the practical duties and responsibilities" of jurors. Therefore, a blind man was disqualified because his blindness would place limitations on his evaluation of physical evidence. *Lewinson v. Crews*, 28 App. Div. 2d 111, 113, 282 N.Y.S.2d 83, 84-85 (2d Dep't 1967), *aff'd*, 21 N.Y.2d 898, 236 N.E.2d 853, 289 N.Y.S.2d 619 (1968). The "good character" requirement was challenged as unconstitutional in *People v. Ferguson*, 55 Misc. 2d 711, 286 N.Y.S.2d 976 (Sup. Ct. 1968). The court upheld the standard as long as it was not used as a device for eliminating any particular group from the jury roster. *Id.* at 720, 286 N.Y.S.2d at 981-83.

involving moral turpitude or a felony.²⁴ The names of potential trial jurors are usually selected from the county's voter registration lists, although other sources of names including telephone directories, city directories, census reports, and assessment lists are permitted.²⁵

Qualified trial jurors who choose to volunteer are then placed on a list of potential grand jurors.²⁶ Names are publicly drawn at random whenever vacancies arise or new grand juries are impanelled.²⁷

B. How the Grand Jury Functions

Grand juries are allowed to initiate investigations into official corruption, and individual members are required to bring to the attention of the grand jury any criminal activities about which they have personal knowledge.²⁸ But, as a practical matter, the prosecutor usually initiates an investigation in routine criminal cases.²⁹ It is the grand jury, however, and not the prosecutor, that has the power to compel the appearance and testimony of witnesses and the production of evidence. Ultimately, the grand jury votes for a true bill, or indictment, if it believes a prosecution is justified.³⁰

The grand jury's powers are extensive and its proceedings are carried on in secret.³¹ A grand jury can subpoena a witness, and if the witness should refuse to testify, it can grant immunity to compel the witness' testimony about a prospective defendant.³² If the wit-

24. *People v. Ferguson*, 55 Misc. 2d at 715-16, 286 N.Y.S.2d at 982 gives the following examples of felonies and misdemeanors involving moral turpitude: tampering with a witness, tampering with a juror, or misconduct of a juror.

25. N.Y. JUD. LAW §§ 503, 594, 658 (McKinney 1975).

26. See *People v. Kessler*, 81 Misc. 2d 492, 493-95, 365 N.Y.S.2d 946, 948-49 (Dutchess County Ct. 1975) for a detailed discussion of the selection process.

27. Because "the county clerk is under no affirmative duty to inform the members of the petit jury that they may volunteer for service on the grand jury," *People v. Mincey*, 81 Misc. 2d at 413, 365 N.Y.S.2d at 708, one judge upheld an indictment issued by a grand jury which the county clerk had personally selected from the petit jury list. *Id.* at 408, 365 N.Y.S.2d at 704.

28. *People ex rel. Livingston v. Wyatt*, 186 N.Y. 383, 391-92, 79 N.E. 330, 333 (1906).

29. Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. Crim. L. & Criminology 157, 160-61 (1974); Lumbard, *The Criminal Justice Revolution and The Grand Jury*, 39 N. Y. St. Bar J. 397, 399 (1967).

30. N.Y. CONST. art. I, § 6; see generally Lumbard, *supra* note 29.

31. N.Y. CRIM. PROC. LAW § 190.25(4) (McKinney 1971). The usual reasons given for maintaining grand jury secrecy are: insuring the grand jury the fullest opportunity to investigate thoroughly, preventing the flight of an accused, preventing any tampering with witnesses, and protecting the reputations of persons who are investigated but never indicted. *United States v. Rose*, 215 F.2d 617, 628 (3d Cir. 1954).

32. There are two types of immunity which may be granted, transactional or use.

ness refuses to testify, he can be cited for contempt and jailed for the duration of the grand jury's term.³³ Neither the witness nor the prospective defendant is permitted to have an attorney present in the grand jury room, although an attorney can wait nearby and be consulted at any time.³⁴ The prosecutor who conducts the investigation is considered the legal advisor to the grand jury and performs ministerial functions under its direction.³⁵ The district attorney "informs the jurors of the complaint against the defendant, advises them on matters of law, examines witnesses, issues subpoenas, draws the indictment and, in general, shapes the tone of the case."³⁶

Because the grand jury's powers are so broad, and because it has absolute control over the indictment process in New York, defendants and witnesses before the grand jury consider it vital that the grand jury system continue to include, "a group of men and women who represent a fair and impartial cross-section of the citizens of the county; each one with his or her own individual thoughts, experiences and reactions."³⁷

IV. Federal Constitutional Requirements

Thomas Jefferson believed the grand jury to be "the true tribunal of the people,"³⁸ and provided for the requirement of grand jury

"[T]ransactional immunity protects against prosecution for any of the transactions or occurrences that are subjects of the compelled testimony. Use immunity forbids only later use against the witness of either the evidence he has been forced to give or evidence derived from his testimony." M. FRANKEL & G. NAFTALIS, *THE GRAND JURY* 77 (1977).

33. The New York statute does not specify the length of the grand jury's term. Instead, it merely provides for its "existence at least until and including the opening date of the next term of such court for which a grand jury has been designated" and permits extensions when necessary. N.Y. CRIM. PROC. LAW § 190.15 (McKinney 1971).

34. Although some states have begun to allow witnesses to have the assistance of counsel in the grand jury room, see, e.g., McMorrow-Love, *Juries and Jurors: The Right to Counsel In the Oklahoma Grand Jury*, 29 Okla. L. Rev. 967 (1976), the great majority, including New York, still prohibit the practice. See *People v. Waters*, 27 N.Y.2d 553, 555, 261 N.E.2d 265, 266, 313 N.Y.S.2d 124, 125 (1970); *People v. Ianniello*, 21 N.Y.2d 418, 235 N.E.2d 439, 288 N.Y.S.2d 462 (1968), cert. denied, 393 U.S. 827 (1968) explained that the purpose of this rule is to preserve grand jury secrecy. *Id.* at 423-24, 235 N.E.2d at 442-43, 288 N.Y.S.2d at 467.

35. *People ex. rel. Van der Beek v. McCloskey*, 18 App. Div. 2d 205, 208, 238 N.Y.S.2d 676, 680-81 (1st Dep't 1963); N.Y. CRIM. PROC. LAW § 190.55 (McKinney 1971 & Supp. 1976-77) details the duties of the district attorney in a grand jury proceeding.

36. *An Examination of the Grand Jury in New York*, 2 Colum. J. of L. and Soc. Prob. 88, 97 (1966). It is always important, though, to distinguish its formal powers from actual practice. See text accompanying notes 28-30, *supra*, for a discussion of this distinction.

37. *In re Grand Jurors Ass'n, Bronx Co., New York, Inc.*, 25 N.Y.S.2d 154 (Sup. Ct. 1941).

38. S. K. PADOVER, *THE COMPLETE JEFFERSON* 128 (1943).

indictment in the Bill of Rights.³⁹ However, the right of indictment by a grand jury, unlike most other provisions in the Bill of Rights, has not been extended to citizens in all states.⁴⁰

In *Hurtado v. California*⁴¹ the United States Supreme Court ruled that the fourteenth amendment's due process clause did not require a grand jury indictment for a felony prosecution.⁴² The Court explained that there was no specific language in that amendment to indicate that its purposes was to extend the grand jury system to all states.⁴³

The Supreme Court has allowed individual states great latitude in choosing whether or not to use the grand jury,⁴⁴ and has permitted a variety of selection procedures when a grand jury is required.⁴⁵ However, the Court has insisted that there are two essential rights which must be protected: the defendant's right to be indicted by a grand jury which is "truly representative of the community,"⁴⁶ and the citizen's right to participate in this judicial procedure.⁴⁷

The first cases which arose in the Supreme Court challenging indictments by grand juries involved the exclusions of minorities, especially of black citizens in Southern states.⁴⁸ In *Strauder v. West Virginia*, the Court declared that a statute which excluded blacks from any form of jury service was unconstitutional under the equal

39. U.S. CONST. amend. V.

40. Van Dyke, *The Grand Jury: Representative or Elite?*, 28 *Hastings L.J.* 37, 40-41 (1976).

41. 110 U.S. 516 (1884).

42. *Id.* at 538. California's information system "is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments."

43. *Id.* at 535.

44. *Id.* at 538. For a discussion of the different indictment procedures in New York, California, and Texas see Van Dyke, *supra* note 40. For a comparison between prosecution by information and prosecution by indictment, see Alexander & Portman, *Grand Jury Indictment vs. Prosecution by Information*, 25 *Hastings L. J.* 997, 1004 (1974).

45. "It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors." *Carter v. Jury Comm'n of Greene Co.*, 396 U.S. 320, 332 (1970), citing *Brown v. Allen*, 344 U.S. 443, 473 (1953); see also *Cassell v. Texas*, 339 U.S. 282 (1950), *Virginia v. Rives*, 100 U.S. 313 (1879).

46. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

47. As the United States Supreme Court explained, "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." 396 U.S. at 329.

48. See *Akins v. Texas*, 325 U.S. 398 (1945); *Smith v. Texas*, 311 U.S. 128 (1940); *Norris v. Alabama*, 294 U.S. 587 (1935); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

protection clause of the fourteenth amendment.⁴⁹ The Court explained: "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."⁵⁰ This reasoning was implicit in later decisions which declared unconstitutional statutes which were nondiscriminatory on their face, but in practice produced totally or substantially segregated juries.⁵¹

After defendants had successfully challenged grand juries for racial exclusions, they began to challenge indictments from grand juries which excluded women.⁵² Using the same rationale in these cases as it had in cases involving racial discrimination, the Court has extended the fourteenth and sixth amendments' protections to women.⁵³ If there were a systematic exclusion from the grand jury on the basis of sex or race the indictment will be invalidated,⁵⁴ and it is not necessary for the party alleging discrimination to be a member of the excluded class.⁵⁵

A *de facto* grand jury⁵⁶ is presumed to hand down valid indictments.⁵⁷ To successfully challenge the indictment on the grounds that it was the product of a non-representative panel, a defendant

49. 100 U.S. at 310.

50. *Id.* at 309.

51. *See, e.g.*, *Smith v. Texas*, 311 U.S. 128 (1940) and *Norris v. Alabama*, 294 U.S. 587 (1935). These cases involved Texas and Alabama statutes which were nondiscriminatory on their face, i.e. they did not explicitly exclude blacks as the West Virginia statute contested in *Strauder* had. However, because no blacks had ever served on the grand juries of those states, the United States Supreme Court found those statutes to be unconstitutional.

52. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Ballard v. United States*, 329 U.S. 187 (1946).

53. "If the fair-cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be systematically excluded from jury panels from which petit juries are drawn." *Taylor v. Louisiana*, 419 U.S. at 533.

54. "[T]he jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538.

55. In *Peters v. Kiff*, 407 U.S. 493 (1972), a white man successfully challenged a grand jury which excluded blacks; in *Taylor* the defendant was male.

56. For a more complete discussion of *de facto* grand juries in New York, *see* notes 64-66, *infra* and accompanying text.

57. *Blair v. United States*, 250 U.S. 273 (1919), where the Court stated that the petitioner was "not entitled to challenge the authority of the . . . grand jury, provided [it has] a *de facto* existence and organization." *Id.* at 282.

must show (1) a substantial mathematical difference between the general population of the area and the excluded group of potential jurors over a period of time;⁵⁸ and (2) an independent factor which would demonstrate that the disparity was the result of purposeful discrimination.⁵⁹ By establishing these two elements, the petitioner presents a *prima facie* case which must be rebutted to uphold the indictment.⁶⁰

Although a defendant, and the entire community, is entitled to a grand jury open to all members of the community, the Supreme Court has been careful to caution that every defendant is not necessarily entitled to a particular jury with any fixed ratios of persons.⁶¹ Mere mathematical differences in any given grand jury will not invalidate an indictment unless, in addition, there is "the opportunity for discrimination" in some aspect of the grand jury selection process.⁶²

V. New York Common Law Challenging a Grand Jury's Composition

The New York Court of Appeals has applied narrowly the United States Supreme Court decisions in cases where grand juries have

58. "This Court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasized that a factual injury is necessary in each case that takes into account all possible explanatory factors." *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972). Although the Court has never stated a given proportional disparity that would conclusively establish discrimination, recent cases challenging grand juries have involved substantial discrepancies in the ratio of population of the area to the representation of a particular minority group on the grand jury panel. The following examples illustrate ratios which the Court has found to be indicative of discrimination: 21%:6.75%, *Id.* at 627-28; 65%:32%, *Carter v. Jury Comm'n of Greene Co.*, 396 U.S. 320, 327-28; 79%:45.5%, *Castaneda v. Partida*, 97 S. Ct. 1272, 1276 (1977).

59. *Akins v. Texas*, 325 U.S. 398, 403-04 (1945).

60. *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Turner v. Fouche*, 396 U.S. 346 (1970), are two examples. In *Alexander* 21.06% of the county's population was black, compared to only 6.75% of the available grand jury venire. By showing this disparity, combined with a grand jury eligibility questionnaire which indicated the applicant's race, the petitioner made out a *prima facie* case. Because the respondent failed to sustain the burden of proof, petitioner's indictment was overturned. The racial disparity between the general population and the grand jury lists in *Turner* was 60% and 37%, respectively. By showing that the jury commissioners subjectively eliminated blacks as "unintelligent" or not "upright" (96% of the prospective jurors rejected for that reason were black) the petitioner successfully challenged his indictment.

61. *Akins v. Texas*, 325 U.S. at 403.

62. *Turner v. Fouche*, 396 U.S. at 360 provides the example of jury commissioners whose personal subjective judgments determined the final grand jury lists.

been challenged for failing to represent a "fair cross section of the community."⁶³

New York courts presume that any grand jury is validly constituted and conforms to state statutory requirements.⁶⁴ If any procedural defect is discovered, the courts have evinced great reluctance to overturn an indictment because of "mere technicalities"⁶⁵ unless there has been demonstrable prejudice to the defendant.⁶⁶

*People v. Dessaure*⁶⁷ is the precedent for all modern New York cases alleging that a grand jury does not represent certain classes in a community. In *Dessaure*, the Court of Appeals articulated the test for a successful challenge: was the absence of any group from the grand jury panel the result of "systematic and intentional" discrimination?⁶⁸

Dessaure arose when there was exclusion of a particular group from the jury roster.⁶⁹ In *Dessaure*, a black man challenged a Nassau County grand jury for discrimination because the questionnaire for grand jury service required applicants to indicate "color" and because for at least ten years no black had ever served on the county's grand jury.⁷⁰ The judge accepted the jury commissioner's explanation that "color" was used only for identification purposes when the application was reviewed,⁷¹ and found that the absence of blacks

63. See *People v. Chestnut*, 26 N.Y.2d 481, 260 N.E.2d 501, 311 N.Y.S.2d 853 (1970); *People v. Agron*, 10 N.Y.2d 130, 176 N.E.2d 556, 218 N.Y.S.2d 625 (1961), *cert. denied*, 368 U.S. 922 (1961); *People v. Dessaure*, 299 N.Y. 126, 85 N.E.2d 900 (1949), *cert. denied*, 337 U.S. 949 (1949); *People v. Prior*, 294 N.Y. 405, 63 N.E.2d 8 (1945).

64. N.Y. CRIM. PROC. LAW §§ 190.20(2), 210.35 (McKinney 1971). The procedural reasons include: where the proceeding is before less than sixteen grand jurors (210.35(2)), if less than twelve grand jurors vote to indict (210.35(3)), if the target of the investigation is not given an opportunity to appear (210.35(2)), or if the grand jury's integrity is "impaired and prejudice to the defendant may result" (210.35(5)). See also *People v. Cohen*, 54 Misc.2d 873, 880, 283 N.Y.S.2d 817, 826 (Sup. Ct. 1967); *People v. Thomas*, 53 Misc.2d 427, 428, 278 N.Y.S.2d 1003, 1005 (Onondaga County Ct. 1967).

65. *People v. Block*, 190 Misc. 78, 82, 74 N.Y.S.2d 430, 434 (Madison County Ct. 1947).

66. Examples of technical improprieties which the courts found not to be prejudicial to the defendant include *People v. Brophy*, 304 N.Y. 391, 395, 107 N.E.2d 504, 505 (1952), where the grand jury was drawn in the county clerk's office instead of the courtroom as the former Code of Criminal Procedure required; and *People v. Block*, 190 Misc. at 79, 74 N.Y.S.2d at 431, where one grand juror's name had not appeared on the county assessment role as a provision in the former Judiciary Law required.

67. 299 N.Y. 126, 85 N.E.2d 900 (1949), *cert. denied*, 337 U.S. 949 (1949).

68. *Id.* at 131, 85 N.E.2d at 902.

69. *Id.*

70. *Id.* at 129-30, 85 N.E.2d at 901.

71. *Id.* at 130, 85 N.E.2d at 901.

from the past grand juries could be explained by the small ratio of blacks to whites, three to one hundred, in the county.⁷² Despite two strong dissents,⁷³ *Dessaure* established the New York rule that unless a defendant could prove that a given group had been "systematically and intentionally" excluded from the grand jury, the challenge would fail.⁷⁴

A. *People v. Chestnut*

People v. Chestnut,⁷⁵ is the most recent New York Court of Appeals decision involving a challenge to the composition of a grand jury. Six witnesses who were cited for contempt for refusing to testify before a New York County grand jury⁷⁶ challenged that grand jury as unlawfully constituted because (1) New York's voluntary system failed to attract minorities;⁷⁷ (2) an age minimum of thirty-five led to the underrepresentation of young people;⁷⁸ and (3) welfare recipients were eliminated.⁷⁹

The detained witnesses first brought a claim in the federal courts alleging violations of their civil rights.⁸⁰ Both the District Court and Court of Appeals for the Second Circuit decided that they lacked jurisdiction.⁸¹

Remanding the case to the New York courts, the Court of Appeals for the Second Circuit noted that "serious constitutional issues" about New York's grand jury selection process had been raised.⁸²

Despite the Second Circuit's caution, the New York Court of Appeals rejected the petitioners' claim that the state has "an affirmative duty to provide a jury which was made up of a cross section of

72. *Id.* at 130, 85 N.E.2d at 902.

73. *See Id.* at 132-36, 85 N.E.2d at 902-04 (Desmond, J., and Fuld, J., dissenting). Judge Desmond argued that the "course of conduct" was clearly discriminatory, and Judge Fuld criticized the county's grand jury for failing to represent a "cross section of the community."

74. *Id.* at 131, 85 N.E.2d at 902.

75. 26 N.Y.2d 481, 260 N.E.2d 501, 311 N.Y.S.2d 501 (1970).

76. *Id.* at 485, 260 N.E.2d at 502-03, 311 N.Y.S.2d at 858.

77. *Id.* at 488, 260 N.E.2d at 505, 311 N.Y.S.2d at 858.

78. *Id.* at 486, 260 N.E.2d at 504, 311 N.Y.S.2d at 857.

79. *Id.* at 491, 260 N.E.2d at 506, 311 N.Y.S.2d at 860.

80. The original federal court action was brought under 28 U.S. C. A. § 1443(1). It alleged that because minorities had been excluded from the grand jury, the state of New York had violated the defendants' civil rights. *Id.* at 485, 260 N.E.2d at 503, 311 N.Y.S.2d at 856.

81. *Chestnut v. New York*, 370 F.2d 1 (2d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967).

82. *Id.* at 7.

the community”⁸³ The court reiterated its familiar “intentional and systematic exclusion” rule,⁸⁴ and found that although it was “unfortunate”⁸⁵ that the voluntary system produced an underrepresentation of minorities, the court held that this failure “does not establish that there has been any unconstitutional discrimination.”⁸⁶

The court also upheld the constitutionality of eliminating persons less than thirty-five years old and welfare recipients from grand jury eligibility because the criteria had “reasonable justification.”⁸⁷ The thirty-five year age limit was used as a convenient way of eliminating persons who would not have had valuable petit jury experience.⁸⁸ The exclusion of welfare recipients was “apparently founded on an assumption which may have been erroneous” that it was unlawful for those persons to receive any additional state economic assistance, including compensation for grand jury service.⁸⁹

The petitioners then brought a writ for *habeas corpus* relief in the federal courts.⁹⁰ The United States Circuit Court of Appeals for the Second Circuit interpreted the rationale for excluding welfare recipients differently, but it upheld the Court of Appeals.⁹¹ Writing for the court, Justice Kaufman found that the procedure was not conducted in an “arbitrary and discriminatory manner,” and, therefore, was constitutional.⁹² He rejected the petitioners’ speculation that the way in which grand jurors were selected produced an “authoritarian” group which followed the prosecutor’s lead.⁹³

Those decisions have made challenges to grand jury panels extremely difficult, but not impossible.

B. A Successful Challenge

There is at least one case where an indictment has been over-

83. 26 N.Y.2d at 488, 260 N.E.2d at 505, 311 N.Y.S.2d at 858.

84. *Id.* (emphasis in original).

85. *Id.* at 490, 260 N.E.2d at 506, 311 N.Y.S.2d at 860.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 491, 260 N.E.2d at 506, 311 N.Y.S.2d at 860.

90. United States *ex rel.* Chestnut v. Criminal Ct. of the City of New York, 442 F.2d 611 (2d Cir. 1971).

91. *Id.* at 618-19.

92. *Id.* at 617.

93. *Id.* at 616.

turned because the grand jury was unconstitutionally impanelled. In *People v. Cosad*,⁹⁴ a pre-*Chestnut* decision, a woman successfully challenged a grand jury indictment on the basis of sexual discrimination. Although women had become eligible to serve on New York grand juries in 1938,⁹⁵ no woman's name had ever appeared on Seneca County's jury list.⁹⁶ The judge found that "persons of the female sex [had] been systematically excluded from service . . . in violation of this defendant's constitutional rights" and overturned her conviction.⁹⁷

C. Challenges to New York Grand Juries Since *Chestnut*

Cosad is notable as an exception to the general pattern in New York. When defendants have alleged that they have been indicted by grand juries which have failed to represent "a fair and impartial cross-section of the citizens,"⁹⁸ those defendants have been remarkably unsuccessful, especially since the rigid requirements of past decisions have been reaffirmed in *Chestnut*.

Courts correctly emphasize that they dislike overturning indictments for "mere technicalities."⁹⁹ As the court explained in *People v. Block*, "If indictments are to be dismissed as mere technicalities which in no way affect the rights of the accused persons, no indictment would ever be secure and would always be subject to attack."¹⁰⁰ But, courts likewise refuse to overturn indictments even where the legality of a grand jury is highly questionable.¹⁰¹

In *People v. Paciona*,¹⁰² the petitioner challenged an indictment issued by an Erie County grand jury drawn from a venire of petit jurors which had previously been adjudicated as unconstitutionally

94. 189 Misc. 939, 73 N.Y.S.2d 890 (Seneca County Ct. 1947).

95. *Id.* at 939-40, 73 N.Y.S.2d at 890.

96. *Id.* at 940, 73 N.Y.S.2d at 890.

97. *Id.*, 73 N.Y.S.2d at 891.

98. *In re Grand Jurors' Ass'n of Bronx Co.*, 25 N.Y.S.2d 154 (Sup. Ct. 1941).

99. *People v. Block*, 190 Misc. at 82, 74 N.Y.S.2d at 434.

100. *Id.*

101. *People v. Brophy*, 304 N.Y. 391, 107 N.E.2d 504 (1952). In *Brophy* the petitioner alleged that the prosecutor had "packed" the grand jury by excluding all potential jurors who admitted knowing certain persons who might be involved in the pending investigations. The petitioner further alleged that the judge had used secret information sheets describing prospective jurors' backgrounds. On appeal, the court determined that "mere error, not resulting in prejudice, is insufficient to invoke the power of the courts to look behind the indictments. . . ." *Id.* at 393-94, 107 N.E.2d at 505.

102. 45 App. Div. 2d 462, 359 N.Y.S.2d 360 (4th Dep't 1974).

impanelled.¹⁰³ The court took judicial note of the defective selection process, which produced an illegally constituted grand jury.¹⁰⁴ The petitioner waited for more than the procedural thirty days to assert his claim,¹⁰⁵ the court found no prejudice, and denied the request for an extension of the time limit.¹⁰⁶ Although courts properly stress that indictments should not be overturned for "mere technicalities," the courts should not look for technicalities to defeat a defendant's serious, substantive charge.

The constitutionality of that Erie County grand jury was also at issue in *People v. Skibinski*.¹⁰⁷ The court denied Skibinski's motion to dismiss his perjury indictment,¹⁰⁸ and rejected defendant's claim that an illegally constituted grand jury was incompetent to administer a valid oath or to receive testimony.¹⁰⁹ The court read *Paciona* to mean that "indictments returned by jurors from the alleged illegally constituted pool were voidable rather than void . . . [and] it cannot be said that the 1973 Grand Jury lacked *all* power to carry out its lawful function."¹¹⁰

Although New York courts are careful to acknowledge that the sixth amendment protects a defendant's right to appear before a jury which is representative of the community,¹¹¹ they are loath to infer that any procedure in impanelling a grand jury is prejudicial to the defendant.¹¹² Courts are especially reluctant to construe questions to jurors by a judge or prosecutor as prejudicial or as an attempt to "pack" a panel, and usually interpret any inquiries as an

103. *People v. Attica Brothers*, 79 Misc. 2d 492, 359 N.Y.S.2d 699 (Sup. Ct. 1974). In this case the Erie County Supreme Court had found that "there was systematic exclusion of students as a class and a deliberate exclusion of woman constituting discrimination contrary to law." *Id.* at 498, 359 N.Y.S.2d at 706.

104. 45 App. Div. 2d at 464, 359 N.Y.S.2d at 362.

105. *Id.* at 464-65, 359 N.Y.S.2d at 363.

106. *Id.* at 465, 359 N.Y.S.2d at 363.

107. 55 App. Div. 2d 48, 389 N.Y.S.2d 693 (4th Dep't 1976).

108. *Id.* at 52, 389 N.Y.S.2d at 696.

109. *Id.* at 50, 389 N.Y.S.2d at 695.

110. *Id.* (emphasis in opinion).

111. *Id.* at 49, 389 N.Y.S.2d at 695.

112. An extreme example is *People v. Reilly*, 71 Misc. 2d 227, 335 N.Y.S.2d 841 (Dutchess County Ct. 1972), where the defendant was indicted for grand larceny for theft of IBM property. Thirteen of the twenty one grand jurors who returned his indictment were employees of IBM or spouses of IBM employees. Reilly's challenge of the indictment was rejected because, "This court cannot assume that the Grand Jury in this case was otherwise than impartial, nor will the court assume that the Grand Jury was prejudiced against the defendant because of its make-up." *Id.* at 228, 335 N.Y.S.2d at 842.

effort to assemble a fair group of jurors.¹¹³ It continues to be the petitioner's onerous burden to prove deliberate exclusions of a particular group.¹¹⁴

Although at least one court has expressed reservations about the kind of grand jury venire which results from the use of volunteers from the voter registration lists,¹¹⁵ the procedure has generally been upheld despite the results.¹¹⁶ In *People v. Cook*,¹¹⁷ a defendant who had been charged with criminal activity on the Onondaga Indian Reservation challenged the county's grand jury panel for systematic exclusion of Indians.¹¹⁸ He maintained that the exclusion occurred because Indians did not vote,¹¹⁹ but the court rejected the argument that non-voters could be considered a "'cognizable group' within the community which may be the subject of prejudice."¹²⁰

Several grand juries have been upheld despite purposeful exclusion.¹²¹ In Queens County the county clerk sent grand jury subpoenas only to men because he speculated that women would choose to exempt themselves,¹²² as they were formerly permitted to do.¹²³ The court found the clerk's explanation that the practice was "economical" to be reasonable and upheld the panel's constitutionality.¹²⁴

*People v. Siciliano*¹²⁵ is a more recent example of the courts' continuing reluctance to delve into the constitutional issue of a chal-

113. *People v. Brophy*, 304 N.Y. 391, 394-95, 107 N.E.2d 504 (1952); *People v. John*, 76 Misc. 2d 582, 584-85 (Sup. Ct. 1973).

114. *People v. Chestnut*, 26 N.Y.2d at 488, 260 N.E.2d at 505, 311 N.Y.S.2d at 858.

115. *People v. Thomas*, 53 Misc. 2d 427, 278 N.Y.S.2d 1003 (Onondaga County Ct. 1967). "It is common knowledge that the percentage of persons entitled to qualify to be a voter and who have registered is not great in light of the entire eligible adult population. . . . [T]his court has already held that such nonservice [by blacks] is not by any design or purposeful action. However, the court does agree with defendant's counsel that, if a man is entitled to be judged by his peers, then the present system must be analyzed and studied." *Id.* at 429, 378 N.Y.S.2d at 1006-07.

116. *People v. Cook*, 81 Misc. 2d 235, 244-45, 365 N.Y.S.2d 611, 620-22 (Onondaga County Ct. 1975).

117. 81 Misc. 2d 235, 365 N.Y.S.2d 611 (Onondaga County Ct. 1975).

118. *Id.* at 243, 365 N.Y.S.2d at 619.

119. *Id.*

120. *Id.* at 245, 365 N.Y.S.2d at 622.

121. *See People v. Cender*, 67 Misc. 2d 129, 323 N.Y.S.2d 807 (Sup. Ct. 1971).

122. *Id.* at 132, 323 N.Y.S.2d at 809.

123. Former N.Y. JUD. LAW § 507.

124. 67 Misc. 2d at 132, 323 N.Y.S.2d at 809-10.

125. 52 App. Div. 2d 408, 384 N.Y.S.2d 994 (1st Dep't 1976).

lenge to the grand jury's composition. Even with the District Attorney's stipulation that "it was the custom in Bronx County *systematically* and *intentionally* to mail qualification notices to prospective jurors based upon a fixed mathematical formula which specifically discriminated against women . . ." (emphasis added),¹²⁶ the court refused to accept the stipulation as a sufficient "factual showing that the Grand Jury . . . was constituted illegally."¹²⁷ Despite a strong dissent,¹²⁸ the court decided, "We should not extend ourselves to decide constitutional issues unless the record contains persuasive evidence."¹²⁹

Despite gross irregularities in the selection of many grand jury panels, New York courts have consistently refused to overturn indictments those panels have issued. It is difficult to determine what kind of defect, if any, the courts would find sufficiently serious to require that an indictment be overturned.

VI. Conclusion

Although the United States Supreme Court has stated that defendants have a right to a jury composed of their "peers and equals,"¹³⁰ many grand jury critics, and even some supporters, find that grand jury panels frequently fail to conform to that ideal. Critics usually charge that grand juries are disproportionately white, male, middle class, and middle aged who are generally sympathetic to prosecutors. This has led some commentators to suggest eliminating the grand jury altogether,¹³¹ while others have resigned themselves to accepting that particular unfortunate result.¹³²

It is neither necessary nor desirable to eliminate an historic part of the Anglo-American legal system which includes citizen participation simply because of one serious, but manageable, defect. However, the discrepancy between the ideal and the reality of a jury should be a matter of concern.

126. *Id.* at 409, 384 N.Y.S.2d at 994-95.

127. *Id.* at 409-10, 384 N.Y.S.2d at 995.

128. "Classifications based upon sex . . . are *inherently suspect* and subject to close judicial scrutiny." (Lupiano, J., dissenting). *Id.* at 418, 384 N.Y.S.2d at 1001. (emphasis in opinion).

129. *Id.* at 410, 384 N.Y.S.2d at 995.

130. See note 9 and accompanying text *supra*.

131. See notes 1-4 and accompanying text *supra*.

132. See M. P. FRANKEL & G. P. NAFTALIS, *THE GRAND JURY* (1977).

At the root of the problem is the type of grand jury panel which results from the common practice of using voter registration lists and volunteers to locate grand jurors. New York statutes already provide practical alternatives. Telephone directories, city directories, and census lists are statutorily approved methods of selecting potential jurors.¹³³ These types of lists should provide access to almost all groups in the community.

In addition to this procedural change in the selection process, there should be a change in the philosophy behind jury service. Grand jury service by all citizens should not be viewed as the privilege of citizens; instead, it should be considered a right of a defendant.

Pearl Zuchlewski

133. See note 25 and accompanying text *supra*.