INVASION OF JUROR PRIVACY

by

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INTRODUCTORY STATEMENT

This report on the invasion of juror privacy is prepared from returns on a questionnaire sent to approximately 230 trial court districts in California, including all 58 county superior courts. Forty-two superior courts responded and approximately 70 of the lower court districts. It is supplemented by postquestionnaire interviews with respondents, additional legal research, and direct courtroom and other experiences.

No survey of this nature has ever been made before now, as far as we know, and the Commission was handicapped in that none of the time spent on preparing the questionnaire, analyzing the responses and writing the report was compensated. Thus, economic pressures required abbreviating some of the inquiry; nonetheless, the survey did reveal an almost universal disregard - perhaps unconscious in some instances - of jurors' constitutional rights to privacy.

Since juror revelations of any kind are often entered into the public record and publicized through news media, citizens in this capacity are unprotected from exposure against their wills. Thus, the principal caveat regarding privacy: the right of each individual to decide for himself what he wishes to make public and to whom and what he wishes to conceal - is lost forever.

A rough estimate of the number of California citizens so deprived is 750,000 each year.

QUESTIONNAIRES SENT BY JUDICIAL DISTRICTS TO JURORS

Almost every county superior court submits a questionnaire of some kind to prospective jurors together with the notification of jury service. Twenty-eight samples were received by the Commission. Of these, almost all demand some information that would be considered invasive in any other context although a few are relatively mild, such as those from San Diego, Sonoma, Butte, San Luis Obispo, Contra Costa, Tehama, Calaveras and Los Angeles Counties. These ask only for age and occupation, except San Diego which asks nothing, and Sonoma which inquires only if the citizen is over 18. To be 18 is the only age information needed as that is the sole age requirement of Section 198 of the Code of Civil Procedure. The initiative of divulging age and occupation, often considered personal, should remain with each individual and is, elsewhere, constitutionally protected except under very specific "compelling state interest" conditions.

However, most counties extend their intrusions much further. Sixteen of the 28 ask about marital status which is a form of prying into one's sexual orientation and 11 of these demand to know occupation of spouse. Fresno asks if the candidate is related to a "Law Enforcement Officer". Eleven ask about children and their ages and four counties request level of education attained: Fresno, Glenn, San Mateo and Mariposa. The last also demands to know major course of study. Questionning jurors on voir dire about their education was deemed improper in Pennsylvania in 1976. (Lenkiewicz vs. Lange 363 A 2d 1172, 1176)

Fresno also wants to know about injuries suffered in accidents, hospitalization, nature of injuries and if a lawsuit resulted. Several ask about length of residence in the county although only 29 days is required. Many want to know about criminal convictions, despite the Fifth Amendment's protection against being a witness against oneself. This is undoubtedly because of Section 199, CCP, discussed below.

The most intrusive questionnaires are those submitted by San Francisco, San Mateo, Fresno and Mariposa. Four counties ask for the social security number - Glenn, Colusa, Stanislaus and Ventura - although revelation of this number leaves the citizen vulnerable to intensive and penetrating secret surveillance. Stanislaus uses the number for the jury payroll although it is not needed. "About 15 percent" of the jurors in Stanislaus do not answer the question, according to the jury commissioner, and no pressure is used to force compliance. An unidentified private investigator in Los Angeles boasted in Newsweek Magazine (April 10, 1978, p. 89) that if he had a name, home address and social security number, he could, within 48 hours, learn every detail about a juror's life, including his drinking habits and bed partners. Butte had been demanding the number but dropped the request in a new questionnaire introduced in mid-1982.

The jury commissioner of San Mateo County reported that the juror is not really required to respond to any question except for name and means of contact. This option is not indicated on the questionnaire. If it is true that the responses are "voluntary", the official aura of intimidation surrounding them hardly reflects this but, instead, carries the awesome burden of not-to-be-questioned Authority.

If the juror is not required to respond, this should be indicated but better, no nonrequired question should be asked at all. The only acceptable questions deal with basic eligibility, as covered by Section 198 of the CCP, as well as the possibility of juror hardship of one kind or another.

The lower courts draw their jurors from the county superior court panels but, nonetheless, sometimes submit questionnaires of their own. Many of these are based on a standard form which solicits such sanctity of the home details as "married, single, widowed, divorced, separated" - none of which bears any relation to the rights of citizenship. These courts also want to know not only employment and employer but if the juror is retired or unemployed, as well as the same information for spouse; some ask for ages of children.

Napa Municipal avoids some of these but inquires if the citizen has "ever" been arrested for drunk or reckless driving, no matter how anciently. Northern Solano demands to know "present means of livelihood" of unemployed persons and "number of employees" of the self-employed. When the State Department of Industrial Relations compiles labor statistics, it guarantees not to reveal the size of individual companies. Northern Solano does not offer such assurance and it is possible for litigants, and other persons, to learn such information. One's means of livelihood are also highly personal, whether unemployed or not.

Northern Solano also wants to know if the candidate has even been treated for "a mental disorder", also much too personal regardless of whether the treatment is remote or recent, especially without regard to the remoteness of time. The questionnaire demands details of the disorder, if the juror drives, and condition of eyesight and hearing beyond basic need. Section 198 of the CCP reads, in part: "...no person shall be deemed incompetent solely because of loss of sight or hearing in any degree..."

With few exceptions, the county questionnaires inquire about the juror's conviction (as opposed to arrest) of a felony or "high crime". The question complies with Section 199 which disqualifies from jury service persons who have ever "been convicted of malfeasance in office or any felony or other high crime".

Section 199 was upheld in 1979 by a majority of only one justice in the appeal from conviction by a jury in Rubio vs. Superior Court of San Joaquin County (154 Cal Rptr 734, 24 Cal 3rd 93). Justice Stanley Mosk and three colleagues found that this exclusion did not violate "equal protection" and was "rational" because "the Legislature could reasonably determine that a person who has suffered the most severe form of condemnation...might well harbor a continuing resentment against 'the system'" and thus be unduly biased in favor of the defendant.

The majority made no distinction between a particularly heinous felony and a minor one, nor how ancient the conviction. Further, by the term "might well harbor", Mosk left open the possibility that any particular ex-felon also "might not harbor a resentment against "the system" nor be biased in any way. Nor was consideration given to changes in the classification of a felony, such as the exclusion of homosexuality or "sodomy" as criminal acts. An individual convicted of homosexuality at some distant time is confronted with the dilemma of perjury by responding "no" or humiliation with an honest answer.

A mature citizen also faces humiliation if he happened to have imbibed too much on high school graduation night years before. The majority did not even consider the constitutional right of the citizen to control the revelation of information as private as this.

The three dissenting justices considered these points, expressed by Mathew Tobriner and supported by Justices Bird and Newman. The minority found the exclusion of ex-felons from jury service as "not even rationally related to" the objective of an impartial jury (Id. @ 747). The "exclusion applies to every former felon, regardless of his crime, the remoteness in time of the offense, the fact that the ex-felon may have been leading an exemplary life and not evinced any 'resentment' towards 'the system'", or even the possibility that the individual "may never have been incarcerated".

Additionally, a conviction "is presently irrelevant to his jury eligibility" and "the exclusion of ex-felons from jury service cannot pass constitutional muster". The exclusion also "flies squarely in the face of the rationale of the cross-section rule" (Id. pp. 747-8). Tobriner made specific reference to the irrelevance of a youthful indiscretion which may have required confinement and the problem such a revelation imposes upon rehabilitation of the citizen whose civil rights have otherwise been completely restored.

Section 199 also contrasts with the principle applied in credit investigations - expunging all adverse records after seven years.

The problem is broader inside the courtroom during voir dire when jurors are queried about their arrests, regardless of disposition. At least 25 counties permit a question such as: "Have you or any member of your family ever been arrested on a charge similar to that for which the defendant is on trial?". This is a standard question in at least 20 jurisdictions, asked in open court without regard to the presence of news media. In Ventura, the juror can balk and request an in camera response but this is a Catch 22 situation. The request is virtually tantamount to a confession which can be picked up by news media for distribution to the world.

San Joaquin restricts the inquiry to "convictions". A few counties report the question is not asked at all or left to the discretion of each judge. These include Fresno, Mariposa, Placer, Riverside, San Mateo, Solano, Tuolumne, Tehama, Shasta, Calaveras, and Glenn when it is "not our bag".

In jurisdictions where it is asked, the courts apparently are unaware of several appellate court decisions dating from as early as 1823 into the 1970's. Sprouce vs. Commonwealth of Virginia is the earliest: "...a venireman may refuse to answer any question tending to disgrace him..." (2 Va Ca 375). Half a century later the U.S. Supreme Court decreed: "Questions which tend to disgrace the person questioned, or to render him amenable to criminal prosecution, have never been permitted to be put to a juror." (Reynolds vs. U.S., 98 US 145, 151, 1876. See also Burt vs. Panjaud, 99 US 180, 181, 1878: "A juror is, no more than a witness, obliged to disclose on oath his guilt of any crime, or any act which would disgrace him in order to test his qualifications as a juror.")

A century later a Michigan court ruled that "the trial court sensed that these reasons (for not responding to a voir dire question) were highly personal to the venireman, and, in its discretion refusing to subject venireman to searching voir dire questions...was no abuse of discretion." (People vs. Anshwer, 189 NW 2d 152, 1971.) A Federal court supported this position in 1977. A juror could not be asked questions "when disclosure...is potentially embarrassing or harmful..." (Crain vs. Krehbiel, 443 F Supp 202.)

In 1979, the Court of Appeals of the 2d Circuit in New York pronounced the principle that: "It is not, after all, the prospective jurors who are on trial...prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed..." (U.S. vs. Barnes, 604 F 2d, 121.)

A california Appellate Court in 1979 addressed itself directly to the issue of publicizing arrest without conviction records. The California Attorney General's Office had been furnishing such information to public employers on job applicants. The Court decided that the applicant's "right to privacy is violated as soon as arrest records containing non-conviction data are disseminated to public employers who are prohibited by law from considering a record of arrest which did not result in a conviction". It was not even necessary that this information be made public for the action to be termed "a prima facie violation of the state constitutional right of privacy". (Central Valley Chapter, 7th Step Foundation vs. Younger, 95 Cal App 3rd 212, 231 and 237.)

How much greater, then, is the violation of California's Declaration of Rights to compel a citizen to reveal nonconviction arrests whether on a written questionnaire or in a public courtroom! Even in the absence of any court ruling, surely the "equal protection" clauses of both the 14th Amendment and the Seventh Section of the Declaration, as well as the Fifth Amendment's protection against testifying against oneself.

VOIR DIRE AS AN INVASION OF PRIVACY

When a citizen comes into the courtroom for jury service, he is forced to submit to a battery of questions put to him by the judge and trial attorneys in turn. This procedure is know as "voir dire". With few exceptions, every juror candidate in every trial court in the State is required to reveal his marital condition and other persons in his household, his home address and occupation. The open court questions may be posed orally or in some cases are written on cards passed from juror to juror. A few, including Riverside, Calaveras, Inyo and Santa Clara, may avoid the "other persons" inquiry; and Los Angeles, San Bernardino, Santa Clara, Santa Cruz and Solano do not require home addresses. Ventura and Colusa ask only for the name of the city. Glenn, Lake and Yolo grant complete discretion to each judge.

By wresting out these confessions before at least a few dozen persons, if not more, the courts appear not to consider the protections of the Fourth Amendment, Section 13 of the California Declaration of Rights,

and the sanctity of the home. The State, in effect, enters each juror's home to discover if he or she maintains a mainstream-type marriage with children; lives alone (embarrassing to many persons); has suffered a potentially humiliating divorce; or is living with one or more room or house mates of varying sexes. One's home life is made public by the prying of State officers.

The presumed prohibition by some counties, as San Mateo, against questions dealing with sexual orientation, become ineffectual. One's home companions often indicate sexual orientation, but not always. Two or more persons of the same sex sharing living quarters may not necessarily mean they are homosexuals, but often arouses suspicion. Any given "straight" may feel impelled to blurt out self-consciously: "But I am not gay". Another may sense that such an apology is insulting to gay relationships and thus refrain but, nonetheless, feel uncomfortable. The juror who is gay is unprotected. His right to be "up front" or "closet" is seized from him by the courts.

One's occupation is also private. Some responses may reveal sexual orientation ("I'm a reporter for a gay newspaper.") but whether they do or not can be otherwise humiliating. ("I am presently unemployed.") or, as in the Angela Davis trial in Santa Clara County: "I'm a cotton picker." This reply elicited general laughter, subjecting the juror to public derision.

Some counties, including San Francisco, do not have an overall policy regarding prohibited questions. Thus, an inquiry into sexual orientation can be quite intense, as in the 1979 trial of Dan White. Defense attorney Douglas Schmidt pressed for such specific information as: "Are you a member of any gay rights group?" without regard to First Amendment protections to privacy of association. All presumed homosexuals were then challenged off the panel in defiance of the "random selection principle and many court caveats regarding discrimination against a "cognizable group".

Other intimate information has been elicited in Alameda County by Judge Martin Pulich who demanded to know of jurors in the Wendy Yoshimura trial if they or any family members had ever been raped; or in San Francisco where Judge Morton Colvin asked in at least one trial in April 1979 for such personal data on women as use of intra-uterine devices, abortions, and examinations for infertility. Or, as in the Patty Hearst trial, if any juror or relative had been in a mental hospital or under psychiatric care.

The survey did not include inquiry into invasions of the privacy of religion but follow-up interviews did reveal that while generally questions about religion are taboo, there are ways of getting around this. Section 4 of the Declaration of Rights includes the advice that "A person is not incompetent to be a witness or juror because of his or her opinions or religious beliefs." Nonetheless, Section 8 of the California Rules of Court does permit asking at least one opinion *on religious* beliefs: "Do you have any religious scruples or other belief that pain and suffering are not real...?" California courts have found no conflict herein.

There exist so many guides on how to make religious inquiries used by so many trial attorneys that we can wonder how many breaches of religious privacy might be made in the State's courts.

The California Supreme Court presented a very confused attitude in two contrasting decisions. In 1978 in People vs. Wheeler, the court seemed to apply Section 4 and render religious inquiries ineffectual since no one could be challenged off the panel for being members of a "cognizable group" such as a religious denomination (22 Ca 3rd 258, 272) or, by extension, sexual orientation.

Three years later the same court apparently reversed itself by permitting voir dire inquiry to "probe under the surface" to determine, among other things, religion as well as "race, sex, age and level of education". (People vs. Williams, 29 Ca 3rd 392, 394, 1981) How Williams is to be reconciled with Wheeler and Section 4 has not been resolved by the courts.

Regardless, the Commission believes in unequivocal support of Section 4 and thay any kind of religious inquiry is an invasion of privacy and the First Amendment as well.

If all humiliating questions are to be barred or, as in Lake County, questions which are "argumentative, repetitive or instructive", who is to make the determination? Can any determination be applied universally on a statistical basis or is not each so highly personal as to apply differently to each individual?

Until now, the courts have apparently assumed this to be their function - whether jurors are protected from humiliation (and there is much evidence they are not) in so assuming they have seized from the individual the constitutional right of making this determination for him or herself. Any given question, no matter how harmless it may appear on the outside, is potentially humiliating to any given juror. Therefore, no question should be posed at all, except for those which determine basic eligibility as stated in Section 198 of the Code of Civil Procedure and, under "compelling state interest" and "exigent circumstances" provisions, juror hardship or personal involvement or direct partisanship in the trial at hand.

Exigent circumstances do not go beyond this. The term was defined by the State Supreme Court in 1976 as follows: "An emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." (People vs. Ramey, 16 C 3rd 263, 127 Cal Rptr 629, 545 P 2d 1333) Obviously voir dire is not evenly remotely covered into such definition.

Regarding "compelling state interest", there has been considerable comment. The "government has the burden of establishing that it's interests are legitimate and compelling and that the incidental infringement...is no greater than is essential to vindicate its subordinating interests" (Bursey vs. U.S., 466 F 2d 1059, Calif. 1972) and the

"court must decide whether government has carried its burden almost question by question before it can compel answers...adequate foundation for inquiry must be laid..."

To be compelling, "the government must show that its interest cannot be satisfied by alternative methods less restrictive of the right abridged". (Payne vs. Superior Court of Los Angeles County, 553 P 2d 565; see also Heilberg vs. Fixa, 236 F Supp 405, 1964)

Thus, it is the exclusive responsibility of the court to demonstrate that the elusive goal of an "impartial jury" can be attained only by the method of eliciting responses from each question as it is put in turn to each juror; that there is no possibility of a less restrictive means; and that an impartial jury will result.

Anything less than this means that neither the "compelling state interest" nor "exigent circumstances" tests can be met. And when they do not, the inquiry violates constitutional rights to privacy.

Voir dire has never demonstrated that it makes any improvement over purely random selection from the total adult population of a designated district. Even without considering that the true objective is to build bias into the jury, voir dire's failure to pass these tests makes it an inexcusable violation of juror privacy. Historical research of the trial jury reveals much evidence that the likelihood of impartiality is far greater if selection is entirely random and devoid of inquiry leading to the making of personal choices or rejections.

JUROR REFUSALS TO RESPOND TO QUESTIONS

What is the reaction of courts to a juror's desire to determine for himself if any given voir dire question is too personal? Will the court grant him the discretion of refusing to answer without taking prejudicial action against him?

Some respondents profess that the court does permit refusals; others that they do not or that no policy has been established because "it has never come up".

Where the court does permit, the juror is, with few exceptions, required to state why a response would be embarrassing. A Catch 22 situation: the juror who has never defaulted on a bill does not hesitate to answer when the question is posed. The balking juror is forced to explain his hesitancy is because he did default 12 years earlier and it would be embarrassing to reveal the detail publicly after so long a time.

Even if he does not have to explain, the fact of balking is, of itself, humiliating: it requires him to withstand the awesome authority the court presents (a terrifying experience) and places him under public suspicion. Who hesitates but a person with a dark secret to hide?

A judicial suggestion to "go into chambers" also arouses suspicion. And, in chambers the venireman faces an audience usually composed of (based on the responses) the judge, attorneys for each side, sometimes the litigants, the court reporter, and, at least in Humboldt and Contra Costa, a bailiff.

With an audience of perhaps five to seven unauthorized persons, the juror's privacy is hardly protected. The court reporter ensures that the responses are entered into the official trial record for anyone to inspect afterward. But even if it were the judge alone, as in apparently only a few rural courts such as Ten Mile, Mendocino City and few others, the citizen is still compelled to make personal disclosures to "the government", represented by the judge. And the judge, no matter how paternal, is unauthorized to receive forced confidences. The value to the respective litigants is uncertain, whether the judge retains or dismisses the juror. A cloud of mystery and suspicion hangs over him.

Counties which grant no privilege to refuse include Calaveras, Fresno, Tuolumne, San Diego and Contra Costa. Amador, Colusa, Glenn and Santa Cruz have never faced the issue. In only San Mateo, Trinity, Los Angeles, Inyo and San Luis Obispo is the juror's refusal permitted to stand without explanation, although he might be taken into chambers. If the juror continues to refuse, in at least Los Angeles and Ventura (and probably more), he is liable to a charge of contempt, a discretionary decision by the judge. Another example where the right to control one's private life is transferred from each individual, where it properly resides, to "the government", where it does not.

In the lower courts, several, largely rural, may not require the juror to state a reason and may not go into chambers, and may continue with voir dire on other subjects. Among these are Sierra County Justice Court; Little Lake, Plumas Judicial; Lodi, Solvang, Northern Solano, Tulare and Kelseyville Judicial. In Oakland-Piedmont Municipal, each judge sets his own policy.

Napa Municipal grants the right to refuse to questions "that would embarrass the juror and make him uncomfortable", which returns us to Catch 22 situations.

STREET SEIZURES OF JUROR CANDIDATES

Nothing seems to panic the court quite as discovering a depleted venire during jury selection. How to supplement it so trial can continue without interruption?

Most commonly the jury commissioners and staff personnel reach for their telephones and dial for citizens already on jury lists and who have been notified to stand by for a limited time to respond to emergency summons. But apparently this procedure does not always meet court needs. When it does not, courts often resort to the ancient practice known as "jury impressment" - widely used in the 16th, 17th and 18th centuries.

Eighteen of the superior courts - 42.9 percent of the 42 respondents - report that bailiffs are dispatched by court order to go out on the street or into other public areas, stop passersby, quiz them to determine basic eligibility, and then transport them back to court - often without regard to protestations from the impressed persons. These include such varied jurisdictions as the State's largest county, Los Angeles; several middle sized, including Stanislaus, San Joaquin, Solano, and Santa Cruz; and rural Del Norte, Inyo, Mariposa, Nevada, Placer, Trinity, Tuolumne, Colusa, Mono, Calaveras, Kings and Yuba. Shasta apprehends persons inside the court house.

The authority to make such seizures is derived from Section 227 of the Code of Civil Procedure which permits the court, when the panel is depleted, to "direct the sheriff, or marshall...to summon a sufficient number of persons having the qualifications of jurors to complete the panel" and "the sheriff, marshall, elisor shall summon the number so ordered accordingly and return the names to the court". The section specifically prohibits making seizures "from the by-standers", a caution apparently disregarded in Shasta.

The provision empowers the court to proceed in a manner as described by Raymond Arce, Director of the Juror Services Division of the Los Angeles Superior Court, in an explanatory letter to the Commission. "Typically, the judge will direct a bailiff to such public places as a library, a shopping center, etc., and bring back a designated number of persons to the trial court." (Emphasis added.) This happens perhaps only once or twice a year, less often in some counties - "once or twice in ten years" in San Joaquin - but perhaps as frequently as four or five times a year in Del Norte.

The court representatives may just walk down any public street, go to shopping centers, enter public buildings, such as the library or, as in Yuba County, go to the front of the post office at the county seat, Marysville, to stop persons.

We have no figures as to how many Californians are impressed into jury service but it must be at least several hundred each year, if not more. In order to take qualified persons back to court, the bailiffs must make some inquiries of the startled citizen: do you live in this county? have you ever been convicted to a felony? and perhaps more - questions which seem to be entirely out of order for any government official to put to unoffending citizens in the course of their daily activities.

We were unable to pursue this as far as we would have liked to learn specific details or whether any questioning is ever as intense as it was on one occasion in Prince Georges County, Maryland. There, one day in May 1980, sheriff's deputies went to two shopping centers and "questioned (persons) intensely", as reported by the Washington Post in its issue of May 23, 1980. One woman was "shopping for groceries and a flea collar for her cat" (how did the deputies learn this?) and was told after responding: "You're now a jury member."

"Right now?" the woman responded, embarrased, "in blue jeans and dirty tennis shoes?"

"That's right," the deputy was reported as answering. "If you refuse, you could be arrested."

Another woman protested because it was "our busy season and we are short of help...I'm working."

"Doesn't make any difference," the deputy told her, and she was brought into court. There were about 50 taken in all. The order given by county Judge James H. Taylor was oral and apparently on impulse when he became "peeved and impatient" that there were not enough jurors "available when he needed them". It turned out they were not needed at all.

The judge told the Post that he had acted properly. "All I know is that I ran out of jurors; I'm allowed to do it, and I did it."

Los Angeles Director Arce reports there were "no legal repercussions from citizens" despite "probably spirited complaints of inconvenience from them."

The Yuba County Sheriff may have a written summons and gives the seized citizen one to three hours to be at the court house. This occurs about once a year and affects from 5 to 25 persons.

Del Norte allows the seized citizens only 45 minutes and possibly up to 50 persons are ordered to court "four or five times a year" according to a telephone interview with County Clerk-Recorder John D. Alexander. Resistance in Del Norte subjects the citizen to forcible apprehension and possible citation but "the judge usually dismisses it since we usually get enough persons anyway". Significantly, the dismissal is not prompted by any respect for citizen rights; the only standard for evaluation is court convenience.

In Kings County, the Commissioner reported that Judge Manuel Vierra ordered such a seizure at least once in 1981 during a trial for murder. The bailiff went to a shopping center and had to confront a number of "very angry people" who were nonetheless carried off in one manner or another. "This has happened only once in five years", the Commissioner responded.

Most of the municipal and judicial district courts depend upon the counties to supply jurors but, nonetheless, many have their own emergency procedures. Where, for example, Humboldt County reports never making seizures, the Municipal Court of Arcata indicates that it does. Similar discrepancies exist in the northern district of San Mateo, as opposed to the county, and the western district of Orange which, like Shasta, makes courtroom seizures.

In Los Angeles, the reverse is true. Several districts and municipalities report never making seizures, including Beverly Hills, Downey, Inglewood, Alhambra and, "not in recent years", in Catalina. Mendocino County did not respond to the questionnaire but at least three districts reported making seizures: Ukiah, Long Valley and Little Lake.

Tulare Municipal and Pixley use impressment although Tulare County does not, as does Fremont-Union City in Alameda County. More local districts violate the "not, in either case, from the by-standers" caution of Section 227.

Stanislaus has supplemented its telephoning perhaps five or six times in the past dozen years to serve lower courts, if not the superior court. Most recently was early 1982 in Oakdale. County Marshall Robert Earl described the procedure in a telephone interview: the judge issues an oral directive to the marshall to secure a specified number of persons from the street. The marshall, or a deputy, stops the very first persons he sees, no matter who they might be. He asks no questions at all - not even if they are citizens or county residents - on the grounds that the respondent is not under oath and that asking questions gives discretionary powers of selection to the marshall. This power should remain with the court. Citizen resistance could lead to arrest.

Lompoc Municipal has an unusual, if not unique, policy of "going to local business". This means that the jury commissioner telephones some half dozen of the leading business firms in town - J.C. Penney, the principal department store, City Hall, among others - and requests the respective managers to dispatch two or three employees each down to the court house. While this method eschews surprise, it would tend to skew the jury quite far from the random selection ideal. The venire becomes overladen with white collar workers personally selected perhaps for dispensibility by the managers for the day or week. This happens about twice a year, the court clerk reports. The cross-sectional ideal is always thrown off balance when any seizure is made arbitrarily anywhere.

This criticism is apart from the intrusive inquiry of citizens not even remotely associated with the "probable cause" admonition of the Fourth Amendment and the State Declaration of Rights. There is certainly no supporting "oath or affirmation" nor any "particularly describing" of a specific "place to be searched" nor of any "persons or things to be seized". Even with a written order, the bailiff can produce the name of no person on it.

The United States Supreme Court considered this type of seizure in another context in 1968. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." (Emphasis added. Terry vs. Ohio, 392 US 1, 16; 88 S Ct 1868, 1877)

The issue was faced again by the court in 1979: "Police offers violated the Fourth and Fourteenth Amendments when, without probable cause, they seized defendant and transported him to police station for interrogation." (Dunaway vs. New York, 99 S Ct 2248, 2249; 442 US 200)

It is a violation of the Fourth Amendment to take a person "involuntarily" and it is of no significance that such apprehension is not technically an arrest. It remains, nonetheless, a "seizure...in the Fourth Amendment sense" that the person was questioned "under conditions in which he was not free to go and would have been physically restrained if he had refused to accompany officers..." (Id. @ 2249) "There can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was taken involuntarily to the police station." (Id. @ 2253)

Must a citizen not even remotely under any kind of shadow of suspicion be treated more shabbily? If a court, on whim or impulse, can order seizures or impressments of this nature, can it not, at some future time, find other "emergencies" requiring seizures for services other than jury duty?

Under any condition, the Privacy Commission believes that the empowering Section 227 is so clearly unconstitutional and in violation of both Terry and Dunaway that it should be declared inoperative at once and repealed.

PUBLIC DISCLOSURE OF JURORS' NAMES

At least 26 counties permit persons not involved in compiling the venire lists to see the names and, in many cases, the home addresses of juror candidates; nine of these restrict inspection only to the attorneys involved in each trial. Reporters from news media may see the lists in at least 10 counties and the jurors themselves in 13 but are apparently denied this privilege in the others.

In at least 11 counties, the records are open to anyone at all, including detectives using them to prepare juror dossiers for "Jury Books". Seventeen counties withhold home addresses; Santa Clara restricts examination only to the district attorney, denying permission to the defense.

Seventeen counties report they will mail jury lists routinely to the attorneys involved in each trial; San Luis Obispo mails to the district attorney and no other. Many counties mail only on special request from any interested attorney and, in some cases, to news media and detectives preparing jury books. Several will mail only under court order, including Contra Costa, Los Angeles, Santa Cruz and Ventura. Stanislaus gave the jury lists for several years in the 1970's, under court order, to a local law student who earned his schooling by preparing juror dossiers.

Policies in district courts often differ from the superior courts. While Los Angeles permits almost anyone to see jurors' names without home addresses, the municipal courts in Beverly Hills, Downey, Alhambra and Inglewood close the files to everyone, the last because the court "does not permit" release of even the names. Catalina gives out home addresses. San Diego County nor San Diego Municipal and South Bay Districts do not reveal the lists but El Cajon opens them to respective attorneys without home addresses.

Both San Mateo Northern District and Oakland/Piedmont are more protective than their respective counties. Neither reveals the names to anyone and mails "only with court approval". Alameda city opens the lists to respective attorneys. Lodi Municipal permits attorney inspection although San Joaquin County closes the lists to all.

There are also variances between superior and lower courts in the policy of mailing out names. For example, in Santa Barbara County the Carpenteria court permits no inspection and mails to no one; neighboring Solvang opens its files in the jury commissioner's office to the attorneys only and mails routinely only to prosecuting attorneys. Defense attorneys receive the lists by mail only upon request.

JURY BOOKS AND PRETRIAL INVESTIGATIONS OF JURORS

There is really only a single reason why attorneys and both government and private investigators seek the jury lists: to permit pretrial investigations into private lives so that jurors can be selected or rejected according to how trial attorneys feel they will vote on verdicts. In brief, to seek "favorable juries" as opposed to constitutional demands for "impartial" juries. This is accomplished by preparing "Jury Books" containing individual files on each person on the panel, based upon secret investigations.

The least productive portion of the questionnaire concerned this issue - most respondents giving no information at all or indicating that jury books were not used.

Only 13 counties replied that jury books were even permitted and of these, only Kings admitted that any public agency was involved. All of the other 12 reported no participation by any governmental agency.

One of these 12 was Sutter County. Among the points of appeal by the Juan Corona defense for a retrial was that the county sheriff had given arrest records of potential jurors to the prosecution and withheld these from the defense resulting, according to the allegation in the appeal, in a skewed jury. This is "jury book" information.

Kings County reported in an interview that the district attorney, sheriff and police departments gather such information from "public records" as arrests, traffic citations and provides both the prosecution and defense attorneys equally. San Francisco reported that government personnel are not involved and this is supported by a letter from Sheriff Michael Hennessey to Commissioner Godrey Lehman, dated June 16, 1980. The Sheriff stated therein: "I do not consider (investigating backgrounds of prospective jurors) a proper function of the Sheriff and would stop any such activity brought to my attention." He acknowledged knowing of private companies which do investigate, one of these in San Francisco being the Darrold Snedigar Company, and until very recently, the Raymond Company.

Raymond McClung operates a service in San Francisco serving only the Federal courts. In Los Angeles County, there is a private service known as Litigation Sciences in Rolling Hills and in Sacramento at least one, California Jury Verdicts. An undated letter signed by John Hartney of this firm is attached to this report (Attachment 1) describing the scope of his services. It may be accepted as typical.

Riverside also reported that jury books were not permitted but a former employee of the County court has related that he and other employees were involved in preparing juror information at the time of his employment.

Stanislaus County informed the Commission in a telephone interview that for several years during the early 70's, a law student at the University of the Pacific provided such a service to attorneys until his graduation but knows of no service at present. One law firm in Modesto was known by the jury commissioner as "doing its own background checks on jurors".

In other counties, the yellow pages of telephone directories list under the heading of "Investigators" firms which advertise "trial preparation" among their services. To what extent this means juror investigations has not been examined although a few investigators questioned indicated that they would, for a fee, prepare reports "as deeply as you want" and might take photographs.

At least two large books and many articles have been published offering very explicit advice on how to prepare such dossiers, without even the knowledge, let alone authorization, of the veniremen permitting publication of details of their private lives. The authors, in fact, advise investigators to conceal their activities from the jurors because "they might object" to this sort of seizure. Note the Hartney letter: "(The juror, himself, is never contacted)." Note also the confession: "The objective has been to obtain...the most favorable jury possible...", which implies conversely, the "most unfavorable" for the side that is not Hartney's client. This is a brazen scoffing at the Fifth Amendment's ideal for an "impartial jury".

The most detailed accounts on invading juror privacy are Jury Work by the National Jury Project and Jury Selection by Ann Fagan Ginger. Each advocate gathering as much information as possible about every juror candidate. The National Jury Project offers professional services primarily to defense attorneys in what might be called "cause" cases and advises employing "cadres" of sympathetic volunteers to explore every aspect of each juror-candidate's private life in strictest secrecy. Even the American Civil Liberties Union is involved in invading the liberties of juror candidates.

So widespread are these investigations and so generally acknowledged by the trial courts and attorneys to exist that it is difficult to believe they do not occur in the State's court, even without the knowledge of the respondents to the questionnaire.

Some of the counties responded as follows:

Humboldt: "Each attorney does his own research or hires an investigator to do so."

Placer: The district attorney "may" prepare material but "not sure".

San Joaquin: No jury books but the district attorney and public defender may keep individual records.

Los Angeles: No county agency involved and it would be useless for private investigators because of the high volume, short period of service, and frequent turnover.

Orange County has no knowledge of jury books, referring inquiries on the same to local police or the sheriff directly. However, the jury commissioner prepares a voir dire sheet containing information about marital status and occupations.

Additional research in this area is needed. However, any unwanted investigation of private lives of private citizens is a seizure of control over private information, violative of the basic principles of privacy. Since the investigators, whether on the public payroll or private, take such great care to conceal their activities from the people generally and specifically from the individuals under investigation, makes it suspect. If there were no question about its honesty and legality, why are the investigations conducted under heavy cover?

VOIR DIRE, QUESTIONNAIRES AND THE FIFTH AMENDMENT

Information provided by citizens, whether in writing on questionnaires or orally in the court room on voir dire, is entered into "the public record". It becomes available to government officials and the public alike for any kind of abuse. It can be introduced into action against jurors, even many years later.

The compelled testimony is, thus, a form of requiring the person "to be a witness against himself", and flies directly in the face of Fifth Amendment protections. There has been some court support for this position, as cited above in respect to questioning jurors about arrests and convictions. We have discovered none covering all testimony, although there is much applied in other contexts. Neither have we discovered court support for waiving Fifth Amendment rights, nor can there be for, as the U.S. Supreme Court decreed in Miranda vs. U.S. (384 U.S. 436), "The Fifth Amendment provision that the individual cannot be compelled to be a witness against himself cannot be abridged" and "Where rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them".

Under any condition, the Commission believes the Fifth Amendment is operative here and must be respected. The compelling of testimony of prospective jurors must necessarily collapse of its own weight before this Amendment, even if no other constitutional offense were involved.

But other constitutional offenses are rife, summarized below:

FIRST AMENDMENT:

Questions dealing with religious attitudes or association; questions regarding reading habits, education, thoughts or personal opinions and private conversations; questions regarding personal acquaintances or associations and memberships; questions about petitions against the government for redress of grievances.

FOURTH AMENDMENT:

Questions about home life, hobbies, occupation, age, personal conduct, and habits, all of which offend the right "to be secure in their persons, houses, papers and effects".

NINTH AMENDMENT:

Questioning going beyond "compelling state interest" tests is a disparagement of nonenumerated rights which are "retained by the people".

14TH AMENDMENT:

Individuals are decreed to be well protected in every other aspect of their lives, and are necessarily covered here under "equal protection". In addition, the compelled testimony is a deprivation of property "without due process of law". Privacy being the most fragile of property since it can never be returned, no adequate compensation can ever be provided the deprived person.

THIRD AMENDMENT:

Although no troops are physically quartered in homes, the effect of compelling testimony is in a sense a form of entering the home; this Amendment is offended in its "penumbra extension".

PRIVACY ACT:

Finally all questioning violates the Privacy Act in principle, even though the Act covers only Federal agencies. The Act requires Federal officers to inform each individual from whom it seeks information if the disclosures sought are mandatory

or voluntary; the purpose for which the information is to be used; the routine uses which may be made of the information, and the effects on him, if any, of not providing the requested information.

The citizen is given no information of any kind, and especially not of the possibility of widespread and enduring publicity.

Attachment 1

California Jury Verdicts

901 F STREET. SUITE 120 - SACRAMENTO. CALIF. 95814
TELEPHONE 444-6150

Re: Jury Investigation and Analysis Procedures

California Jury Verdicts has, for over a decade, researched and analyzed prospective venires throughout California and Nevada.

The objective has been to obtain for our attorney client the most favorable jury possible, within the rule of law and ethics.

To effect such result a mobile team of researchers disperses throughout the venire area to collect every facet of public or private record available on each individual juror assigned to the subject trial. While those details are being developed the client attorney and aides are interviewed. A concise understanding of the case and its principals is secured and a preliminary jury profile agreed upon between counsel and the jury consultant.

Then a series of interviews with local authorities, agencies and individuals is pursued toward obtaining objective data about the jurors. Demographics of the county, germane to the case issues, as well as those that illuminate the jurors attitudes are entered. (The juror, himself, is <u>never</u> contacted).

The completed book is reviewed with counsel the evening prior to trial. Arbitrary ratings are given to each juror based on his probable attitude toward the client's case.

On civil jury trials we require at least a week prior to trial date to collect and analyse the jury data, (criminal cases 2 weeks).

On civil jury cases we charge $300 per day and expenses. Criminal matters are charged at $450 per day, and expenses. There is a $1,500 minimum charge once the research team is on site in the county of litigation.

Yours very truly,

CALIFORNIA JURY VERDICTS

John D. Hartney

John D. Hartney

JDH/ib

ATTACHMENT 2

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

COMMISSION ON PERSONAL PRIVACY
107 South Broadway, Room 1021 • Los Angeles, CA 90012
(213) 620-5269 • ATSS 8-640-5269

March 29, 1982

TO: Jury Commissioners, California Superior and Municipal Courts

FROM: Governor's Commission on Personal Privacy

The Commission on Personal Privacy was established by Governor's Executive Order in October 1980 to study invasions of the right of personal privacy, in both the public and private sectors, and documenting these problems with recommendations for corrections in a final report due December 1982.

We request the cooperation of your office and the court in a survey by the Governor's Commission on Personal Privacy relating to certain aspects of juror management. We are enclosing a questionnaire, wherein most of the questions may be answered by checking a "yes" or "no" box.

In a few instances we are asking for short explanations of court policy, or that you submit sample forms or materials distributed by the court. When sample forms or materials are requested, the question is identified by an asterisk.

Thank you very much for your cooperation.

Very truly yours,

George Eskin (DDA)

GEORGE ESKIN
Chairman, Committee on Criminal Justice
Commission on Personal Privacy

Please return completed questionnaire in enclosed envelope by May 1, 1982, to:

Commission on Personal Privacy
Room 1021
107 South Broadway
Los Angeles, CA 90012

I. PRELIMINARY INFORMATION:

Full title of court jurisdiction _____

Name of person filling out questionnaire, and title. _____

_____

II. PROCEDURE FOR SELECTING BASIC JURY VENIRE

A. What are the standard sources used by your court for selecting names of prospective jurors? (Please check appropriate box.)

	Yes	No
1. At random from voters' registration lists?	____	____
2. State Department of Motor Vehicles list of registered drivers?	____	____
3. Do you use any other sources for names?	____	____

If so, please identify.

_____

_____

_____

_____

4. Is the basic venire compiled once a year only?	____	____
If no, at what intervals is it updated?	_____	
5. Does the court ever employ "emergency" measures such as taking citizens at random?	____	____
a. From spectators or other persons assembled in the court room?	____	____
b. Going outside to a street, shopping center, or other public area?	____	____
c. Other means? (Please describe.)	_____	
	_____	

	Yes	No
B. How are people notified they are on the venire?		
1. By mail?	_____	_____
Other means? (Please describe.)	_____	
*(Please enclose a copy of your standard notification form.)		
2. Do you submit a questionnaire to those on the venire?	_____	_____
*(If yes, please enclose sample questionnaire.)		

If your court employs some procedure not covered by your answers above, would you explain this in the space below?

_____

_____

_____

_____

_____

_____

3. How many weeks or months after original venire list is formed are jurors actually summoned to appear in court? _____

4. What form of notification do you use? _____

*(Please enclose copy of this form.)

	Yes	No

III. RELEASE OF JURORS' NAMES

What is court's policy regarding releasing names of jurors to persons outside the office of jury commissioner, other than the jurors themselves?

A.	Is venire list available for public inspection inside jury commissioner's office?	_____	_____
	1. To prosecuting attorneys?	_____	_____
	To defense attorneys?	_____	_____
	2. To reporters from news media?	_____	_____
	3. To jurors themselves?	_____	_____
	4. To preparers of jury books?	_____	_____
	5. To anyone coming to office and requesting to see it?	_____	_____
	6. Are home addresses available?	_____	_____
B.	Does the court mail out names of jurors <u>routinely</u> to:		
	1. Prosecuting attorneys?	_____	_____
	2. Defense attorneys?	_____	_____
	3. Other trial attorneys (civil cases)?	_____	_____
	4. News media?	_____	_____
	5. Preparers of jury books?	_____	_____
	6. No one at all?	_____	_____
C.	If not routinely, <u>only</u> on request to:		
	1. Prosecuting attorneys?	_____	_____
	2. Defense attorneys?	_____	_____
	3. Other trial attorneys (civil cases)?	_____	_____
	4. News media?	_____	_____

4. News media? _____ _____

5. Preparers of jury books? _____ _____

D. Are home addresses released together with names? _____ _____

IV. WHAT IS THE COURT'S POLICY REGARDING THE USE OF JURY BOOKS?

(A jury book is defined as a compilation of any personal data about individual jurors, whether this be single sheets, files, or any other form and employed by trial attorneys as an aid in juror selection.)

A. Does the court permit the use of jury books at attorneys' discretion? _____ _____

B. Is any governmental agency such as the sheriff or police involved in preparation of jury books for attorney use in criminal trials? _____ _____

1. If yes, please identify agency or agencies:

_____

_____

2. If information provided by these agencies in criminal trials, is it gathered from public records? _____ _____

3. Does information, if provided, include any of the following:

a. Arrest records on potential jurors? _____ _____

b. Traffic citations? _____ _____

c. Voting registration? _____ _____

d. Voting record? _____ _____

		Yes	No
e.	Property ownership?	_____	_____
f.	Marital records, including divorces?	_____	_____
g.	Petitions signed?	_____	_____
h.	Litigation by juror, either as plaintiff or defendant?	_____	_____
i.	Other. (Please identify below.)		

_____

_____

4.	Is this information furnished to prosecuting attorneys only?	_____	_____
5.	If not limited to prosecuting attorneys, is it also supplied to defender attorneys?	_____	_____
a.	To public defenders?	_____	_____
(1)	As a matter of policy?	_____	_____
(2)	Upon request only?	_____	_____
b.	To private defense attorneys?	_____	_____
6.	To any other person? (Please identify below.)		

_____

_____

7.	Do any of these agencies provide similar information in civil trials?	_____	_____
a.	If yes, is information provided to parties on both sides?	_____	_____
b.	If no, to which party(ies) is the information provided?	_____	

		Yes	No
C.	Do private juror investigative services provide similar information to trial attorneys?	____	____
1.	Approximately how many such investigative services are active in your jurisdiction (if known)?	_____	
	Please identify these private investigative services:		
	_____		
	_____		
2.	Do these private investigative services provide information in criminal trials?	____	____
	a. To Prosecutors?	____	____
	b. To defense attorneys?	____	____
3.	Do these private investigative services provide information in civil trials?	____	____
	a. To defendant's attorneys?	____	____
	b. To plaintiff's attorneys?	____	____
4.	Are services available to attorneys on a subscription basis, such as a specified fee over a specified time period?	____	____
	a. Fee basis, per trial?	____	____
	b. Fee per juror?	____	____
	c. Time basis, such as per hour or per day?	____	____
	d. Other. (Please identify below.)		
	_____		
	_____		

	Yes	No
D. Are jurors generally informed when information is gathered about them?	_____	_____
1. If yes, may a juror inspect their own files?	_____	_____
2. Is a juror given any right to correct or amend the file?	_____	_____
3. May a juror place any restriction on distribution of his/her file?	_____	_____
E. Is the juror generally contacted by investigators?	_____	_____
1. Generally, is any family member of juror contacted by the investigators?	_____	_____
2. Does court place any restriction on collection of juror information?	_____	_____

If yes, please indicate restrictions:

_____

_____

V. COURT POLICY REGARDING CONDUCT OF VOIR DIRE

A. Is the participation by the presiding judge in voir dire discretionary (on an individual basis)?	_____	_____
1. If yes, does the judge ask general questions of the jurors as a group?	_____	_____
2. Does the judge ask specific questions of the jurors individually?	_____	_____
If yes, do these questions generally include the following:		
a. Name and home address?	_____	_____
b. Home address?	_____	_____
c. Marital status?	_____	_____
d. Other persons in juror's household?	_____	_____
e. Occupation?	_____	_____

	Yes	No
3. Does judge ask other questions at his discretion?	_____	_____
B. Are jurors ever asked if they have been arrested on a charge similar to the one for which the defendant is on trial?	_____	_____
1. If yes, is this a standard question?	_____	_____
2. Is this type of question used in open court?	_____	_____
3. Is this type of question asked if the media is present in the court room?	_____	_____
C. Is any restriction placed upon trial attorneys regarding questions they may ask jurors?	_____	_____
1. Are restrictions a general policy throughout court jurisdiction?	_____	_____
2. Are restrictions left to discretion of presiding judge?	_____	_____
3. What specific questions, if any, are prohibited by court? Please state general policy.		

_____

_____

_____

_____

_____

_____

D. May juror refuse to answer any given question?	_____	_____
1. If juror refuses, must he state reason for refusal?	_____	_____
2. May the fact of his refusal stand without explanation?	_____	_____

		Yes	No
c.	If dismissed, may he/she continue to serve out the term of jury duty?	_____	_____
d.	If the juror refuses to answer, is he/she questioned in chambers?	_____	_____
	If questioned in chambers, who is generally present for this questioning?		
	_____		
	_____		
	_____		
e.	None of the above.	_____	_____

D. How many jurors were called in 1981? _____

1. How many jurors were excused for personal reasons or economic hardship? _____

2. How many were actually sworn as jurors? _____

Thank you very much for your cooperation.

Please return the completed questionnaire in the enclosed envelope by May 1, 1982, to:

Commission on Personal Privacy
Room 1021
107 South Broadway
Los Angeles, CA 90012

DDM:X-329/1-10

THE UNCONSTITUTIONALITY OF VOIR DIRE, PEREMPTORY CHALLENGES, AND JURY BOOKS IN JURY SELECTION

by Godfrey Lehman

Introduction

The elder William Pitt may have been the first to verbalize it, but the philosophy is centuries older. In a speech before the British House of Commons on general warrants he admonished:

> "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail' it's roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshhold of the ruined tenement." (Quoted in Thomas M. Cooley: A Treatise on the Constitutional Limitations, 8th Ed., Little Brown & Co., Boston, 1927, p. 611.)

Professor Alan F. Westin of Columbia University traces the principle of the sanctity of the home and of privacy far back to the earliest and most primitive human societies - and even before that to the animal world. (Privacy and Freedom, Atheneum, New York, 1967, pp. 8-22.) Today we consider it self-evident, firmly secured in the Constitution. The heart is the protection against "unreasonable searches and seizures" as specified in the Fourth Amendment, often termed the "privacy amendment..." Privacy is further ensured by frequent court analysis as coming from the First, Fifth, Ninth and Fourteenth, and from a penumbra extension of the Third. (Documentation follows.)

Although the word "privacy" is used nowhere in the Constitution, its essence, as President Reagan said in his inaugural, is to get the government off the backs of the people. We are understanding that there is a direct correlation between the protection of privacy and personal freedom. The more government knows about private lives, the greater is the possibility to oppress, control and intimidate. Conversely, the less is known, the less likely can it manipulate the lives of the people. The same is true for any unauthorized investigator or agency.

But no matter how universally we may accept the right to privacy, there is an unresolved dichotomy in the legal application - an inadquately explored region which this commentary dares to venture into. Volumes of erudite analysis have been published; court decisions by the thousands define ever more broadly such hallowed constitutional phrases as "unreasonable searches and seizures" (Fourth Amendment); "due process" (Fifth and Fourteenth Amendment); abridging "privileges and immunities (Fourteenth Amendment); taking of private property for public use (Fifth Amendment); abridging the right to silence as well as to speech (First Amendment); "equal protection of the laws (Fourteenth Amendment); and the denial or disparagement of "other (rights) retained by the people"

(Ninth Amendment). That is, the broadening definitions are extended to all residents within our borders in every aspect of their lives - with a single exception. An exception so widely disregarded that it largely nullifies the sensitivity of constitutional safeguards, because it impinges on the lives of possibly 8,000,000 citizens each year, and eventually affects most of us. What good, then to be so precise and broad with privacy defenses when we leave open a floodgate of such enormity?

The exception is the citizen as a candidate for jury duty, and as a juror.

No sooner is his name entered upon a jury roster than the citizen is subject to violation of all of these constitiutional protections. He is defenseless against the probability of intensive and extensive pre-trial investigations performed without his knowledge nor authorization by such governmental agencies as the F.B.I., police and sheriffs and others. Private detectives invade juror privacy through tactics prohibited by court caveat in respect to every one else. All done with the full knowledge of, and often encouragement by, the very courts whose principal obligation is to protect the rights of all citizens.

If the juror does escape the secret inquiry, he can rarely dodge the searching, penetrating voir dire. He is forced under court order to bare before the public assembly the most intimate aspects of his or her life - mercilessly. He has no right to demur, without the alternative of embarassment, a charge of contempt, and loss of juror rights.

These compelled revelations are recorded verbatim by court reporters for "the public record"; secreted in files of private detectives and government investigators; broadcast by news personnel, often to appear in newspapers, books, magazines, or on electronic media, leaving the juror exposed to public view. The property that is his private life has been seized without due process of law. He has lost the basic principle of privacy - the right to control what he wishes to make known, and what kept secret.

My figure of 8,000,000 a year may be too high or too low. It is a very rough guess based in part on the estimate by Harry Kalven and Hans Zeisel in their The American Jury that there were in 1965 some 80,000 criminal jury trials in the United States; and guessing that by adding civil jury trials the total may be around 250,000. In California, representing about ten percent of the national population, there are approximately 20,000 criminal and civil jury trials. If we can assume an average of 30 to 40 candidates per trial, we arrive at the estimate of 8,000,000. But the accuracy of the figure is less important than the possibility of a constitutional offense against a single individual.

This commentary explores this largely unexplored region, to examine the possible double thinking, and poses the thesis that the citizen-as-juror merits equal protection as he would receive as a litigant, or in any other capacity. There are six subject headings:

I. Right to Privacy is Sacred and Guaranteed to All.

II. Constitutional Right to Privacy Necessarily Covers Citizens-as-Jurors.

III. The Constitituionally Impartial Jury Can Be Attained Only by Random Selection from the Widest Possible Community Base.

IV. Voir Dire and Prevoir Dire Investigations are Unconstitutional as Violations of Jurors' Rights to Privacy under the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments.

V. Voir Dire and the Peremptory Challenge Violate the Sixth and Seventh Amendments Because the Objective is to Destroy the Cross-Sectional Character in Order to Build Bias Into the Jury.

VI. Voir Dire at Best is Bumbling, Unreliable, Wastes Time and Money.

I. Right to Privacy Is Sacred and Guaranteed to All.

> "So private men become public records while public power is secreted into closed systems of private benefit." (John Curtis Raines: Attack on Privacy, Judson Press, Valley Forge, PA, 1974, P. 12.)
>
> "By opening more avenues to collect information, government has enormously increased its opportunities to help or embarrass, harass and injure the individual." (United States Privacy Commission: "Personal Privacy in an Information Society", Superintendent of Documents, U.S. Government Printing Office, 1977.)

The respect for privacy as a constitutional right has grown largely from a commentary published in the Harvard Law Review almost a century ago. Not yet Supreme Court Justice Louis D. Brandeis and his coauthor Samuel D. Warren, observed in 1980 that:

> "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others. Under our system of government he can never be compelled to express them (except upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given to them." (4 Harvard Law Review 193, 198, 1980.)

Later the authors added:

> "The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, as far as possible, prevented." (Ibid., pp. 214-215.)

Yet there is no beginning without a precedent. Brandeis and Warren refer to a far earlier edict by British jurist Yates. Despite the autocracy of George III, Yates was able to write: "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." (Millar vs. Taylor, 4 Burr. 2303, 2379, 1769.)

Two particularly powerful precedents were formed four and three years before the article, although not cited in it. In the earlier, Associate Justice Joseph P. Bradley of the United States Supreme Court found that a respect for privacy affects "the very essence of constitutional liberty and security" and applies "to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of his life." (Boyd vs. U Sm, U.S. 616, 630, 1886.)

Privacy invasions, Justice Bradley continued, extend further than to "circumstances of aggravation" such as "breaking of his doors and the rummaging of his drawers". They cover "the invasion of his indefeasible right to personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offence". They also involve "any forcible and compulsory extortion of a man's testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods".

The Justice punctuated this comment by describing "compulsory extortion" as contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." (Ibid., P. 632.) Even if the invasion is "the obnoxious thing in its mildest and least repulsive form" it is a "first footing" that succeeds "by silent approaches and slight deviations from legal modes and procedures". Therefore, he warned, the "constitutional provisions for the security of persons and property should be liberally construed" and "it is the duty of the courts to be watchful for the constitituional rights of the citizen, and against any stealthy encroachments thereon". (Ibid., p. 635.)

The following year, appellate Justice Field advanced the same theme in In Re Pacific Railway Commission. (32 Fed Rep. 241, 250, 1887.)

> "...of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value."

All of these four caveats are intended to cover every person.

While considering these decisions, we should reflect on the juror during voir dire, as well as on the secret, unauthorized investigations of his or her life before trial by private detectives and governmental agencies. We should ask if being required to answer questions which (s)he would prefer not to answer comes under the head ing of being subjected to the "scrutiny of others" without his consent. And whether this is a form of inspection of "his private affairs, books, and papers", or an "invasion of his indefeasible right of personal security, personal liberty and private property". Would this not be, as Brandeis and Warren conclude their article, a closing of "the front entrance to constituted authority (while opening) wide the back door to idle or prurient curiosity"? (Op. cit., p. 220.)

Certain specific exceptions are sanctioned. Pacific Railway Commission makes one:

> "The law provides for the compulsory production, in the process of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also in certain cases for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained... against the will of the owners." (Op. cit., p. 250.)

Certainly the juror is no "offender against public justice". Whether the expression "as affect the interest of others" could allow an opening is discussed in Section V. of this article.

Brandeis excepted only the individual "upon the witness-stand", which is certainly not the juror. Had he intended to except the juror, he would have been as specific. Bradley in Boyd was reversing the conviction of a criminal defendant who had been forced to produce the condemning evidence from his own papers. He went beyond that immediate issue by decreeing that "the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of government..." (Op. cit., p. 639.) His only exception from such protection was a convicted person.

This decree was considered so important by the Supreme Court that it was cited seven years afterward in Interstate Commerce Commission vs. Brimson because "it cannot be too often repeated..." (154 U.S. 447, 478, 1893.) At that time the Court added: "Neither branch of the legislative department, still less any merely administrative body, established by Congress possesses or can be invested with a general power of making inquiry into the private affairs of the citizen". (Ibid., p. 478.) The specific reference is to a litigant, but the term "citizen" applies equally to a juror. Voir dire is by every definition a process of "making inquiry" into private affairs.

The court listed only two branches of government. Was it intentional to omit the Judiciary? Whichever, it is legitimate to ask if it would not be meaningless to guarantee security if one door is left open.

It was, in fact, the recognition of the right to privacy which gave birth to what John Adams termed "the child Independence". Parliament had issued "writs of assistance" in 1761 to revenue officers, empowering them, at their exclusive discretion, to search suspected places for smuggled goods. At a debate in Boston in February of that year, one of the resistors, James Otis, attacked the writs as "the worst instrument of arbitrary power, the most destructive of English liberty". Adams labeled this resistance "the first scene of the first act of the opposition to the artbitrary claims of Great Britian. Then and there the child Independence was born." (Works of John Adams, Vol. 2, Appendix A, pp. 523-525.)

Even in a state where courts often took an equivocal position on civil rights of racial minorities, there was no equivocation regarding the right to privacy. The Supreme Court of Georgia decreed in 1905 that:

> "Liberty of speech and of writing is secured by the Constitution, and incident thereto is the correlative liberty of silence...Each (citizen) is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him this liberty...One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze." (Pavesich vs. New England Life Insurance Company, 50 SW 68.)

The 1928 U.S. Supreme Court described privacy as "the most comprehensive of rights and the right most valued by civilized man". (Olmstead vs. United States, 227 US 438, 478.) Earl Warren made several incisive comments in Sweezy vs. New Hampshire in 1956. (354 US 250.) The case concerned a citizen called to respond to a legislative inquiry about his political activities. "Merely to summon a witness and compel him against his will to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment...areas in which government should be extremely reticent to tread."

Later in the opinion the Chief Justice added: "We do not now conceive of any circumstances wherein a state interest would justify infringement of rights in these fields." (Ibid., p. 251.)

Any circumstances? Voir dire is a "circumstance" and so is the preparation of jury books. Warren had spent many years both as district attorney for Alameda County and as Attorney General of California; if he had felt voir dire was an exception, it seems he would have been equally as explicit as Brandeis and the trial witness. Instead he went further. "...thought and action are presumptively immune from inquisition by political authority." (Ibid., p. 266.)

Three years later, Justice Douglas added more weight: "Privacy of the individual is protected from invasion by 'officious' governmental officials." (Frank vs. Maryland, 359 U.S. 360, 1959.) And a year later in another "searches and seizures" case, the high court delivered a further victory for privacy. Privacy is "a basic constitutional right" under the Fourth Amendment, and is "no less important than any other right, carefully and particularly reserved to the people (and) would stand in marked contrast to all other rights declared as 'basic to a free society'". (Mapp vs. Ohio, 367 U.S. 656-657, 1960.)

The Court then asked rhetorically: "Why should not the same rule (inadmissability of coerced confessions) apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? We find that as to the Federal Government, the Fourth and Fifth Amendments, and as to the states the freedom from unconstitutional invasions of privacy and the freedom from convictions based on coerced confessions enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty' secured only after years of struggle". (Ibid., p. 657.)

This court continued to stress the value of the right to be let alone.

> "Official intrusion into the matters or activities as to which an individual has exhibited a 'reasonable expectation of privacy' are searches...a reasonable expectation is something more than just a subjective expectation of privacy; it must also be an expectation that 'society is prepared to recognize as reasonable'." (U.S. vs. Katch, 389 U.S. 361, 1967.)

Three more significant cases from the Warren court include NAACP vs. Alabama, 1958 (357 U.S. 449); Griswold vs. Connecticut, 1964 (381 U.S. 479); and Stanley vs. Georgia, 1968 (394 U.S. 557). In

the first, the court covered under the First Amendment's protections the "freedom to associate and privacy of one's associations", and declared that disclosure of membership in an association entailed "the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association". (357 U.S., p. 462.)

This edict would seem to proscribe investigations before trial or voir dire questions about a juror's membership in any club or association, or even to seek membership lists.

Griswold called upon the 1887 Boyd precedent, and invoked the First, Third, Fourth, Fifth and Ninth Amendments in declaring "the right of privacy which presses for recognition here is a legitimate one". The issue was governmental intrusions into "the sacred precincts of marital bedrooms for tell tale signs of the use of contraceptives". (382 U.S., p. 485.) With direction as precise as this, can a woman be quizzed about her use of intra-uterine devices, abortions, fertility examinations?

The Stanley case involved "inquiry into the contents of (appellant's) library" which the court found "a drastic invasion of personal liberties by the First and Fourteenth Amendments" because "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy" is fundamental. (394 U.S., pp. 564-565.)

From this it should be clear that no juror can be asked what magazines or newspapers he subscribes to, or what books he has read, for these are "contents of his library".

"First, Fourth and Fifth Amendments to the Constitution are related and safeguard not only privacy and protection against self-incrimination, but conscience and human dignity and freedom of expression as well, according to the 1965 Court. (Stanford vs. Texas, 85 SCt. 506, 1965.) Two years later: "The principal object of the Fourth Amendment is the protection of privacy, and personal thoughts lie at the heart of our sense of privacy." (Warren vs. Hayden, 387 U.S. 294, 1967.) To ask a juror his opinions about given subjects, his views on the death penalty, or anything else would seem to be delving into his personal thoughts, and also proscribed.

The Court depended on the Fifth Amendment in the same year in Katz vs. United States: "To some extent, the Fifth Amendment reflects Constitution's concern for right of each individual to a private enclave where he may lead a private life." Thus, are

not questions such as "Who are members of your immediate household?" or other inquiry about family or personal life prohibited? For where else but in one's household is there presumed to be a more private "private enclave"?

"This right of privacy is well within the penumbra of the Bill of Rights" as the First Amendment offers protection "from governmental intrusion", wrote the California Supreme Court. (Annenberg vs. Co. Cal. District of Laborers, 38 CA 3rd 637.)

The Mapp case involved entry into a private home to seize certain materials which the Supreme Court refused to be used as evidence. If they could:

> "the assurance against unreasonable Federal searches and seizures (applicable to states) would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties; so too, without that rule, the freedom from state invasion of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this court's high regard as a freedom 'implicit in the concept of ordered liberty'." (op. cit., p. 665.)

Even with Warren gone from the court, the support continues: "Official surveillance, whether its purpose be criminal investigations on ongoing intelligence gathering, risks infringements of constitutionally protected privacy of speech." (U.S. vs. U.S. District Court, 407 U.S. 320, 1971.)

> "The mere semblance of legislative purpose will not justify any inquiry in face of the Bill of Rights, and court cannot simply assume that every congressional investigation is justified by a public need that overbalances any private rights affected...In congressional investigations, witnesses cannot be compelled to give evidence against themselves, and cannot be subject to unreasonable search and seizure, and the First Amendment freedoms of speech, press, religion, or political belief, and association cannot be abridged." (Watkins vs. U.S., 77 S Ct. 1173.)

Five years later: "Compelled disclosure, in itself, may seriously infringe on privacy of association and belief guaranteed by the First Amendment." (Buckley vs. Valeo, 96 S Ct. 612, 1976.) Voir dire requires compelled disclosures, often of religious or political beliefs.

Two recent influential courts allowed no equivocation nor exception. "Privacy is protected not merely against state action", said the California Supreme Court in 1976. "It is considered inalienable right which may not be violated by anyone." (Porten vs. U.S.F., 134 Cal Rptr. 1976.) "By anyone" must necessarily include trial judges, attorneys and private investigators.

The next year a Federal appellate court decleared: "The Constitution protects individual interest in avoiding disclosure of personal matter, which right is well characterized as the 'right of selective disclosure'." (Crain vs. Krehbiel, 443 F Supp 202.)

Earl Warren once commented:

> "Legislative or executive action eroding citizen's rights in the name of security cannot be placed on a scale that weighs the public interest against that of the individual in a sort of count the heads fashion" as it is "the right most valued by civilized man." (Quoted in Vance Packard: The Naked Society, D. McKay Co., New York, 1967.)

Another Supreme Court decision would seem to excuse the juror from responding to any voir dire questioning at all. "The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." These twin rights "are complementary components of the broader concept of 'individual freedom of the mind'." (Wooley vs. Maynard, 97 S Ct. 1428, 1431, 1977.)

Professor Alan F. Westin wrote what has become possibly the most widely accepted definition of privacy: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." (Privacy and Freedom, Atheneum, New York, 1967, p. 7.)

In the same year, Omar V. Garrison used different phraseology: "The right to privacy is the right of the individual to decide for himself how far he wishes to go in sharing with others his thoughts, his feelings, and the facts of his personal life.

It is a right that is essential to ensure dignity and freedom of self-determination." (Spy Government, The Emerging Police State, 1. Stuart, New York, 1967, p. 227.)

Another definition was given by Charles Fried in the Yale Law Journal, also in 1967.

> "Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves...Privacy, thus, is control over knowledge about oneself...if we thought that our every word and deed were public" fear would restrict our activities. ("Privacy", 77 Yale L H 475.)

A Texas court explained that "right of privacy" is "generic term, encompassing various rights recognized to be inherent in concept of ordered liberty, and such right prevents governmental interference in initimate personal relationships or activities; freedom of individual to make fundamental choices involving himself, his family and his relationship with others." (Industrial Foundation of the South vs. Texas Industrial Accident Board, 540 S W 2nd 668, 669, 1976.)

A Michigan court added in 1977.

> "Invasion of plaintiff's right to privacy is important if it exposes private facts to public whose knowledge of those facts would be embarassing to the plaintiff, and such 'public' might be general public, if plaintiff were a public figure, or particular group such as fellow employees, club members, church members, family or neighbors, if plaintiff were not a public figure." (Beaumont vs. Brown, 257 N W 2nd 522.)

The common theme throughout all these is the right of control by the individual as the sole authority to determine what facts about himself should be made public. This was the theme of Brandeis-Warren and of Judge Yates in 1769. Without individual control there can be no privacy. If it exists to any degree, it necessarily covers all persons - with the exceptions as noted. It is, as a New Jersey court told us in 1976, "guaranteed by the U.S. Constitution" and "the fundamental freedom from intrusion by government".

> "Essence of privacy interest includes general right to be left alone and to define one's circle of intimacy; to shield intimate and personal characteristics and activities from public gaze; to have moments of freedom from unremitted assault of the world, and unfettered will of others in order to achieve some measure of tranquility for contemplation or other purposes, without which life loses its sweetness." (Galella vs. Onassis, 353 F Supp 196, 1972.)

Violations of privacy are torts, and are actionable.

> "We approve the extension of the tort of invasion of privacy to instances of intrusions, whether by physical trespass or not, into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded. Just as the Fourth Amendment has been expanded to protect citizens from government intrusions... so should the law protect citizens from other citizens. The protection should not turn exclusively on the questions of whether the intrusion involved a technical trespass under the law of property. The common law, like the Fourth Amendment, should protect people, not places." (Pearson vs. Dodd, 410 F 2d 704, 1969.)

The American Law Institute defined the tort as an intentional intrusion "physically or otherwise, upon solitude or seclusion of another, or his private affairs or concerns...if the intrusion would be offensive to reasonable person..." [Restatement of the Law (Second) Torts, quoted in Munley vs. ISC Financial House, Inc., 584 P 2d 1336.]

There is much support for this thesis: "...essence of injury is an unreasonable interference in making known a person's affairs to others..." (Meyer vs. Pennypack Woods Home Ownership Association, 559 F 2d 894, Penn., 1977.) "Right to privacy, in sense of right to be free from intrusion upon seclusion, implies exclusion of all unauthorized persons..." (Vernards vs. Young, 539 F 2d 966, 967.) The tort includes "public disclosure of prior facts". (Factors Etc., Inc. vs. Pro Arts, Inc., 579 F 2d 215, 216.)

"One who gives publicity to matters concerning the private life of another of a kind highly offensive to a reasonable man is subject to liability to the other..." wrote a Kansas court in 1975. (Atcheson, Topeka & Santa Fe Railroad vs. Lopez, 531 P 2d 455.) A juror investigator, whether representing the government or private, who gives facts to trial attorneys is "giving publicity" to unauthorized persons.

The intrusion can be "physically or otherwise" and an action can result "based upon injury to emotions and mental suffering". (Froelich vs. Adair, 516 P 2d 993.) No juror investigation, in court or out, involves physical intrusion, but it certainly is "otherwise".

Other declarations that violation is a tort come from Shibley vs. Time, Inc. (321 N E 2d 791, affirmed 341 N E 2d 337); Guthbridge vs. Pen. Mon. Inc., (239 A 2d 709); Leopold vs. Levin, 259 N E 2d 250); and when interrogation is "unreasonably intrusive" (Noble vs. Sears Roebuck & Co., 109 Cal Rptr 269 33 Cal 3rd 654, 1973) or "pursued in an offensive or improper manner" (Alabama Elec. Coop., Inc. vs. Partridge, 225 So 2d 848, 1969.)

Questioning is improper if it concerns "something which is objectionable" (Earp vs. City of Detroit, 167 N W 2d 841, 1969) or is an attempt to reveal "something that a person has a right to keep private". (Bradshaw vs. Michigan National Bank, 197 N W 2d 531.) Nor should an inquiry be allowed as it would cause "mental suffering, shame or humiliation of ordinary sensibilities". (Shorter vs. Retail Credit Company, 251 F Supp 329, 1966.)

When General Motors employed private detectives to trail Ralph Nader, he was awarded the decision in his complaint to the New York Court of Appeals. "Secret, initimate facts" about his life were to be protected "from prying eyes or ears of others..." when the intrusion "was designed to elicit information which would not be available through normal inquiry or observation". (Nader vs. General Motors, 255 N E 2d 765.)

"Under certain circumstances," the decision reads, "surveillances may be so overzealous as to render it actionable; a person does not automatically make public everything he does by being in a public place." If a public figure like Nader is protected, even more so should essentially nonpublic figures like jurors.

One's right to privacy can be infringed upon only when "the state (can) show a compelling justification for its action and that no less restrictive alternatives are available". (Mental Hygiene Law, New York, Sec. 103, quoted in Dale vs. Hahn, 331 F Supp 1923, New York, 1970; affirmed in part, reversed in part 440 F 2d 633, centiorari denied 95 S Ct. 44; also Miller vs. Dale, 95 S Ct 44, 419 U.S. 826.) The question of the "compelling interest" or "compelling justification" is examined in Section V. of this commentary.

Ralph Waldo Emerson considered "the private life of each person (as) a more illustrious monarchy than any kingdom" (quoted by Vance Packard, op. cit.) and Alan Barth observed that "...a respect for privacy...as much as is any other single characteristic that the free society differs from the totalitarian state". (The Price of Liberty, Viking Press, New York, 1961, p. 11.)

John Curtis Barnes, quoted at the head of this section, finds there is a trend to reducing citizenship to a system of control over passive inhabitants. "We receive our place in reality as subjects of bureaucratic manipulation. Federal agencies administrate for the benefit of their administered clientele" and turn private persons into public records, while politics become private. (Op. cit., p. 11.)

"For individual and associational privacy are the cradle of both personal vitality and that social distance necessary for effective citizen advice and consent. Privacy, then, becomes a key political issue because it bears upon the fundamental logic of not just our own but of all high-technology societies." (Ibid., p. 12.) This loss of privacy "is moving our culture in the direction of an administrative state and toward privatization of public power." (Ibid., p. 13.) Jurors have no access to jury book dossiers, and their very existence is concealed from them.

Omar Garrison has discovered the same threat:

> "Is the annihilation of privacy the antecedent state of an emerging police state in America? Does tyranny always establish itself by choosing first an unpopular victim, or by pleading invasion of privacy is necessary to combat organized crime? In a free society, where does bureaucratic shepherding end and despotic control begin?" (Spy Government, op. cit.)

The defenseless juror - perhaps 8,000,000 a year - is as good as any one else a "first...victim", even if not unpopular.

Once privacy is lost, "restitution in any literal sense is simply impossible...once made, a disclosure cannot be erased" wrote Ken Karsh in "Legal Controls Over Stored Personal Data" (31 Law and Contemporary Problems 342, 351, 1966). Or, as more graphically stated by San Francisco attorney William Petrocelli: "Privacy - like virginity,, cannot be recovered once it is lost." (Low Profile: How to Avoid the Privacy Invaders, McGraw-Hill Book Co., New York, 1981.)

Petrocelli is one of the first of his profession to acknowledge the possibility of abuse to juror privacy:

> "The most gratuitous invasions of privacy in any court proceeding are reserved for the only other laymen involved: the jurors. In the interests of finding an unbiased jury (or one biased in his client's favor) an attorney is given broad latitude to question jurors about their backgrounds, attitudes, employment, religious beliefs, and so on. As

with parties and witnesses, however, the most significant actions go on outside the courtroom. Most communities have various 'jury reporting' services that compile dossiers on prospective jurors for use by attorneys. This includes voting registration, marital status, voting records on prior juries, and anything else that can be picked up from the public records or from other attorneys. Like everyone else involved in a legal procedure, jurors are likely to find that their private lives have become public knowledge." (Ibid., pp. 123-124.)

The publisher of Privacy Journal, Robert Ellis Smith, supported this position:

"Yet jurors are subjected to outrageous invasions of personal privacy. Prosecutors and defense attorneys have access to records in public agencies, including the tax department, to form personal profiles on each person called as a potential juror. [Data include] age, length of local residence, length and type of employment, education, home ownership, association memberships, newspaper reading habits, party politics, marital status, spouse's and parent's employment and education, stock ownership, home town, race, physical or emotional problems, and previous jury service [to become] part of the trial record, open to the public for years." (Privacy: How to Protect What's Left of It, Anchor Press, New York, 1980, pp. 179-180.)

In short, everything declared a "private sanctuary", a "secluded area", an escape from "the public gaze" by so many courts cited herein. Does this not mean that the juror is receiving inequitable treatment in defiance of constitiutional protections?

II. Constitutional Right to Privacy Necessarily Covers Citizens-as-Jurors

The San Francisco Chronicle published two stories on the same day in 1981 about victims of rape. In the first the woman was testifying at the trial of her attacker, but her identity was concealed both in court and in the newspaper.

The second story concerned hearings on child molestation. The now grown woman recounted childhood offenses against her by her own father. Her picture was shown with her face blocked out and her name not used.

Perhaps in the Spring of 1983, or sometime in 1986, or not until 2004, either or both of these women will be called to the jury box. Likely as not, the judge or a trial attorney will pose the following question which I heard Superior Court Judge Martin Pulich ask of many women during voir dire for the Oakland, California trial of Wendy Yoshimura in 1978: "Have you or any member of your family ever been raped?"

That trial attracted widespread news attention; every juror response was taken down by reporters. One mother stammered before replying, and the judge coaxed out of her the private information that her 12-year old daughter had been attacked four years earlier on her way home from school. Judge Pulich required more details and succeeded in extricating them from the flustered woman.

She told me afterward that the questioning was embarrassing and revived traumatic experiences the family was just overcoming. She felt she could not defy the court. Her revelations are now part of the public record for the inspection of any detective or other unauthorized person.

This situation epitomizes the dichotomy of our thinking. The two previously unidentified rape victims will now, as jurors, be forced to take off their masks. Why are they so well protected in one capacity, yet lose protections when performing so vital a service as jury duty? The front entrance against invasion is closed but the back is opened.

In the vast area of privacy law so far considered, there has been no specific reference to the trial juror, either as being excluded or included. Without specific exclusion, and in view of many advices that privacy extends to everyone and should be "liberally construed", it would seem constitutionally correct not to set jurors apart in a discriminated class. Nonetheless, there is a body of law, albeit less often invoked, which is explicit about juror coverage. The earliest court commentary I have found comes from an appellate court in Virginia, dated 1823: "...a venireman may refuse to answer any questions tending to disgrace him...it is his privilege." (Sprouce vs. Commonwealth, 2 Va Ca. 375.)

The following year in Indiana another court sustained the Virginia decision: "If the cause of challenge to a juror tend to his infamy, he cannot be examined on oath respecting it. The challenge must be supported by extrinsic proof." (Hudson vs. State, 1 Blackf. 317, 1824.)

These decisions may seem ancient and limited in territorial application, but they do not stand alone. They have been frequently supported by other courts, up to the highest. In 1876, the U.S. Supreme Court admonished: "Questions which tend to disgrace the person questioned, or to render him amenable to criminal prosecution, have never been allowed to be put to a juror." (Reynolds vs. U.S., 98 U.S. 145, 151.) The trial dealt with polygamy and the court determined "it was clearly erroneous for the prosecution to ask several of the jurymen, upon voir dire, whether they were living in polygamy".

Other decisions are broader. "Jurors are not bound on their voir dire examinations to answer questions which are irrelevant or impertinent, or those the answer to which might lead to their disgrace, infamy or self-accusation of a crime." (State vs. Mann, 83 No. 589, 1884.) The Supreme Court of Georgia wrote in 1897: "In no event is the court bound to ask, or to permit counsel to ask, the juror any questions the answer to which would tend to incriminate or disgrace him." (Ryder vs. State, 28 S E 246, 248.)

Even if the juror has been convicted or is under indictment which might disqualify him from service, "the fact must appear otherwise than from the examination of the proposed juror on his voir dire". (Sewell vs. State, 15 Tex. App. 56, 1883.) Or, "A juror is, no more than a witness, obliged to disclose on oath his guilt of any crime, or of any act which would disgrace him in order to test his qualifications as a juror." (Burt vs. Panjaud, 99 US 180, 181, 1878.)

Proscribed questions don't even have to be disgracing, by an 1895 Supreme Court decision: "We are of the opinion that the court correctly rejected the question (of political affilitation) put to the juror...his political opinions or affiliation will not stand in the way of an honest discharge of duty." (Connors vs. U.S., 158 US 408, 414.)

This thinking is not confined to the 19th century. The Maryland Court of Appeals followed the wording of Ryder closely in writing Twining vs. State in 1964: "Questions having a tendency to disgrace prospective jurors are properly disallowed." (198 A 2d 291, 293.) Specifically, "The refusal to permit prospective jurors to be questioned as to whether they, or members of their family, had ever been in a situation similar to that of prosecuting witness in bastardy case was not an abuse of discretion."

In 1975, a similar sentiment was expressed by the Connecticut Supreme Court: "Counsel is not entitled to ask questions on voir dire on the subject to race prejudice...and questions must not be

irrelevant or vexatious." (State vs. Marsh, 362 A 2d 523, 525.) Continuing: "When counsel's questioning of jurors transcends the proper limits of the voir dire and represents an abuse of the right of examination, court is under duty to restrain such examination."

A Pennsylvania Superior Court advised in 1976: "It was not abuse of discretion for trial court to refuse to allow waitress (the plaintiff) to inquire into education of prospective jurors on voir dire." (Lenkiewicz vs. Lange, 363 A 2d 1172, 1176.) And in the same year from Louisiana: "Voir dire examinations...may not serve to pry into their opinions concerning evidence to be offered at trial." (State vs. Clark, 325 So 2d 902.)

The West Virginia Court of Appeals agreed, also in 1976: "A trial court should not permit...any questioning which is calculated to embarrass, humiliate, intimidate...The West Virginia statute governing voir dire examination forbids abusive, improper or pointless voir dire." (State vs. Pendry, 227 S E 2d 210, 216-7.)

A Federal appeals court reviewed a California case in 1977:

> "When disclosure of personal information which is potentially embarrassing or harmful violates right secured by Constitution, Constitution secures right of privacy because that right is 'indispensible' to some other constitutional right, and thus critical questions are whether and how involuntarily disclosure of private information affected exercise of right independently secured by the Constitution." (Crain vs. Krehbiel, 443 F Supp 202.)

From Michigan we learned in 1971 that: "The trial court senses that these reasons (for not responding to voir dire questions) were highly personal to the wenireman, and, in its discretion, refusing to subject the venireman to searching voir dire questions...was no abuse of discretion." (People vs. Ashwer, 189 N W 2d 152.)

The strongest Federal case restricting voir dire was delivered in 1979 by the U.S. Court of Appeals, Second Circuit in New York, identified as U.S. vs. Barnes. (604 F 2d 121.) The Court established several principles. The opinion upheld a decision by the trial judge to withhold identities of prospective jurors, their residences and ethnic backgrounds to prevent pretrial investigations and to protect jurors from possible threats. The appeal came from the convictions of one Hispanic and several Black defendants for violating Federal narcotic laws. The privacy of the jurors was to be protected, except insofar as their views might relate to charges submitted to them.

Prohibited were questions where "the matter sought to be probed by the defendants was too remote from the issues in the case to warrant the intrusion into potential juror's private thoughts...It is not, after all, the prospective jurors who are on trial." Continuing:

> "It can be imagined that, as counsel seek more and more information to aid in filling the jury box with persons of a particular type whom they believe to be well disposed toward their clients, prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed...As long as a defendant's substantial rights are protected by a voir dire designed to uncover bias as to issues in the cases and as to the defendant himself, then reasonable limitations on questionings should not be disturbed on appeal."

The court drew upon a 1964 decision in which then Appellate Judge Thurgood Marshall had also upheld a trial judge's decision to conceal the identities of jurors. (U.S. vs. Borelli, 336 F 2d 376, 392.)

Barnes extended juror protections beyond this:

> "As to religion, our jury system was not designed to subject prospective jurors to a catechism of their tenets of faith, whether it be Catholic, Jewish, Protestant or Mohammedan, or to force them to publicly declare themselves to be atheists... If Darrowesque questioning of prospective jurors were allowed, namely 'religion, politics, social standing, family ties, friends, habits of life and thought', any semblance of juror privacy would have to be sacrificed. There is neither statutory nor constitutional law that requires disclosure of information about jurors unrelated to any issues as to which prejudices may prevent an impartial verdict."

There is divided thinking in Barnes. On one hand, jurors are protected in specific ways mentioned; on the other hand, they can be quizzed regarding personal attitudes to "uncover bias". This brings us up against the First Amendment's "correlative liberty of silence" (see Pavesich, op. cit., 50 SW 68) and other cases cited in Section I.

Nevertheless, Barnes went too far for the Harvard Law Review which published a scathing commentary. (Vol. 93, 782, 1980.) "One who is compelled to sit as a juror may be required to relinquish his

right to privacy" because "Society's immediate concern with according defendants a fair trial outweighs any speculative injury to the juror's privacy" (page 792). The statement reveals a gross disrespect for the juror as an individual, but the injury is hardly "speculative" when the right of control is seized from the juror, his life becomes part of the public record and often widely publicized; he is humiliated, and the rights of possibly 8,000,000 persons are affected nationally each year.

Against this "speculative injury" is all the privacy law previously cited, as well as the position of Richard Gerstein, Chairman of The American Bar Association's Section of Criminal Justice: "The privacy of the individual should be paramount in a democratic society." (Quoted in 66 ABA J'l 831, July, 1980.) Gerstein has had 21 years as a state's attorney for Dade County, Florida.

The Harvard criticism also presumes that the purpose of voir dire is benevolent and is effectual. That it is neither is examined in Sections V. and VI. The U.S. Supreme Court, however, did make an observation on the "speculative" nature half a century earlier in the "Teapot Dome" case. (Sinclair vs. U.S., 279 US 749, 1929.)

> "The most exemplary (jurors) resent having their footsteps dogged by private detectives...the mere suspicion that (a juror), his family and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet or disgust. Trial by capable juries, in important cases, probably would become an impossibility." (Ibid., p. 765.)

Barnes is not the only instance of judicial confusion about where to draw the line between "proper" and "invasive" questioning. For example, State vs. Pendry also gave support to the West Virginia statute "clearly" requiring "the court to provide for an adequate voir dire" which was partially defined as making certain that the jurors were "not related to either party, with no interest in the cause or sensible bias or prejudice". (op. cit., p. 216.)

While the statute "would forbid abusive, improper or pointless voir dire", it "guarantees that voir dire may fully probe a prospective juror's general qualifications, interest, bias or prejudice." Many other cases include some verbal genuflection to voir dire, leaving a very fuzzy area. However, if basic privacy

law gives the power of control to each individual for himself, it would mean that the juror is the sole authority for making the determination as it concerns himself. And from his decision, there can be no appeal nor any prejudicial action taken against him.

In conflict with Barnes are two decisions by the California high court delivered within two months of each other in 1981. The later deals with secret pretrial investigations. Dated July 27, the opinion by Justice Mathew Tobriner acknowledges that the prosecution had conducted "field investigations of prospective jurors and maintained records showing how the jurors have voted in prior cases and whether they have arrest records". The right of the jurors to know that these investigations had been conducted and to put a stop to them was ignored, despite Ryder, Twining, etc., cited above. Had the jurors been the defendants, would the court have decided that they could exercise control? Instead of reprimanding the prosecution, Justice Tobriner decided that defense counsel should have permission to inspect the same records.

The trial judge had apparently denied a request by the defense either for $1,000 in tax money to conduct an investigation of its own, or to grant access to the prosecution's files. This was error because:

> "...when courts deny defendants who cannot afford similar investigations access to the prosecutor's records, the result is the prosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel. Such a pattern or inequality reflects on the fairness of the criminal process." (People vs. Murtishaw, 29 Cal 3rd 733, 765.)

Although acknowledging that "it may be doubtful whether public funds should be spent on investigations...those doubts cannot justify making the results of the investigations available to one side but not to the other."

Perhaps so, but if there is a question as to abuse of constitutional rights, should not the court have prohibited it entirely, and condemned the prosecution? Where, also, is the constitutional authority for giving either side the right to have any secret information about the prospective jurors?

The earlier case, dated June 1, deals with voir dire. Justice Stanley Mosk agreed at least that voir dire should be contained "within reasonable limits" and "a question to a prospective juror may be exluded if it appears to be intended solely to accomplish such an improper purpose as educating the jury panel to particular facts of the case, compelling the jurors to commit themselves to

vote a particular way, prejudicing the jury for or against a particular party, arguing the case, indoctrinating the jury, or instructing the jury in matters of law". Nonetheless, the trial court "cannot exclude questions proper in scope" and "is free to require that they be phrased in neutral, nonargumentative form". But counsel should be "given a significant opportunity to probe under the surface to determine the potential juror's individual attitudes". This comes from the same Justice Mosk who not long before had decreed that "man requires some sanctuary in which his freedom to escape the intrusion of society is all but absolute". (Annenberg vs. So. Cal. Dist., op. cit. See also Mosk decision in People vs. Dumas, 9 Cal 3rd 871, 882.)

What is the proper balance is apparently left to the trial judge, being "impossible to dictate a priori". Where is the juror's sanctuary of escape? (People vs. Williams, 29 Cal 3rd 392, 394.) "Probing under the surface" implies no "reasonable limits", no sanctuary; it is rapacious intrusion forced upon defenseless citizens.

The chief hypocrisy comes when Mosk later declares that the purpose of inquiry is to determine who are "the most or least desirable jurors based solely on general characteristics such as race, sex, age, religion, and level of education". Darrowesque inquiry prohibited in Barnes and others. In other words, the objective is not to select "impartial" jurors, but those "desirable" on the basis of unreliable stereotypes.

To support this position, Mosk cited the trial of Maurice Stans and John Mitchell, when the "defense was advised to seek a jury of working class persons of Catholic background, neither poor nor rich ($8,000 to $10,000 per year) who read the New York News" (fn. p. 405). Or a handpicked jury whose religion, reading habits and earnings are exposed to public inspection for the purpose of building "desirable" homogenous juries. On such foundation, the entire Williams decision must collapse as antithetical to Sixth Amendment requirement of an "impartial jury". Williams also violates Mosk's own 1978 Wheeler decision (see below) prohibiting jury selection by identifiable classifications and requiring a "broad spectrum" representation.

If there is a question that these direct references to jurors are not sufficient guarantees to their privacy, we can turn to the Fourteenth Amendment's command not to "deny to any person within its jurisdiction the equal protection of the laws".

"Whenever governmental actions result in different treatment of people similarly situated, there is possibility that claim under equal protection clause can be established." (Henry vs. White, 359 F Supp. 969, 971, Comm. 1973.) A juror is "similarly situated" when he is no more free to leave than is a witness.

"An equal right or right to equal protection of laws...is simply right of individuals to receive from state the same treatment as state accords to all other individuals." (Heymann vs. State of Louisiana, 269 F Supp. 36, 41-42, 1967.) "The Constitution protects equally citizens throughout the United States." (Garrison vs. Smith, 413 F Supp. 747, 753.) "Equal protection clause of the Fourteenth Amendment prohibits disparities before the law." (U.S. ex rel Mishkin vs. Thomas, 282 F Supp 729, 737, New York, 1968.) The constitutional equal protection guarantees "were designed to protect fundamental rights...even against the will of the majority." (Keyes vs. School District #1, Denver, 303 F Supp. 279, 287, 1969.) as well as against the will of attorneys to probe.

"The 'equal protection' clause...means that the rights of all persons must rest upon the same rule under similar circumstances." (State ex rel Vars vs. Knott, 184 So. 752, 754, Fla.) The Supreme Court affirmed in another Florida appeal: "Equal protection clause requires uniform treatment of persons standing in same relationship to governmental action question or challenged." (Hargrave vs. Kirk, 400 US 900, 1970.)

These decisions it would seem clearly establish that the juror must receive the same protections regarding governmental actions. The inequality of treatment was expressed by jury forewoman Mary Timothy in the Angela Davis trial. Noticing that a great deal of evidence against the defendant was not admitted "because of the manner in which it was secured", protecting her rights "just as any other person's are supposed to be", juror Timothy contrasted this with the treatment of jurors. Their lives were "thoroughly investigated" before trial in secret, and later "painstakingly investigated" by court investigators who "explored the lives of the jury panel". (Jury Woman, pp. 168-171.)

This, she concluded, was not "equal treatment".

III. The Constitutionally Impartial Jury Can Be Attained Only By Random Selection from the Widest Possible Community Base

Trials by the community at large are probably the earliest attempts by the people for self-rule; the history of trial by jury and its antecedents may be as ancient as the first-known human social organization - dating from the Sumerian civilization; (see Samuel Noah Kramer, From the Tablets of Sumer, Falcon Wing Press, Indian Hills, CO, 1956, pp. 52-55) and its modern usage may be based both in Magna Carta (Article 39) and the Constitution, but in none of these official documents do we find a description of what a "jury" exactly is. Magna Charta does not even use the word "jury", requiring only "the lawful judgment of his equals". There is no explanation of who is an equal, how the judgment is made, nor how many persons form the judgmental body. Use of the plural "equals" presumably could mean as few as two.

Nor does the Constitution offer guidance, despite three specific guarantees. (The only civil right to receive so much attention. Freedom of the press is limited to 16 words, but the jury is given 161 - a demonstration of the high regard for both civil and criminal juries.)

The first reference is the third paragraph, Section Two, Article III: "The Trial of all Crimes...shall by by Jury..." But it does not define a jury. Patrick Henry found this much too "vague and equivocal". Thus, the Sixth Amendment which explicitly requires that an accused "be informed" of the accusations against him, and "be confronted with witnesses against him" as well as having "compulsory process for obtaining witnesses in his favor and to have the assistance of Counsel in his defense".

But there is no such detail regarding the judgmental body. Only the assurance that the defendant "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed". The Seventh Amendment extends "the right of trial by jury" to civil suits. But what is a jury and what is "impartial"?

The Unabridged Webester's Dictionary of the English Language, 1977, defines "jury" as "a number of qualified persons, selected in a manner prescribed by law, empaneled and sworn to inquire into the facts in a law case, and to give a decision on the evidence given them in the case". The term "trial by jury" in the same dictionary adds one more detail: "A jury of 12 persons impaneled to decide a court case". But then the dictionary is only a guide, and definitions change to adapt to usage. At present we have many groups of

"qualified persons" im or empaneled (the dictionary alternates the spelling) and sworn of numbers other than 12, but nonetheless considered "juries" by some courts.

Our discussion here is less concerned with the number as with the elusive expression "impartial". This is the term over which we stumble, and which receives often conflicting interpretations.

The selection of an impartial jury is a function of several issues:

What is impartiality? How is it to be determined?

Who is impartial?

Wno is capable of determining who is impartial?

How do we determine the impartiality of the determiners, and who is to select the determiners of those sufficiently impartial to decide what jurors are impartial? Most critically, are respective counsel, as trial partisans, qualified to determine juror impartiality or are they not likely to make selections based on their partisanship?

We receive some help by turning to the common law, already centuries old when the Constitution was adopted, and which prescribed that trials be "per pais". Elementary Latin tells us the term means "by the country" or by the whole people, or a representative sampling thereof.

One of several plausible explanations for the number 12 is superstition about the Zodiac. Selecting one juror born under each of the 12 signs was believed to bring diversity of character, personality and response to evidence. The proper representation "per pais" was achieved.

Our 20th century sophistication rejects the Zodiac as naive. Nonetheless, we have accepted 12 because its endurance over the centuries has shown it to be a number frequently large enough to be both representative and independent of external domination, without being cumbersome.

As regards "impartial", we are well guided by many appellate court opinions, including the U.S. Supreme Court. That Court gave us in 1942 the definitive principle of the "impartial jury". The 40-year old case seems to have been relegated to obscurity for it is much overlooked, but it remains part of the law of the land,

and should be more widely heeded. It is identified as Glasser vs. U.S. and appears in the 315th volume of U.S. Reports, page 60. The decision was written by Justice Frank Murphy and states succinctly:

> "Our democracy itself requires that the jury be a 'body truly representative of the community'...Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes, weakening the institution of the jury trial, and should be sturdily resisted."

"Representative", the dictionary tells us, is "a person or thing enough like the others in its class or kind to serve as an example or type of the class or kind." A representative group would thus consist of persons enough like others in the community to serve as examples of all the classes or kinds forming the community - per pais.

The Glasser case arose out of a well-intentioned attempt to include "quality" women jurors from the membership of the League of Women Voters. The court found this improper because "it is part of the established tradition of public justice that the jury be a body truly representative of the community". Justice Murphy borrowed that expression from the year-old case of Smith vs. Texas. (311 US 128, 1941.)

The jury cannot conform to Sixth Amendment guarantees of impartiality if it is "the organ of any special group or class", and "the desire for competent jurors" must not lead to methods of selection "which do not comport with the concept of the jury as a cross-section of the community". (Ibid., p. 86.) Both the Murtishaw and Williams decisions by the California Supreme Court, cited in Section II. of this commentary, fly directly in face of the superior authority of Justice Murphy.

Glasser does not stand alone. It was supported by the high court four years later in Thiel vs. Southern Pacific Company:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community...This does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political and geographical groups of the community... but it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society." (328 US 217, 220, 1946.)

The Thiel case was an appeal from the exclusion of working class wage earners, and court found this discriminatory.

Another Federal court in 1967 defined a fair and impartial jury as "a composite jury representing a cross-section of the community". (Heymann vs. State of Louisiana, 209 F Supp. 36, 37.)

Many courts have written much more on the subject, all in the same theme. In 1966 it decried any "departure from statutory scheme depriving jury system of broad base it was designed by Congress to have...Statutory standards of qualifications of Federal jurors may not be extended by broad and vague subjective tests as to good character, intelligence and ability to understand cases tried in court". (Rabinowitz vs. U.S., F 2d 34, citing 28 USCA 1861.) Continuing:

> "To extent 1948 Judicial Code vested discretion in court clerk and jury commissioner with respect to compilation of jury list, it related to source of names, and not to setting of general standards...Federal qualifications for jurors are objective and precise, requiring in the application no discretion on the part of court clerk and jury commissioner...Desire for competency on part of Federal jurors must not be pursued to extent that fair cross-section of community is prevented...(in choosing jurors) the court clerk and jury commissioner under supervision of district judge may strive to obtain the best possible, but must never do so to exclusion of fair cross-section of community."

If the front entrance is thus closed to clerk and commissioner against skewing the jury, can the back door be opened by counsel and court? Rabinowitz adds:

> "Any attempt to gain competent federal jurors that would result in less representative cross-section of community than selection drawn from statutorily qualified pool would destroy right to serve on juries which Congress intended to confer as well as destroy broad based cross-section Congress has designated for Federal juries. Officials charged with choosing federal jurors must not allow desire for competent jurors to lead them into selections which do not comport with concept of jury as a cross-section of community."

The Supreme Court spoke again in 1975: "The broad representative character of the jury should be maintained, partly as an assurance

of diffused impartiality, and partly because sharing in the administration of justice is a phase of civil responsibility." (Taylor vs. Louisiana, 419 US 522, 530.) Taylor cautioned:

> "The purpose of a jury is to guard against the exercise of arbitrary power - to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor, and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace...restricting jury service to only special groups..." (Ibid., p. 530.)

Taylor has raised the same issue as Glasser. Can the jury become a "prophylactic vehicle" if it is chosen by an "overzealous prosecutor" or defender, or even by the overconditioned judge? Are they not likely to be conditioned by their partisanship? And how well can the resulting jury act independently in "guarding against the exercise of arbitrary power" by the selectors?

Taylor acknowledged the Federal Jury Selection and Service Act of 1968 which "recognized that the jury plays a political function in the administration of the law and that the requirement of a jury's being chosen from a fair cross-section of the community is fundamental to the American system of justice...(which) we accept as fundamental to the jury trial guaranteed by the Sixth Amendment, and are convinced that the requirement has a solid foundation".

In 1971, still another Federal court taught us that: "A trial by jurors selected from the broad spectrum of society is a constitutional mandate", and a defendant is "entitled to a jury selected from a master list drawn from the community as a whole". (Carmical vs. Craven, 457 F 2d 582.) Carmical decreed that "the object of constitutional mandate is to produce master jury panels from which identifiable community classes have not been systematically excluded".

The American Bar Association itself advised that: "The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community". (Standards Relating to Trial by Jury, ABA Project on Minimum Standards for Criminal Justice, May 1968.)

Federal appellate courts continued this support, as demonstrated in part by U.S. vs. Smaidone (185 F 2d 1333, Colorado) and Ballantine vs. Hendricks (351 F Supp., 208, Virgin Islands, 1972).

The Jury Commissioners Association of the California Court Administrators decided unanimously in 1973 that: "The administration of justice in California requires that juries be constituted from the broadest possible spectrum of the citizens of this state."

Jon Van Dyke, professor at the School of Law at the University of Hawaii, Honolulu, is one of the keenest scholars on trial by jury. In his book, Jury Selection: Our Uncertain Commitment to Representative Panels (Ballinger Publishing Co., Cambridge, MA, 1978), he described the jury as:

> "Fundamentally a human institution, relying on the personal wisdom and judgment of ordinary individuals, rejecting the concept of 'expert' wisdom. The impartial jury must be a balance between the diverse views and experiences in our society; only then will it have the respect of the community for its diversity." (Ibid., p. 162.)

Van Dyke has found that by random selection of the basic venire, there is brought to the panel persons representing the various strata of society and various shades of opinion, and "if the jury is to represent the conscience of the community in all its diversity, then no shade of opinion should be exluded". (Ibid., p. 167.) A completely representative jury which meets the Sixth Amendment requirement is best met "only if the jurors are selected without discrimination of any sort so that jurors are in fact representative" of the community. (Ibid., p. 75.)

"A jury decision...is always the composite of different views, and each additional perspective helps the other jurors to come to a more reasoned decision" (Ibid., p. 97) and "a jury that includes a broad cross-section of the population...is less likely to be dominated by the biases of one group". (Ibid., p. 164.) "...the jury is not a scientific instrument", he has written elsewhere in his book. "It cannot be guaranteed that bias will not play a part. But the best way to minimize bias is to impanel a representative cross-section of the community; without such a cross-section, doubts about the jury's partiality will persist." (Ibid., p. 45.)

More than 30 years ago, Felix S. Cohen gave the rationale for random selection diversity:

> "...the ancient wisdom of our common law recognizes that men are bound to differ in their views of fact and law, not because some are honest and others dishonest, but because each of us operates in a value-charged field which gives shape and color to whatever we see. The proposition that no man should

> be judge of his own cause embodies the ancient wisdom that only a many-perspective view of the world can relieve us of the endless anarchy of one-eyed vision." ("Field Theory and Judicial Logic", 59 Yale L J'1 238, 242, 1950.)

San Francisco attorney Melvin Belli, who may be sometimes accused of attempting the "Darrowesque" voir dire, nonetheless is aware that "The strength of a jury is in diversity...12 people, none of whom you'd want to have trying your case, are transformed by the alchemy of that coming together and bring a verdict greater than the sum of the 12 parts". (Dallas Justice, 1964, p. 118.) He noted the breakdown of this ideal by the prosecution's attempt during the trial of Jack Ruby "to limit the jury as much as possible to the white middle class, the community boosters who had never personally felt the heavy load of the police". (Ibid., David McKay, Co., New York, p. 138.)

Richard L. Moskitis also defined the truly impartial panel as "necessarily...composed of 'partial people' possessing subtle biases. In light of this fact, the Sixth Amendment right to an 'impartial' jury would seem to apply only to more gross biases. A normal jury, one selected without prevoir dire investigations, will contain a fairly random assortment of juror attitudes and predispositions. Through the use of modern social science techniques, however, lawyers can effectively pack a jury."

It is difficult to believe from this that Moskitis is actually arguing for pretrial investigations, and his article is entitled, "The Constitutional Need for Discovery of Prevoir Dire Juror Studies". (49 So. Cal L R 597, 1975.) Yet he continues with some of the most effective and rational arguments against such studies:

> "The right to a jury drawn from a cross section of the community serves not only to secure juries which properly will reflect community values in their exercise of discretion, but also to protect the criminal defendant's right to a jury of accurate fact finders." (Ibid., p. 619.)

The impartial jury, he finds, "is compromised" by investigations, and "the use of juror information invades the right to a jury drawn from a cross-section of the community." (Ibid., p. 620.)

> "One of the theories behind jury, as opposed to judge fact finding, is that the facts will work themselves out through reasoned discussion and debate over 12 different perceptions of the evidence. Unless the jury represents a broad range of

perceptions, it will be less equipped to recognize all the ramifications of the evidence, and therefore will be less likely to make accurate findings of fact." (Ibid., p. 619.)

Professors Steven Brams and Morton Davis co-authored an article in Trial Magazine in 1976. "We believe that the cause of equal justice is best served by a procedure that renders strategic calculations irrelevant, and hence gives no advantage to the best strategist." ("A Game Theory Approach to Jury Selection", December 1976, p. 48.)

Harry Kalven and Hans Zeisel also had observations on jury selection procedures in their 1966 Trial by Jury. They had studied some 8,000 criminal jury trials, and found that "juries en masse reflect the conscience of the community. The jury system is very much a democratic institution by which attitudes of the community at large are brought into the court room and given voice in the judicial determination of a wide range of community conflicts." (Little, Brown & Co., Boston, pp. 493-495.)

The Jury Selection and Service Act of 1968 (28 USC secs. 1821, 1861-9) presumably requires random selection, at least as far as the basic venire is concerned. So do many corresponding state provisions. California, for example, to broaden the base, abolished privileged exemptions for specific professions in 1976; additionally, jury commissioners add the roster of persons holding driver's licenses to the voter's registration lists to form this venire. (Stats. 1975, Ch. 593, Sec. #3, and Ch. 657, Sec. #3.)

But this is apparently where the attempt to maintain a cross-section stops. The investigations before trial, the inquisition of voir dire, and the peremptory challenge immediately destory this representativeness. Glasser's edict that "tendencies, no matter how slight...should be sturdily resisted" is declared, in practice, nonexistent by trial courts pledged to obey the law established by the Supreme Court.

IV. Voir Dire and Prevoir Dire Investigations Are Unconstitutional as Violations of Jurors' Rights to Privacy Under First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments

Few readers of this publication have ever been jurors. Their chief experiences have been to plead or persuade before jury panels. This is unfortunate, for when a trial attorney sits in the jury box, he receives an entirely different perspective of the trial. But since the ritual is not alien to him, he is not likely to be intimidated. His appreciation of the juror's role may be improved, but is not complete.

The courtroom stranger is insecure among all those officials directing him, poring over papers, or gathered in solemn conferences. He regards even his fellow jurors with circumspection, not knowing whom he can trust - and there are too many of them to set him at ease.

Jurors perform the most exalted service for perpetuation of a free society that a citizen can. Time Magazine recognized the jury as "the most rewarding civic duty" (September 28, 1981, p. 44) and William Blackstone, two and a quarter centuries earlier, did likewise. "It is the most transcendant privilege" and "the bulwark of northern liberty". (Cooley's Blackstone, ch XXIII "Trial by Jury", pp. 1139-1140.)

Alexis de Tocqueville described the jury as "the most energetic means of making the people rule", and the savior of liberty. (Democracy in America, Vol. I, Schocken Books, New York, edition 1961, pp. 339 and 336.) In contrast to these encomia, the court creates an atmosphere which seems designed to reduce the juror to insignficance. He submits docilely; he endures while resenting his role as courtroom pawn; after all it will not last long. He is not told that he has powers, privileges and rights, and is made to feel he has none.

He often develops a dislike for jury service, not realizing that his poor treatment reflects only court disdain. That he gains any appreciation of the significance of his service is more in spite of rather than because of the court.

Jurors are summoned in far greater numbers than necessary; herded about in almost bovine fashion; are underpaid; placed in poor accommodations; forced to sit around all day, all week with no consideration for their time - and all for the convenience and at the whim of an unfeeling court.

But of all the insults, the worst is the stripping of his individuality and humaneness through the pretrial preparation of "jury books" and the voir dire. It is as Circuit Judge David Scott DeWitt, 42nd Judicial Circuit of Michigan, told a juror by telephone about October 1, 1978: "You have no constitutional rights in this area." He previously threatened the juror by letter with contempt and imprisonment because the juror had made a constitutional protest against filling out a searching questionnaire as an invasion of his private life. The judge disdained to respond to the juror's documentation. (Juror letter to Midland County Jury Board, September 22, 1978; response by Judge DeWitt, September 29.)

The humiliation of the juror begins when he is kept ignorant of the investigation he has not authorized of his life before trial to prepare a dossier on him. At the Federal level the undercover work is performed by the Federal Bureau of Investigation and may involve such other governmental agencies as the CIA, the IRA and whomever else solicited by U.S. attorneys. (See Falange, below; also Sinclair vs. U.S.; confessions by FBI officials on NBC Today show, 1977.) At county and municipal levels these services are performed by sheriffs and police. (See People vs. Aldridge and Losavio vs. Mayber, below. Part of the appeal for a retrial of Juan Corona in Marysville, CA, was the allegation that the county sheriff had supplied the prosecution with arrest information on the jurors and withheld this from the defense. Also, see Murtishaw case, above in Section II.)

The defense considers itself at a disadvantage and "in the interests of fairness" believes it should have access to prosecution files. It responds not by considering juror rights, but by employing private investigative services, as if two wrongs make a right. (Newsweek, cited below; admission on same NBC Today show, 1977, by an unidentified New York attorney's firm that it budgeted $50,000 a year to investigate juror backgrounds; undated letter from California Jury Verdicts, Sacramento, stating that it collects "every facet of public or private record available on each individual juror" and "the juror, himself, is never contacted".)

But no matter who performs them, the invasions defy every court caveat concerning privacy rights cited in Sections I. and II. above. Whereas the defendant is decreed to be rigidly protected by the Fourth Amendment, as well as the First, Fifth, Ninth and Fourteenth, the juror is not covered, as was previously noted here in Mary Timothy's book. (Jury Woman, op. cit., pp. 168-171.)

So sharp is this discrepancy that it might be a strategic, if fanciful, ploy for the prosecution to arrange to place a defendant on another jury panel. The investigation could be unrestrained. For the Angela Davis trial a total of 5,040 citizens of Santa Clara County, California, were degraded by both prosecution and defense. The rights of these citizens to control their private lives - "the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others..." has been seized from them forever. (Brandeis-Warren 4 Harvard Law Review, 1890, op. cit.)

How many unauthorized persons hold records of these investigations? Who have access to inspect them at will? Probably none of the 5,040 knows the files exist, nor that the collection of the information could be a tort, as it is considered in almost any other context.

These are the numbers from just one trial. A private investigator in San Francisco, Ray C. McClung, boasted in Newsweek magazine of holding secret files on 750,000 citizens called for Federal jury duty in the Ninth Judicial District. (April 10, 1978, p. 89.) Since about 10,000 are summoned each year, and McClung secures files on many, possibly all of them, he may hold 800,000, or approximately one-third of every adult citizen in the district. The only restraint against misuse of so many secrets depends solely upon the tug between pocket book and conscience. Who can estimate the hundreds of millions of juror dossiers filed by private and government investigators across the nation nor how many persons have access to them?

One Federal case is almost enough to document how widely accepted the practice is. The following is from U.S. vs. Falange (426 F 2d 930, 932, 1970):

> "During voir dire examination of prospective jurors, defendants' counsel learned that the government had conducted some investigation into records containing information about the panel of jurors who had been summoned for jury duty. After the jury was selected and sworn, the defendants were permitted an opportunity to conduct an inquiry into the nature and extent of the government's investigation. The hearing disclosed that a list of the panel was obtained by the government's attorneys from the court clerk. They referred it to the FBI at Albany for 'any information in your files which would be of interest to the government in this case'. A check for information was made through credit bureaus in Rome and Syracuse, the area from which the panel was drawn. Inquiry was made of two members of the Utica Police Department, two members of the New York State Police, a Special Agent of the FBI and Chief of Intelligence of the FBI in Buffalo...
>
> "The defendants' argument that the exercise of challenges based on information about jurors obtained through investigation resulted in a jury that was not impartial is presented in the form of a rhetorical question. '...can it honestly be said that the government's investigation was not designed to secure a jury favorable to the government's position?' The more appropriate question is, can it be said that the jury which was sworn was prejudiced against the defendants."

The government's interest was clearly to convict, and the objective was to stack the jury with a conviction bias. Here is another rhetorical question: With such an objective, can there be any valid support for government investigation of jurors? Can the Constitution be stretched to permit this?

The defense had made a motion that the jury was not impartial and should be withdrawn. The trial court denied this motion, and the Appellate court concluded "that the denial of the motion to withdraw the jury was not an abuse of discretion". Thus giving judicial sanction to Fourth Amendment violations not permitted against a litigant. What becomes of ICC vs. Brimson or of Pacific Railway Commission (op. cit.) exempting a person's "private affairs, books and papers from the inspection and scrutiny of others"? (32 Fed Rep. 241, 250, 1887.)

Are we to forget entirely what Justice Bradley wrote in Boyd about the "indefeasible right of personal security" and any "forcible and compulsory extortion of a man's testimony or his private papers..." And his advice that "...the essence of constitutional liberty and security forbids all invasions on the part of the government". (Op. cit., 116 US 616, 630, 1886.)

This is advice that "cannot be too often repeated" (ICC vs. Brimson, 154 US 447). If so, I am justified by this second reference to juror investigations as being precisely inquiries into the private affairs of citizens.

Falange invoked the 12-year old case of U.S. vs. Costello (255 F 2d 876, 1958) which was an appeal from a conviction for income tax evasion. The government had examined tax returns of many members of the jury "in an effort to find out whether (they) had income tax troubles of their own or had reasons to be unfavorably disposed to the government". The court on appeal held there was:

> "...utterly no basis for the contention that it resulted in a jury 'specially conditioned' to convict, or otherwise biased or prejudiced against the defendant. At most, the practice led to challenges of jurors who might have been unduly biased in favor of the defendant." (Ibid., p. 884.)

This is an unprovable assumption by the court, which upheld the decision of the trial judge not to grant a new trial. The unauthorized inspection of the jurors' tax reports was excused on the ground that "none of the jurors in this case had knowledge of the practice..." as if to sanction a constitutional violation when the victim is unaware. Forced entry is all right if the homeowner is absent. If no one is aware of a murder (the victim being in a state of oblivion) then murder is no crime.

The Federal court did not consider the citizen trusting that his tax reports would be seen by no one outside the IRS. The Falange court added a comment: "The fact that some members of the panel were challenged does not mean that those who were not were biased or prejudiced." (Ibid., p. 933.) Nor does it mean vice versa, that those who were challenged were biased or prejudiced.

Not every case had the same result as Falange and Costello. A state court in Michigan reviewed in 1973 a defendant's appeal from the trial court's refusal to require the prosecution to turn over juror records to him. Police agencies in the area had collected "information regarding the jurors and their families' adverse contact with the law...The principle of fairness," the court decided, required that "disclosure of the prosecutor's dossier upon prospective jurors must be made to defendant upon request". (People vs. Aldridge, 209 NW 2d 796, 797-8 and 800.)

The Supreme Court of Colorado took a similar position in 1972. The Pueblo Police Department had been providing the district attorney with conviction records of jurors in traffic and criminal cases. The defense asked the trial court for permission to see these records. The request was denied. The chief of police maintained that the records were kept for administrative purposes, and not available for outside inspection. It was true, the Supreme Court said, that they were "not public records within the definition of that term..." but since the police chief had given the information to the prosecution, he should also have made it available to the public defender as a "requirement of fundamental fairness" because the litigating sides were entitled "to be treated as equals". (Losavio vs. Mayber, 496 P 2d 1032, 1033-5.)

Prosecution and defense are "equals" but not the juror. The court made no reference to Burt vs. Panjaud, protecting the juror from answering questions tending to disgrace him, or which would "disclose on oath his guilt of any crime..." (Op. cit., 99 U.S. 180, 181, 1878.) Or Reynolds vs. U.S.: "Questions which tend to disgrace the person questioned...have never been allowed to be put to a juror." (Op. cit., 98 U.S. 145, 151, 1878.)

If citizens are to be permitted to live in whatever degree of seclusion they desire; if they are protected from the inspection and scrutiny of others, the rational permitting exposure of records seems ingeniously twisted.

The legal mind does not seem to consider this. Columbus, Ohio, attorney Andrew J. White urged his colleagues in 1952 to "institute investigations" before trial, because there are "dangers in certain types of jurors". In his book, Successful Jury Trials, White suggested that juror studies need be "limited only by the lawyer's ingenuity", the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments notwithstanding.

Chicago attorney Max Wildman agreed. He stressed that the investigations must be conducted in secret because "jurors generally resent being investigated". (5 AmJur Trials 249.) We are brought again to the question: is an offense not an offense when the offended is not aware?

The American Bar Association, departing from its random selection, cross-section ideal cited in Section III., endorsed pretrial investigations in its Trial by Jury. "Upon request (the litigants) should be furnished with a list of prospective jurors with their addresses...in order the more intelligently and pertinently to examine to determine either the existence of disqualifying cause, or the advisability of eliminating one or more of them by the exercise of peremptory challenges." (pp. 60-61.)

The prosecution's disqualifying poison is the defense's qualifying meat, and vice versa. To such extent, every juror could be challenged by one side or the other.

It is "common knowledge", wrote Francis X. Busch in Law and Tactics in Jury Trials (1959), "that many public prosecutors make an effort through extensive, expert investigation to ascertain before trial of important cases the backgrounds, association, and experiences of prospective jurors." (Ibid., p. 145.) Some states might seem to restrain investigations by withholding jurors' names; in others they are given out. No mention of investigation is made in the law either way. For example, Kentucky law says that "...neither the clerk nor the sheriff shall disclose to any person...and name of any person who may be summoned either as a Grand Juror or petit juror." (Kentucky Revised Statutes, 29.020, 1953)

Prior to this statute in 1948, the law read exactly the opposite. Jurors' names were to be "publicly announced" as they were drawn. The change led to an amusing pair of appeals from jury decisions. The Cincinnati, Norfolk and Covington Railway succeeded in 1947 in winning a reversal from a verdict against it becuase the trial court had not made the jurors' names public.

The same plaintiff lost a similar appeal nine years later, after the change. "There is no provision in the law of this state which gives a litigant a right to 'investigate' prospective jurors." (Cincinnati, Norfolk and Covington Railway Co. vs. Tenkotte's Examiner, 205 S W 2d 503, 1947; Cincinnati etc. vs. Peluso, 293 S W 2d 556, 1956).

In Illinois the law requires the jury commissioner to supply "a list of prospective jurors with their addresses if known" only "upon request". (Illinois Revised Statutes, Ch. 28, Par. 11454(c),

1965.) There is little consistency among the states - each establishing its own policy. Legal newspapers sometimes publish jurors' names and the days they are called.

In the Federal courts permission is granted in criminal cases only when the defendant is "charged with treason or other capital offense." The list must be furnished "at least three full days before the commencement of the trial." (18 U.S. Codes Ann. Par. 3432.)

This phrasing appears to place the responsibility on the court to supply the names, rather than on counsel to request them. However, the statute has no effect in noncapital cases, and on several occasions over the past decades various appeals courts have made this clear: "The trial court...may withhold the list of jurors until the day of the trial" reads a 1963 Florida decision. (Stone vs. U.S. 324 F 2d 804.) And again, "the accused...were not as a matter of right entitled to receive lists of jurors prior to the day of the trial." This decision was supported in Alabama the following year. (Wilson vs. U.S., 104 F 2d 81, Georgia, 1939; Spivey vs. U.S. 109 F 2d 181, Alabama, 1940.)

Capital cases or not, the Ninth Federal District Court in San Francisco, for one, has granted exclusive privilege to McClung to secure not only names and addresses, but to inspect the questionnaires returned to the jury commissioner. These supplemented by whatever further investigation McClung wishes to perform, are used to prepare the jury books. Jurors have no knowledge of this, believing their questionnaires to be confidential. Apparently no competing service or other person receives permission from the chief judge to see the files, opening up the second question of preferential treatment.

Appellate courts are equivocal about endorsing investigations. A 1949 case brought up the recurring issues that it was "not improper" to compile jury books "in the absence of a showing that...the jurors knew the purpose of the book, that they were influenced by its use, or that they were even aware that it was being used." (Baugh vs. Beatty, 91 Cal Ap. 2d 786; 205 P 2d 671.)

A Federal Appellate Court in Illinois in 1955 endorsed "a reasonable investigation of jurors" as being "helpful". (Small violations don't count.) The appellant had asked for a reversal of the verdict because an investigation had caused "intimidation" and was "unauthorized surveillance" of the jurors before trial. But "intimidation" had not been demonstrated, according to the decision, even though a prospective juror might have known "that some one working for the lawyers has asked questions about him...even if it