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Jury - Pre-Trial Selection - Suggested Improvements

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COMMENTS

JURY—PRE-TRIAL SELECTION—SUGGESTED IMPROVEMENTS—Over the course of the past twenty years, the desirability of trial by jury has been a subject of constant debate. In contrast, the matter of jury selection has been given little direct attention.[1] Yet it is obvious that if consideration is given to improvements in selection procedure aimed primarily at raising the calibre of the jury panel, disappointment in the judicial process due to the general ineptness of jurors can be decreased. It is true that the fate of a a litigant often is entirely within the discretion of the jury. This is not necessarily a reason for the abandonment of trial by jury, however, but rather a reason for increased care in the selection of jurors.[2]

Although very few states employ identical methods of jury selection, in all states the procedures used are at least similar.[3] Thus the deficiencies discovered in the process of pre-trial selection in one state may often be typical of faults attributable to the statutes governing this area in almost every other state. This comment, then, while designed primarily as a critical analysis of Michigan legislation, is intended as a possible basis for evaluation and reform of other state acts as well.

I

The Michigan Judicature Act establishes, inter alia, the procedure for acquiring jurors for service in the circuit courts for sixty-four of the state's eighty-three counties.[4] Once a year, certain

1 VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 158 (1949).

2 See Knox, "Jury Selection," 22 N.Y. UNIV. L. Q. REV. 433 at 438 (1947).

3 For a brief description of the methods in use throughout the country, see VANDERBILT, JUDGES AND JURORS 68-71 (1956).

4 Mich. Comp. Laws (1948) §§602.120 to 602.148, as amended, Mich. Comp. Laws (1948; Mason's Supp. 1956). There are 39 judicial circuits in Michigan. Where there is more than one county within the jurisdiction of the circuit, the circuit court sits in the counties by rotation, and each county provides its own jurors. The procedure under the Judicature Act is inapplicable to Berrien, Kent, Saginaw, and Wayne Counties and to Michigan's 15 Upper Peninsula counties. Id., §602.149. In addition, any county may adopt certain optional procedures. Id., §§602.150 to 602.159. Not only is this lack of uniformity in procedure prevalent at the circuit court level, but at the level of other courts as well. Compare Mich. Comp. Laws (1948) §670.13 et seq. (justice courts); id., §730.251 et seq. (justice courts, optional); Mich. Comp. Laws (1948; Mason's Supp. 1956) §730.401 et seq. (justice courts, optional); Mich. Comp. Laws (1948) §117.28 (Home Rule Act, city courts); id., §725.102 et seq. (Mun. Court of Record, optional); id., §730.123 (Flint Act city courts); Mich. Local Acts 1903, No. 505, amended by Mich. Local Acts 1905, No. 347 (courts in Kent County).

officials within each county, e.g., the supervisor and township clerk of each township, or the supervisor or assessor, as the case may be, and alderman of each ward or assessment district in each city, compile a list of prospective jurors, taking names from the tax assessment rolls in their respective locale. The only mechanical procedure required is that the number of names returned must be between a minimum and maximum figure for each locale, as determined by population tests set out in the statute.[5] Since this involves mere copying by rote the names from one list to another,[6] and filing the latter with the county clerk, it is a task easily done by only one official, and in practice this is sometimes the case.[7] There is an additional statutory requirement that the persons whose names are returned must, among other qualifications,[8] be of sound integrity and judgment, and have the qualifications of electors. However, this limitation is adhered to only to the extent that the selecting officer has personal acquaintance with the names on the rolls, for there is no procedure under the law for further investigation at this point, and normally, none is made.[9] Because no mechanical method of selection is prescribed, this officer may choose any name on the rolls at random or as he desires. In the event there is an element of personal acquaintance, this system may lend itself to implications of favoritism and abuse.

After the names have been returned to the county clerk, that officer copies them on separate pieces of paper and deposits them in envelopes, a separate envelope for each township and for each supervisor district within a city or for each voting precinct in

[5] Mich. Comp. Laws (1948; Mason's Supp. 1956) §602.122.

[6] Two lists are actually made, since one-half the names chosen are designated for service as petit jurors and the other half for service as grand jurors. Ibid.

[7] Questionnaires to county clerks in Michigan, returned to the *Michigan Law Review*, Feb. 21 to 28, 1958.

[8] ". . . [T]hey shall take the names of such only as are not exempt from serving on juries, who are in possession of their natural faculties, and not infirm or decrepit, of good character, of approved integrity, of sound judgment, and well informed and conversant with the English language, and free from all legal exceptions, and who have not made . . . any application to be selected and returned as jurors." Mich. Comp. Laws (1948) §602.121.

[9] Discussing a similar system in Texas whereby the selecting officials are to take from the tax lists the names of all men who are known to be qualified jurors under the law, one Texas judge remarked that, as a practical matter, the officials take all the names "without any attempt to determine whether those chosen are 'known to be qualified.'" As a result, the court has to summon four or five times the number of jurors it needs. Gardner, "Jury Reforms in Texas," 6 TEX. B. J. 293 at 295 (1943). Similar practice in Michigan may be inferred from answers received to inquiries in regard to prequalification procedures. Questionnaires to county clerks in Michigan, returned to the *Michigan Law Review*, Feb. 21 to 28, 1958.

cities having a commission form of government. When the court informs the clerk of the number of prospective jurors it requires for the term, the clerk draws one name out of each envelope in rotation until the requested number is attained. This method of drawing potentially, and often practically, provides at least reasonable opportunity for the character of the ultimate panel to reflect a cross-section of the county.

The sheriff then summons those drawn to appear in court on a designated day, and the court selects from among them by lot or chance the jurors that are needed. Except for the possibility of elimination because of personal acquaintance, it is evident that up to this point there has been no actual or attempted determination of the juror's capacity to serve effectively.[10] Under such procedure, this determination, if made at all, must await questioning of the individual by the judge and the opposing attorneys in court.

II

Patently, there is room for improvement in the above statutory system if the concept of trial by jury is to retain its right to existence. If the panel is made up of citizens who are unable to grasp situations placed before them by the litigants, justice will be meted out by emotion rather than reason. This does not mean that in order for juries to be effective they must be composed only of people with superior intelligence. But it does mean that care must be taken to assure at least normal competence of all members of the panel. Therefore, various changes may be suggested in the present-day jury selection procedures. The suggested improvements herein fall into four areas: (A) determination of prospective jurors' statutory qualifications and competence; (B) choice and supervision of personnel administering the selection procedures; (C) systemization of the procedure used for acquiring prospective jurors from a basic source; and (D) consideration of the basic source from which prospective jurors are obtained.

A. *Prequalification.* The basic purpose of any statute establishing a procedure for jury selection is to provide the court and the

[10] The county clerk in one large Michigan county mails a questionnaire to all persons whose names are submitted by the cities and townships, and if there is no statement in the reply that disqualifies the person, his name is placed in the proper envelope. Questionnaires to county clerks in Michigan, returned to the *Michigan Law Review*, Feb. 21, 1958. While this does serve to pre-qualify jurors to some extent, such procedure is not authorized by law and is in possible violation thereof. See Mich. Comp. Laws (1948) §602.127.

parties before it with jurors who are physically and mentally healthy, and "of sufficient intelligence and experience in life to be able to understand the various problems presented in both civil and criminal litigation."[11] The very fact that there is great displeasure with the juries of today is evidence that the court itself is either too busy or, as a practical matter, unable to investigate the qualifications of its jury panel with any great degree of thoroughness. This unfortunate situation may be considerably alleviated by legislative recognition that some effective form of prior screening of all prospective jurors is necessary. Such a step would not only assure a supply of prequalified jurors, but also save the court valuable time, as the judge and attorneys would require less time for examination and potentially find fewer reasons for challenge.[12]

The only practical, yet effective, method by which this result may be accomplished is the use of personal interrogation by a responsible official at some point in the selection process.[13] A brief interview could establish, with some degree of certainty, the mental and physical competence of every prospective juror as well as determine questions of statutory qualifications and exemptions. The examiner might use a few questions about background to help determine the moral character and physical health of the person, along with short verbal or written aptitude tests[14] on problems commonly faced by jurors in court. A desirable variation on this procedure would be to mail questionnaires to those selected from the roles for jury service, and on the basis of the answers given, the examining official would excuse from service

11 Hughes, "Observations on the Method of Selecting Jurors," 4 DALLAS BAR SPEAKS 57 at 62 (1939).

12 The scope of the *voire dire* is generally limited to inquiries of prior knowledge, preconceived opinion, and possible bias. If an attorney asks numerous questions and is alert to the manner in which the prospective juror responds, he may be able to determine the intelligence and perception of such juror and challenge the juror for failure to meet the statutory standards of competence. See McCready, "Challenging Jurors," 58 DICK. L. REV. 384 at 385 (1954). If the attorney does not take advantage of this method of challenge, he must face the possibility of an inept jury. On the other hand, if the jurors were prequalified for mental competence, this time-consuming challenge would probably not occur as the attorney would rarely find a juror unacceptable in this respect.

13 This method has been recommended by various study committees. See "Report of the Committee on Trial by Jury Including Methods of Selection of Jurors," 63 A.B.A. REP. 559 at 563 (1938); "Report to the Judicial Conference of Senior Circuit Judges of the Committee on Selection of Jurors (1942)," cited in VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 152 (1949). See also 32 BOST. UNIV. L. REV. 428 (1952); 1 SOUTHWESTERN L. J. 68 (1947).

14 For a description and sample of tests successfully used in various counties in California, see 5 STAN. L. REV. 247 at 260, 273 (1953).

all persons who claim exemption or disqualification and who give satisfactory proof thereof. All others, as well as those who do not reply, could then be called for personal examination.[15] Certain practical allowances should also be considered. If the individual is personally known by the examiner, the interview could be waived.[16] Night sessions ought to be provided when needed, as well as arrangements to hold interviewing sessions in various areas of the county.

In addition to pre-establishing competence, another advantage of the personal interview is the contribution it makes to the cross-sectional character of the ultimate jury panel. Upon examination in court, prospective jurors from certain areas of the county fail to meet the statutory qualifications at a higher than average ratio. Since the sheriff, under Michigan legislation, summons only the person whose name is drawn from an envelope representing each area, that area will often lose its representation.[17] However, if every name had been prequalified before being put into the envelope, the chances of disqualification at a later time are equalized. The proper place, therefore, for the prequalification step in the Michigan statute would be after a list has been compiled from the assessment rolls but before being filed with the county clerk.[18]

B. *Personnel and Supervision.* Without question, the responsibility for the prequalification process must be placed where it can be controlled. This calls for the creation of a supervisory body, ideally a county board of jury commissioners.[19] The num-

15 This is the applicable procedure under the Municipal Court Jury Code. Mich. Comp. Laws (1948) §725.101 et seq. Most of the suggested procedures in this comment are embodied in this code. Although it may be adopted by referendum in any city in Michigan, thus far it has been adopted only in Detroit.

16 Taking practical advantage of personal acquaintance at this step is not subject to criticism if an impartial, mechanical procedure is used to take the names from the assessment rolls. See discussion of the key number system, note 27 infra, and accompanying text.

17 Many states use a jury wheel or box into which all the names are thrown without segregation as to locale within the county. Here, too, people from particular areas will often be disqualified should their names be drawn. Grant, "Methods of Jury Selection," 24 AM. POL. SCI. REV. 117 at 124 (1930).

18 An argument can be made for holding the examination after the name has been drawn from the envelope or jury wheel because of the saving in administrative expense, permitted by the decreased number of interviews. But because of the fact that there will be only a relatively small number of persons to interview, from whom will come the ultimate jury panels, such procedure may be too vulnerable to jury tampering.

19 Four counties in Michigan have a jury commissioner board created by statute. *Berrien County,* Mich. Pub. Acts 1905, No. 58; *Kent County,* Mich. Local Acts 1903, No. 505, amended by Mich. Local Acts 1905, No. 347; *Saginaw County,* Mich. Pub. Acts 1889,

ber of members desirable on each board must of necessity vary according to the size of the county, but it is suggested that a minimum requirement of three members be prescribed.[20] Even though each commissioner would work individually in interviewing different prospective jurors, and thereby eliminate any overlap, there would at least be some group vigilance, thus avoiding the abuse of discretion possible when the system lies in the hands of a single person. When feasible, the personnel of the board could consist of citizens from various walks of life, e.g., merchants, farmers, housewives, and laborers.[21] Since the interviewing procedure, however, can be expected to require additional expense, consideration should be given to the smaller counties by providing that any county official may hold the office of commissioner in addition to his other duties.[22]

The question who is to control the board of jury commissioners raises the issue whether the selection of jurors is an administrative or judicial function, or a mixture of the two. It can be said that the court possesses inherent power to provide itself with a jury, and that the act of selection is a court function.[23] On the other hand, it has been argued that it is the function of

No. 273; *Wayne County*, Mich. Pub. Acts 1893, No. 204. The duties of the commissioners under these statutes are to select people from a basic source who are qualified for service, but no procedure is designated. The board in Wayne County which selects jurors from the voters' lists for the circuit court, common pleas court, and the circuit court commissioners court adopted the practice of personal examination of all names taken from the lists. For a description of similar jury commissioner procedures in Cleveland, Detroit, and Los Angeles, see 63 A.B.A. REP. 563-569 (1938). For State of New York, see 20 REP. N.Y. JUDICIAL COUNCIL 60-65 (1954).

20 The office of jury commissioner is normally a part-time job, and the work load can easily be divided to create sufficient need for three members.

21 The board might thereby acquire a fuller understanding of the various personal problems of the people who request to be excused or deferred. Simmonds, "Reform in the Jury System," 21 TENN. L. REV. 389 at 392 (1950).

22 In 1954 a uniform up-state jury law was adopted in New York embodying procedures similar to those suggested in this comment, and applicable to the 57 counties outside New York City. This law was amended in 1955 to make its provisions merely optional to the 42 up-state counties which had populations of less than 100,000. 29 N.Y. Consol. Laws (McKinney 1948; Supp. 1957) §§650-661. Commenting on this amendment, Desmond, J., remarked, "No record, official or unofficial, discloses any reason why the 42 counties were exempted from these requirements of centralized control. There is some suggestion that the new requirements (of the 1954 act) were financially burdensome for the smallest counties, but this is in no way documented. Indeed, it is contradicted by the Governor's statements (confirmed by the bill's language) in approving the 1954 bill: 'In small counties which are not financially able to provide for a full time commissioner, any county official may be designated commissioner on a part time basis.' " Farrington v. Pinckney, 1 N.Y. (2d) 74 at 97, 133 N.E. (2d) 817 (1956). But see id. at 91.

23 Moore v. Nation, 80 Kan. 672, 103 P. 107 (1909); Pitts v. White, 9 Terry (48 Del.) 311, 103 A. (2d) 245 (1954). See annotation 23 L.R.A. (n.s.) 1115 (1910).

the legislature to prescribe the method of selection, thereby aiding and regulating the exercise of the court's power. It would not seem unreasonable to say, however, that the legislative function should end at the creation of the office of jury commissioner as one step in the selection process, and that it should be the court's prerogative to choose the personnel to fill that office. It would then follow as a matter of course that the court would control the board. This arrangement would be preferable for two reasons. First, the court has a responsibility to provide the litigants a fair trial by jury. Unless the court has effective policy supervision over the commissioners, this responsibility will not be fully within its control. Effective supervision demands the right to select commissioners who are in accord with the court's policies and to discharge others who are not alert to the importance of supplying the court with competent jurors. Second, selection of the jury commission should not be a means of political patronage for local county officials or the governor of the state.[24] Admitting the possibility that judges themselves may be politically appointed or elected and that they may also indulge in patronage, it would appear that supervisory power would still be less dangerous as a political weapon in their hands. It may be suggested, however, that an acceptable alternative to selection by the court would be selection by the governor upon recommendation by the court.[25] Even this, however, would serve to weaken the authority of the court's superintending control.

A further question arises as to the amount of discretion that would be given the board. The board's power to excuse prospective jurors from service could be limited to the qualifications and exemptions established by statute, or extended to allow it to excuse hardship cases which may ultimately be excused by the court anyway.[26] Since the commissioners would have all the facts

[24] "The caliber of the juries . . . hinges on the mode of selecting them. In selecting jurors the elimination of political influence is a paramount consideration. This can never be accomplished when jury commissioners are politically elected or appointed officials. Therefore, the recommendation for the appointment of jury commissioners by the courts is a fundamental one." VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 147 (1949).

[25] The Michigan statute can be amended in part by any county in Michigan which adopts by referendum statutory provisions under which the governor, upon the recommendation of the judges of the circuit court, appoints a board of jury commissioners consisting of three persons, no more than two of whom shall be of the same political party. All other jury selection procedures remain generally the same. Mich. Comp. Laws (1948) §§602.150 to 602.159. To date, no county has adopted these provisions.

[26] Examples of such hardship cases would be the case of the one-man business and

at hand, there seems to be no reason for duplication of their questioning by the court. Perhaps such extended discretion should be with the commissioners but under broad policy regulations determined by the court.[27]

C. *Systemization.* In addition to passing upon competence qualifications, it should be the jury commissioner's job to compile, or at least supervise the acquisition of, the original list of prospective jurors from a basic source, e.g., the assessment rolls. However, it is necessary that in this function he should not be permitted any exercise of discretion. A mechanical, and therefore impartial, method of selecting names would be desirable here because favoritism in placing particular groups on the list could carry through to favoritism in the interview and result potentially in tampered juries.

Probably the best such method is the "key number" system. Under this plan, the judges are asked to estimate the number of jurors needed for the year. Added to this figure is the number which the board's experience shows will probably be eliminated upon examination. If the assessment rolls are the source of prospective jurors, the total of the two figures is divided into the number of names on the rolls, and the quotient becomes the key number. For example, if there are 50,000 names on the rolls and the court needs 300 jurors, and 200 of those called are expected to be excused before reaching that amount, every hundredth name on the rolls would be called in order to obtain 500 names.[28] One advantage of this system is that there can be no pre-arranged exclusion of any class since every hundredth name, and only every hundredth name, is called. Another advantage is that repetition of service would be avoided since the key number would not fall on a person's name again until it had made a complete cycle of all the names in his assessment district.[29]

the mother with small children. The jury commissioners of Wayne County recommended that discretion over excusing and deferring service in such matters, which presently rests with the circuit court, be delegated to the commission. See MINUTES OF MEETING OF WAYNE COUNTY JURY COMMISSION 59 (Nov. 27, 1957).

27 Although for convenience of approach the discussion of improvements in procedure has been at the county court level, some thought should also be given to the applicability of these suggestions to the selection systems now used in courts of even lower level, e.g., municipal and justice courts. Where duplication would result in waste, consideration could be given to the possibility of selection machinery centralized somewhere within the county which would supply jurors for the county and lower courts.

28 This system apparently originated in Cleveland. See generally Hughes, "Observations on the Methods of Selecting Jurors," 4 DALLAS BAR SPEAKS 57 (1939).

29 Two practical techniques would be generally employed here. First, the commis-

D. *Source.* A problem arising under any system of jury selection is that of deciding what basic source to use when compiling the original list of names for jury service. The established source under the Michigan statute is the assessment roll.[30] Use of this source, however, can be criticized on the ground that it excludes persons who, while not property owners, may be otherwise well-qualified as jurors. Moreover, the wisdom of creating jury panels composed exclusively of property owners may be questioned.

The best alternative source to the assessment roll would be the registered voters' list. Compiled normally on the basis of wards, such lists would be the only other source easily available that complemented the cross-sectional approach of the key number system. A very desirable aspect of use of the voters' list is that it provides names of people who, because they take the initiative to vote, are presumably somewhat alert to their civic responsibilities generally. Unfortunately, however, adoption of this source might possibly discourage voter participation in the election process by those seeking to escape jury duty.

Although a third possibility would be to use either of these sources as a master list and add to it names drawn from the other as well as from any source available, such as telephone and club directories,[31] the additional administrative expense may prove prohibitive, especially if an attempt is made to segregate the names according to assessment districts or wards in order to preserve the cross-sectional distribution possible under the key number system.

Regardless of the basic source finally decided upon, however, proper administration of the jury commissioner system would require complete cooperation from the proper officials at city and township levels. Without up-to-date source lists, the commissioners would not be able to function efficiently. It would therefore be desirable to authorize the commissioners to compel the

sioners would start at a different place on the rolls each year if it is found that the key number remains constant. Second, if because of alterations on the rolls the key number falls on a name called in a prior year, this name would be passed over and the next one taken.

30 There is little uniformity at this step, however. Elsewhere in Michigan, other basic sources have been adopted. *Upper Peninsula:* voters' lists, by statute. Mich. Comp. Laws (1948) §691.413; *Detroit:* voters' lists, by statute. Id., §725.103; *Wayne County:* voters' lists, by choice. Questionnaires to county clerks in Michigan returned to the *Michigan Law Review,* Feb. 26, 1958. *Kent County:* personal acquaintance, telephone and other directories, by choice. Id., Feb. 24, 1957.

31 See proposal in 5 STAN. L. REV. 247 at 269 (1953).

local officials in charge of such records to furnish accurate lists at pre-selected intervals.[32]

III

The suggestions for improvement in the four categorized areas discussed above are not offered, and would not serve, to change the basic structure of the Michigan or similar jury selection systems. To the contrary, their integration is meant to complement existing systems in places where those systems are deficient. The first three categories for improvement, i.e., prequalification, personnel and supervision, and systemization, go to the heart of the deficiency: the failure to delegate the responsibility effectively for providing the court with a jury panel possessing at least a reasonable degree of competence. A modification of present statutory procedures in accordance with the suggestions above would go far in the creation of a climate favorable to the traditional concept of trial by jury.

In the final analysis, it must be recognized that we shall never have perfect juries. On the other hand, there is no compelling reason to be satisfied with less than the improvements that practical changes might provide.

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32 Similar legislation was recommended by the jury commissioners in Wayne County. See MINUTES OF MEETING OF WAYNE COUNTY JURY COMMISSION 15 (Nov. 27, 1957). Compare 29 N.Y. Consol. Laws (McKinney 1948; Supp. 1957) §658.