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Juries on Trial: Faces of American Justice

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JURIES ON TRIAL: FACES OF AMERICAN JUSTICE. By *Paula DiPerna.* New York: Dembner Books. 1984. Pp. vii, 248. $17.50.

Responding to a jury summons, free lance writer Paula DiPerna[1] found herself in a dimly lit courthouse where she was questioned, educated, and eventually excused by the court for jury service in a child pornography trial. The experience captured her interest, and she subsequently undertook to write *Juries on Trial,* a personal analysis and defense of the American jury system. Her theme is that the jury system is "an original good idea" with tremendous potential for improvement. Much more than simply her own personal story, her book examines several common criticisms of juries, describes how the jury system actually performs through individual case examples, and suggests measures that would improve its performance.[2] What makes this book important is that DiPerna uses a juror's perspective and skillfully combines jurors', judges', and attorneys' stories with trial transcripts, reported opinions, statistical studies, and legal literature. *Juries on Trial,* rather than a conclusive legal analysis, is the product of an intelligent layperson's extensive research. It is an enjoyable and thoughtful description of the strengths and weaknesses of the jury system.

DiPerna devotes much of her book to a discussion of jury selection, a process which has received much criticism.[3] She argues that the system selects juries that are not racially or socially representative, and that current methods of choosing the venire panel, excusing jurors before voir dire, and voir dire all contribute to this imbalance. After briefly examining the theoretical and historical meaning of a jury of peers as well as legal efforts to secure impartial and representative venire panels, the author describes the continued underrepresentation of minorities in jury pools, using individual cases as examples.[4] In one

1. Paula DiPerna is the author of numerous articles on the environment, working women, health, and education for the *New York Times, The Nation,* and *Working Woman.* She is a contributing editor to *The Cousteau Almanac.*

2. DiPerna also provides the reader with a historical understanding of the jury early in her book. She traces the history of juries from Athenian dicastery, the huge group drawn by lot to vote with colored stones on an accused's fate, through England's primitive trial by ordeal, to the early American juries that vigorously exercised their right to decide the law. Pp. 21-30.

3. P. 174. *See, e.g.,* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977); *see also* Johnson, *Black Innocence and the White Jury,* 83 MICH. L. REV. 1611, 1659 n.242, 1661-62 nn.267-69 (1985) (listing 19 recent law review articles and notes examining racial prejudice in the use of peremptory challenges).

4. The sixth amendment guarantees a jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522 (1975). Discrimination in venire selection may also violate the fourteenth amendment. Casteneda v. Partida, 430 U.S. 482 (1977); Norris v. Alabama, 294 U.S. 587 (1935). The Jury Selection and Service Act of 1968 gives federal litigants a statutory right to juries "selected at random from a fair cross-section of the community in the district or division wherein the court convenes" and prohibits exclusion from jury service "on account of race, color,

town,

> jury lists are culled from voter lists, which still, it is claimed, seriously underrepresent blacks. Then, according to the town clerk, the jury list is "revised" by jury revisers — a half-dozen local people who, going by their personal knowledge of the community, remove the names of people who have died or moved away, and add those they think would make good jurors. There is nothing to prevent them from tampering with the list, consciously or unconsciously; their meetings are secret, and they will not talk about how they do their job.
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> . . . .
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> [This] happens in other small towns still, especially in the South, but elsewhere in the country as well, where few questions are asked about the legality of it.[5]

The second "cut," excusing jurors by request or exemption, also skews representation by eliminating "whole categories of people" (p. 86). Some states automatically excuse attorneys, doctors, nurses, firefighters, pharmacists, teachers, or women with young children. Many low income and self-employed potential jurors are excused for economic hardship because their employers will not pay the difference between lost wages and the average juror fee of $10 per day (pp. 85-87). DiPerna supplements existing critiques[6] of this long-recognized problem with her firsthand observations and stories.

The stage at which "the idea of an impartial jury of one's peers takes the most abuse," however, is voir dire (p. 90). Characterizing jury selection as the manipulation of bias, DiPerna criticizes attorneys for choosing the least offensive, least independent, and least informed jurors. Peremptory challenge abuse, she notes, has been allowed to continue, and "remedies remain elusive because of the knotted constitutional issues involved. . . . [B]ecause there is no effective control and no real way to get caught, attorneys continue to flavor their peremptory challenge use with racial bias" (p. 174). All-white juries are not only more likely to be biased against nonwhite defendants (p. 152), they are not representative because it is hard for a white to identify with what being black means (p. 163). In case after case, DiPerna shows how prosecutors all over the country use peremptory challenges to eliminate blacks and Hispanics from juries.[7] Racial prejudice in jury selection is also reflected in some judges' reluctance to excuse racially biased jurors for cause:

> One white male juror — named White . . . — when asked if he thought

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religion, sex, national origin, or economic status." 28 U.S.C. §§ 1861-62 (1982). Most of DiPerna's examples are state cases.

5. Pp. 83-84. The "key-man" system described here is still in use in about a third of the states. 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 708 (1984).

6. *See, e.g.*, STANDARDS RELATING TO JURY USE AND MANAGEMENT 131-32 (1983) [hereinafter cited as STANDARDS]; J. VAN DYKE, *supra* note 3.

7. In this section, and others throughout the book, DiPerna draws from personal observations and interviews which, without references, are essentially unverifiable.

> of black people as his social equals . . . said, "Some of my best friends are black." Farmer [the attorney] then asked how it was that these best friends had never been to his house. White answered, "We're in the South. It's a custom, I guess. It's just like a dog. I don't believe a dog ought to be in the house." Farmer immediately moved to challenge this man for cause on the basis of racial prejudice, but the prosecutor objected. The judge intervened: "Do you mean by that you consider a black person as a dog?" But before White could reply, the judge rehabilitated the man's answer himself: "It means that some people believe in house dogs, and some people don't." The juror simply affirmed. "That's right." Thus, the defense had to spend a peremptory challenge on White and others like him.[8]

DiPerna's conclusion that systematic underrepresentation is a widespread problem is sound.[9] She suggests no solutions, however, to support the optimism evident in her discussion. She argues that the standard the Court set in *Swain v. Alabama*[10] to measure unconstitutional systematic use of the peremptory challenge to strike blacks is nearly impossible for a defendant to meet. DiPerna's interpretation of *Swain* is shared by many.[11] She does not endorse any particular alternative to the *Swain* rule, however, nor does she propose one of her own. In discussing one alternative, California's requirement that an attorney justify her challenge at the bench when questioned by opposing counsel, DiPerna doubts how effectively it is enforced.[12] She suggests that the American public, disillusioned with the increasing time and expense consumed by trials and opposed to more protections for criminal defendants, would not welcome California's approach nor the idea of reducing the number of peremptory challenges available to the prosecutor. "Abuse of the peremptory challenge," she says, "makes jury selection . . . a political act and renders today's courtroom a wellspring of potential long- and short-term consequences, including racial tension and violence. Its political aspect makes the peremptory issue a hot potato" (p. 178). Although her treatment of possible peremptory

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8. P. 161. On a defendant's right to question prospective jurors about racial prejudice at voir dire, see Turner v. Murray, 106 S. Ct. 1683 (1986); 2 W. LAFAVE & J. ISRAEL, *supra* note 3, at 720-22.

9. *See* Johnson, *supra* note 3; *see also* Batson v. Kentucky, 106 S. Ct. 1712, 1724 (1986) ("The reality of practice, amply reflected in many state and federal court opinions, shows that the [peremptory] challenge may be, and . . . has been, used to discriminate against black jurors.").

10. 380 U.S. 202 (1965). The Court explained that systematic striking of black jurors would raise a *prima facie* case of discrimination under the fourteenth amendment

> when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries . . . .

380 U.S. at 223. The Court has recently rejected part of *Swain*'s holding in Batson v. Kentucky, 106 S. Ct. 1712, 1719-24 (1986).

11. *See* Batson v. Kentucky, 106 S. Ct. 1712, 1719 n.14 (1986) (listing critiques).

12. *See* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

reforms is superficial compared with recent legal works on the issue,[13] her use of graphic examples and personal interviews successfully portrays the gravity of the problem.

Most of DiPerna's recommendations to improve other aspects of jury selection have some support in the legal literature (eliminating automatic jury exemptions and encouraging more judge-conducted voir dire, for example).[14] One change she suggests, developing a plan of government jury service insurance to reimburse jurors for lost income, appears dubious.[15] She cites no support for this proposal and fails to develop the idea enough to convince the reader of its viability. Despite its occasional flaws, her treatment of jury selection is, overall, very readable and thought-provoking.

DiPerna does not believe that other criticisms of the jury system are troublesome ones. For example, she rejects the idea that professional jury research results in injustice by "squeez[ing] out the randomness that is the keystone of the jury system" (p. 133). She describes the successes, failures, and techniques of hired jury pickers, drawing from the famous trials of Mark David Chapman (tried for shooting John Lennon), Jean Harris, Sacco and Vanzetti, Angela Davis, Dr. Benjamin Spock, John Mitchell and Maurice Stans, the Pinto case, and MCI's antitrust suit against AT&T (pp. 130-50). Although DiPerna fears that "increasingly sophisticated marketing techniques" may make the jury of the future "highly susceptible to manipulation," she suggests that jurors' unpredictability will foil the efforts of prosecutors, plaintiffs, and defendants to control verdicts through jury selection (pp. 149-50).

Many complain that juries are "susceptible to being moved by factors which do not have to do with the evidence" and that such jury misconduct is too often undiscovered (p. 218). DiPerna agrees, and recounts amazing incidents of juries that decided to create their own evidence, including jury members who bit each other's arms to see how long teeth marks last and a jury that determined a tight skirt in evidence could be raised high enough for a rape to have occurred by dressing the smallest member of the all-male jury in the skirt to test it (pp. 218-19). DiPerna's suggestion that this independence could be ad-

13. *See, e.g.*, Johnson, *supra* note 3; Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979).

14. *See, e.g.*, Note, *Judge Conducted Voir Dire as a Time-Saving Trial Technique*, 2 RUT.-CAM. L.J. 161 (1970); *see also* 2 W. LAFAVE & J. ISRAEL, *supra* note 5, at 722 & n.23. The American Bar Association recommends that all automatic excuses or statutory group exemptions be eliminated. *See* STANDARDS, *supra* note 6, at 61. *See generally* J. VAN DYKE, *supra* note 3.

15. P. 225. Currently private business finances up to 68% of the cost of the jury system. Raising juror fees to current wage levels would be a "nearly impossible burden" for many jurisdictions. *See* STANDARDS, *supra* note 6, at 131.

equately controlled if judges "warn jurors very specifically against the reconstruction of events" (p. 220) is hardly groundbreaking, but her illustrations provide an amusing, yet unsettling, reminder that misconduct occurs.

The author writes glowingly of jury nullification, the historic power of juries to refuse to follow the rules of law, still exercised openly in some states today.[16] Her chapter entitled "Power to the Jury?" begins with an account of the trial and jury deliberations in the case of a young woman, charged with the murder of her father, who claimed self-defense in response to a pattern of sexual abuse. After interviewing the jurors months after the conviction, DiPerna concluded that "had [they] been charged that they had the right to dissent from the law, conceivably an acquittal could have held sway" (p. 190). She seems to agree with expert Hans Zeisel, however, that for more states to add instructions informing jurors of their right to nullify would be an "invitation to lawlessness" (p. 192). Infrequent and flagrant abuse of the jury's nullification power is controllable, in her view, by clearer charges, public education, appeal, the power of the judge to render a judgment against the verdict, and use of the special verdict.[17]

She defends high jury awards in civil cases, another commonly criticized aspect of the jury system, quoting an attorney, "It is only when the plaintiff wins a lot of money that we hear about juries being 'hogwild.' How come 'hogwild' doesn't apply when the jury underawards?" (p. 207). To eliminate juries in civil cases, she believes, would deny a voice to individual citizens — those most affected by litigation in product liability, consumer fraud, medical malpractice, environmental hazards, and other areas of law. Responding to complaints that juries in civil cases cause delay, she recognizes that bench trials take forty percent less time than jury trials, but implies that eliminating civil juries would not increase the efficiency of civil trials significantly because jury cases are more "unclear" than bench cases (p. 221). Except for this questionable suggestion,[18] DiPerna's defense of the use of civil juries is echoed by many authorities.[19]

Despite the complaints, public cynicism, and pressure to speed up cases, DiPerna maintains that the jury system is indispensable. She

16. *See* 2 W. LAFAVE & J. ISRAEL, *supra* note 5, at 700-02.

17. DiPerna's optimism in this regard is shared by many, but not all. *See* Broeder, *The Functions of the Jury: Facts or Fiction,* 21 U. CHI. L. REV. 386, 412-13 (1954) (jury is inconsistent and highly unrepresentative "law-dispenser"); Van Dyke, *The Jury as a Political Institution,* 16 CATH. LAW. 224, 240-41 (1970) (jury nullification "is an important safeguard that should be recognized and strengthened"). *See generally* Note, *Toward Principles of Jury Equity,* 83 YALE L.J. 1023, 1025-32 (1974).

18. DiPerna offers no support for her interpretation of the relative complexity of bench and jury trials, and her conclusion seems far from obvious to this reader. P. 221.

19. *See, e.g.,* Kalven, *The Dignity of the Civil Jury,* 50 VA. L. REV. 1055, 1057-61 (1964).

calls it the most "active hands-on civic duty" and suggests that it provides a "direct way of having a say in the proceedings of society" (p. 2). In her view, the jury is a political institution, needed to decide important social and political issues in the courts. The capable juror takes his or her duty to deliberate very seriously, and, she believes, is less jaded and more attentive than most judges (p. 221). Reform is necessary not only to minimize jury manipulation, but to ensure that jury service is not so burdensome that potentially good jurors will try to avoid it. She suggests using the one day/one trial technique,[20] encouraging more frequent jury service by attorneys and even judges,[21] allowing jurors to take notes and ask questions, providing simpler, written jury instructions, treating jurors courteously, and interviewing jurors to collect needed information. Although these pleas for reform are not novel,[22] the author's collection of illustrative cases and intelligent personal observations about the wide range of current jury issues is impressive and unique.

The book's usefulness as a legal authority or research tool is limited by the lack of footnotes and bibliography. Despite this, DiPerna's research seems thorough and her conclusions well-informed. She refers to several Supreme Court cases, legal periodicals, books, and studies throughout the text. She also uses interviews with prominent legal authorities on the American jury, including Hans Zeisel and Rita Simon.[23] *Juries on Trial* would be helpful to anyone, especially a juror, attorney, or student, who seeks an engaging explanation of the history and vitality of juries and the potential for improvement of the jury system.

— *Nancy J. King*

20. The one day/one trial technique ensures that a juror will serve no longer than the duration of one trial for which she is impaneled or one day if not impaneled. This system results in more efficient juror usage, less inconvenience to jurors, and fewer excuses from juror duty. *See generally* K. CARLSON, A. HALPER & D. WHITCOMB, ONE DAY/ONE TRIAL JURY SYSTEM (1977); STANDARDS, *supra* note 6, at 55-59.

21. For one view of how a judge gained valuable insights from jury duty, see Battani, *Have You Reached A Verdict*, 64 MICH. B.J. 966 (1985).

22. *See generally* A. CAIN & M. KRAVITZ, JURY REFORM: A SELECTED BIBLIOGRAPHY (1978); STANDARDS, *supra* note 6.

23. Both Simon and Zeisel are authors of several works on the jury, including R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY (1980); H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966). DiPerna lists several titles and individuals in a convenient index at the end of the book.