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Manuel J. Edling Jr.

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OBTAINING JURORS: A COMPARATIVE STUDY OF METHODS EMPLOYED

THE functioning of the jury has probably resulted in even greater criticism of the courts and the administration of criminal justice than has the activity of lawyers and judges.¹ The administration of the jury system with zealous care in an effort to protect the rights of the accused has resulted in extreme liberality on the part of the state; it has been prodigal with its money and the time of the courts, has permitted abuses of justice, and has tended to bring into disrepute the entire judicial system which it maintains.² In speaking of the several criticisms offered against the institution of the trial jury, a learned trial judge has declared that the one most justified is "that with regard to the competence of jurors."³ Failure in the practice of the theory of trial by jury occurs because men of character, intelligence, and experience, qualities essential to the juror's modern role in the administration of justice, are not obtained to fill the jury box.⁴ Present-day juries are not often genuinely representative of the community;⁵ and many jurors are completely unfit for jury service.⁶ Both trial lawyers and judges and the legal profession generally are reported to have "the conviction that there is frequently a miscarriage of justice because of the lack of ability on the part of the average juror adequately to

¹ See Leighton, *How About the Jury?* (1924) 8 J. AM. JUD. SOC. 246.

² See Perkins, *Some Needed Reforms in the Methods of Selecting Juries* (1915) 13 MICH. L. REV. 391, 394.

³ Hughes, *Observations on the Method of Selecting Jurors* (1939) 4 THE DALLAS BAR SPEAKS, 57, 58.

⁴ See Leighton, *How About the Jury?* (1924) 8 J. AM. JUD. SOC. 246.

⁵ See Gardner, *Jury Reforms in Texas* (1943) 6 TEX. B. J. 293, 294; Otis, *Selecting Federal Court Jurors* (1943) 29 A. B. A. J. 19.

⁶ See Watkins, *Selecting Jurors* (1941) 48 W. VA. L. Q. 47.

⁷ Miner, *The Jury Problem* (1946) 41 ILL. L. REV. 183.

discharge the duties that devolve upon him in the fact-finding process.”⁷ The grounds for the ever-increasing volume of criticism directed in recent years at the jury system and, for the most part, impugning the character and quality of jury verdicts, will be removed only as there is improvement in the quality of the jurors who deliver these verdicts. The problem, while partly one of raising legislative standards for jury service, also has an administrative aspect which necessitates analysis of the methods of obtaining jurors. So long as there is no provision made for determining the character and competence of persons selected for jury service,⁸ a fundamental weakness in the system of jury selection will remain.

In spite of such criticisms and the many efforts to eliminate the jury system, trial by jury is still widely regarded as the most acceptable method of determining the truth of the facts in controversy.⁹ The root of the trouble, therefore, must lie elsewhere than in the concept itself. As observed by Wigmore,

“Trial by Jury as the Constitution gave it to us, is one thing. Trial by Jury as we have allowed it to be spoiled by laws and practices *not required by the Constitution* is a very different thing. . . . What Trial by Jury needs is to cleanse (and repair) . . . the original mechanism that the Constitution placed in our hands. . . .”¹⁰

The crux of the difficulty is that the practice of trial by jury no longer conforms to the traditional theory of its functioning.

I

At common law, the writ of *venire facias* directed to the sheriff merely specified the number of free and lawful men to be summoned for jury service; it was within the sheriff's discretion to summon whomever he chose from the inhabitants of the county to try the truth of the matter in controversy.¹¹ This method of determining the prospective jurors to be called seems never, however, to

⁸ See *Report of the Crimes Survey Committee of Philadelphia* (1926) 84.

⁹ See *Watkins, Selecting Jurors* (1941) 48 W. VA. L. Q. 47.

¹⁰ *Wigmore, First Aid for Trial by Jury* (1925) 9 J. AM. JUD. SOC. 121, 122.

¹¹ See 2 BL. COMM. *352.

have been followed in Texas. Under the early Texas law, a list was kept of all the citizens of the county who were freeholders or householders. These names were placed in a box and drawn out by the clerk of the court and the sheriff in the presence of the judge who presided as judicial superintendent.¹²

In 1876 the Legislature provided for the selection of prospective jurors by jury commissioners who were to be appointed by the court.¹³ In 1907 the first Jury Wheel Act was passed,¹⁴ the purpose of which was “. . . to abolish in counties containing a city of large population, the element of discretion that is involved in the selection, by Jury Commissioners, of the individual jurors to make up jury panels; and to substitute a mode of procedure for securing jury panels by mechanical means whereby the exercise of choice in the selection of men for jury service is eliminated.”¹⁵ Since 1907 there has been no substantial change in the method of procuring jurors. The Jury Wheel Act is applicable to counties having a population of at least 58,000 or containing a city of 20,000 or more.¹⁶ In those counties which are more sparsely settled, persons are still called for jury service by jury commissioners.¹⁷

In the sparsely settled counties in which the simple and effective commissioner system is operative, there seems to have been general satisfaction with its results; it has been felt that by reason of the exercise of discretion on the part of the commissioners competent jurors are brought into the courtroom.¹⁸ However, there has been considerable criticism of the result where the jury-wheel system is relied upon. For example, a Texas district judge has written thus with reference to this method of procuring prospective jurors:

¹² See *Tompkins v. The Republic*, Dallam 488 (Tex. 1842).

¹³ *Tex. Laws 1876*, c. 76, p. 78, *LAWS OF TEXAS* (Cammel, 1898) 914.

¹⁴ *Tex. Laws 1907*, c. 139, p. 269.

¹⁵ *Northern Texas Traction Company v. Bryan*, 116 Tex. 479, 486, 294 S. W. 527, 530 (Comm. App. 1927).

¹⁶ *TEX. REV. CIV. STAT.* (Vernon, 1936) art. 2094.

¹⁷ *Id.*, art. 2104 *et seq.*

¹⁸ Gardner, *Jury Reforms in Texas* (1943) 6 *TEX. B. J.* 293.

¹⁹ *Ibid.*

"Here there are many complaints, about the operation of the system itself and the functioning of the jury as an institution. Many students of the problem have begun to feel that it was a mistake to eliminate all discretion from the system of selection of the names put into the jury wheel. . . ." ^{19a}

It is indeed unfortunate that this phase of the administration of criminal justice should have been put upon a wholly mechanical basis without regard to the fitness or competence of those upon whom the successful operation of our judicial machinery depends. ²⁰ Such a procedure is opposed to sound practice and to the tradition in Texas of permitting the exercise of a sound discretion in the selection of persons for jury service as it existed from the time of the Republic until 1907. ²¹ If the jury is to effect its manifest purpose of determining the facts in issue rather than to obstruct the administration of criminal justice, ". . . some method of selecting jurors to insure reasonable capacity upon their part to discharge their duty ought to be adopted. Certainly no constitution can be thought to guarantee trial by a jury of incompetents. . . ." ²² A system that operates on the assumption that every man is fit for jury service will inevitably fail to provide venires uniformly composed of the men of intelligence and character which are needed to assure justice both to the accused and to society.

In determining what form corrective measures might take, it is submitted that no radical departure from established practice is necessary. Analysis indicates that a return to the traditional Texas method of obtaining prospective jurors by the commissioner system would partially remedy the ills of the present situation by permitting the exercise of some degree of discretion to the end that those who are incompetent will be eliminated from the consideration of those who compose the venire. This method of procuring jurors, however, would not in itself be adequate to the needs of congested areas. Obvious limitations on the breadth of the commissioners'

^{19a} Gardner, *Jury Reforms in Texas* (1943) 6 TEX. B. J. 293, 294.

²⁰ See Howard, *CRIMINAL JUSTICE IN ENGLAND* (1931) 408.

²¹ See Gardner, *op. cit. supra* note 20, at 312.

²² Miner, *The Jury Problem* (1946) 41 ILL. L. REV. 183, 184.

acquaintance would serve to defeat the purpose of supplying our courts with jurors of intelligence, able to render sound verdicts. Therefore this procedure, if adopted, would have to be supplemented by one of several refinements which have been developed and proven effective in other jurisdictions.

II

It is common knowledge that increasing numbers of Texas practitioners have come to prefer the federal trial courts to those of the state. The bases for this preference were recently ascertained by means of a questionnaire sent to lawyers throughout the state. The question asked the practitioner was whether he preferred the state or the federal courts for purposes of obtaining a just verdict. Of those answering, 75.4 per cent preferred to try their cases in the federal courts.²³ It is highly significant that among a variety of nineteen reasons assigned for this preference, the superior method of selecting jurors was asserted as the reason by 56.6 per cent. This preference suggests that a comparative study of the provisions governing the manner of selecting jurors in the Texas and federal courts respectively may indicate wherein lies the superiority of the federal method.

The United States Code provides that the qualifications and exemptions of jurors are to be determined by the laws of the state where the federal district court is located,²⁴ and that the clerk of the court and the jury commissioners shall place in the jury box at least three hundred names of persons possessing the requisite

²³ Stayton, *Report Upon Federal and State Jury Questionnaire* (1938) 17 TEX. L. REV. 62. It must be noted that Professor Stayton's query was phrased so as to apply to civil cases only, being expressly exclusive of criminal cases. It would seem, nevertheless, that the results are also a suitable basis for certain conclusions as to the jury in the trial of criminal prosecutions. The reason for restricting the scope of the interrogation is, of course, obvious. The practice in the federal courts does not encourage attempts to confuse and perplex the jury, and the "free show" which frequently takes place in the state courts does not occur in the federal courts. Not being conducive to irresponsible acquittal, such procedure cannot be expected to achieve great popularity among defense attorneys concerned with representing guilty clients.

²⁴ 36 STAT. 1164 (1911), 28 U. S. C. § 411 (1940).

qualifications.²⁵ It is from this group that the panels are to be drawn. The statute is silent as to how the names placed in the jury box are to be selected, and the jury commissioners may use any reasonable method deemed suitable to provide qualified jurors.²⁶

Methods of choosing names for the federal district jury box vary. In the Northern District of Texas, the names of persons for jury service are procured by requesting the postmasters of various cities and towns within the District to supply the jury commissioners with a certain number of names, apportioned on the basis of population. A printed form is used, one side stating the commissioners' request and the general requirements for prospective jurors as well as the exemptions,²⁷ with the other side ruled for the names. Each postmaster is asked to submit only names of citizens who are resident in the county and who would be in all respects competent jurors. It is requested that no one be discriminated against because of political affiliation or color; and the postmaster is instructed to select only the most intelligent and morally worthy of the community from among those who are not exempt by statute. The names so returned are deposited on separate slips in the jury box and drawn in the manner prescribed by statute.

An appraisal of the system in operation indicates that jurors in the federal courts are uniformly of a much higher quality than are those serving in the state courts. There seems to be little or no criticism of the operation of the jury as an institution in the federal courts. The success of the system would seem to be attributable principally to the fact that the names are selected by responsible persons, and that those who are irresponsible, incompetent, or exempt are rarely called. As an incidental result, the court is also

²⁵ *Ibid*, 28 U. S. C. § 412 (1940).

²⁶ *Watkins, Selecting Jurors* (1941) 48 W. VA. L. Q. 47, 48.

²⁷ Under federal statute (see note 24 *supra*), the qualifications and exemptions of jurors in the United States Courts for the Northern District of Texas are determined under TEX. REV. CIV. STAT. (Vernon, 1936) art. 2133 and art. 2135 respectively.

spared the useless delay and bother of dismissing or excusing large numbers of persons who are found to be disqualified or exempt.

A different method is used in the Northern District of West Virginia.²⁸ The jury commissioners, when called upon by the court to present a new list of prospective jurors, select several leading citizens and write letters to them requesting that they submit, for consideration as prospective jurors, a list containing a specified number of names of persons meeting the requirements appended to the request. When these lists are returned, the commissioners send each person named therein a questionnaire. These questionnaires when returned are analyzed by the commissioners, and those persons who appear to fall short of the necessary requirements are excluded from consideration. The names of those who appear to be suitable are written on cards and deposited in the jury box to be drawn later, in accordance with the statute.²⁹ Thus only those are summoned who, by the questionnaire, reveal themselves to be qualified for jury service, in good health and able to see and hear, and who claim no exemption.³⁰

III

The State of New York has recently dealt with the problem of reforming the method of selecting jurors, and it is worthwhile to consider what has been accomplished in that jurisdiction. The first step was taken in 1936 by an amendment to the New York Consti-

²⁸ See Watkins, *Selecting Jurors* (1941) 48 W. VA. L. Q. 47, 49.

²⁹ 36 STAT. 1164 (1911), 28 U. S. C. 412 (1940).

³⁰ "Careful use of the questionnaire is a splendid substitute for the personal interview. Either personal interview or the questionnaire insures that the deaf, incompetent, and many others who are wholly unfit, will never be called for jury service because their names will never enter the box." Watkins, *Selecting Jurors* (1941) 43 W. VA. L. Q. 47, 52.

The use of the questionnaire to eliminate the disqualified and obviously undesirable seems to have obtained highly satisfactory results wherever it has been used. The only criticism of the questionnaire method that was found appeared in the ILLINOIS CRIME SURVEY (1929) 230, which reported that the questionnaire method of elimination was found unsatisfactory for the sole reason of numerous statutory exemptions—a claim of any one of which would result in elimination of the name under consideration, without investigation to ascertain the validity of the claim. However, this would seem to be a defect of administration, rather than a defect in the method itself.

tution, by which the political office of county clerk in each of those counties within the City of New York was made into an administrative office, and the county clerks made appointive and removable by the Appellate Divisions.³¹ In 1940, the Judicial Council recommended a unified jury system for the City of New York.³² The proposal provided that the county clerk should have the duty to select, draw, summon, and impanel jurors, and determine their qualifications and exemptions.³³ The justices of the Appellate Divisions were to be empowered to adopt, amend and rescind rules by which this process should be conducted.³⁴ The county clerk should have authority to obtain the names of persons for jury service from the latest census report, the telephone or city directory, tax records, voters' registry lists, and any other available source.³⁵ The most important part of the recommendation, however, was Section 595, which provided that "No person's name shall be entered on a jury list unless (a) he has been personally interviewed by the county clerk, (b) he has stated his qualifications under oath, (c) his name has been forwarded to the police department for checking against the records of that department. . . ."³⁶ The proposal was enacted into law that same year as Article 17 of the Judiciary Law.³⁷

The following year the Judicial Council made a similar recommendation for counties outside of the City of New York.³⁸ Although

³¹ N. Y. CONST. (1894) Art. X, § 1, as amended 1936.

³² See SIXTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF NEW YORK (1940) 191 *et seq.*

³³ *Id.* at 198.

³⁴ *Id.* at 200.

³⁵ *Id.* at 204.

³⁶ *Id.* at 205. The Council comments that it ". . . is felt that all jurors should be subjected to equally close scrutiny in order to provide trial jurors of uniformly high calibre. . . . The provision as to the checking of names by the Police Department . . . has been added to insure as much as possible the elimination of undesirable characters from juries."

³⁷ N. Y. LAWS 1940, c. 202.

³⁸ SEVENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF NEW YORK (1941) 34-7, 151, *et seq.*

an examination as to fitness was proposed,³⁹ there was no recommendation for a mandatory personal interview of the prospective juror by the county clerk as in the law enacted to regulate the procedure in the City of New York. Instead, it was to be left to a jury commissioner to determine the prospective juror's qualifications by means of a questionnaire mailed to the person under consideration, to be filled out in that person's own handwriting, signed, and returned; or, if deemed necessary or desirable in order that a satisfactory determination of the matter could be made, personal attendance for an interview could be required. The reason for this change was the practical consideration that in the rural communities a requirement of personal attendance for an interview might be unduly onerous and should not be required so long as the questionnaire would suffice.⁴⁰ It was the Council's conclusion that "The necessity for a thorough examination for the qualifications of prospective jurors is no longer open to question."⁴¹ The soundness of the conclusion reached would hardly be disputed on principle, and certainly not by those who have observed in a trial court in Texas the futility of attempting to obtain a competent jury from a panel which has been mechanically selected without regard for fitness or qualification.

IV

In each of the methods discussed, it will be noted that at some stage of the process of obtaining jurors there is provision for some person or persons to consider the qualifications of the prospective juror and to eliminate him from further consideration if, in the exercise of a sound discretion, he is found wanting. It may be the postmasters within the district who are relied on to call only those who appear to be qualified; it may be responsible private citizens who select for the jury lists only the names of persons considered

³⁹ *Id.* at 165.

⁴⁰ *Id.* at 166.

⁴¹ *Ibid.*

to be well qualified; it may be done by the jury commissioners using a detailed questionnaire; or it may be done by the county clerk, acting only after personal interview. It is suggested, however, that the inclusion of such a step in the procedure of selection is an important, if not a determinative, factor in the effectiveness of these jurisdictions in securing a consistently satisfactory quality of jurors.⁴²

In Texas, however, there is no examination whatever to ascertain in advance the qualifications of the prospective juror or to determine his competence. As a result, large numbers of persons are required to report for jury service, many of whom⁴³ are dismissed because disqualified, exempt, or obviously incompetent.⁴⁴ Those remaining to constitute the venire from which the jury is to be selected are, on the whole, no better qualified intellectually and in their ability to discipline their emotions than could be expected from a system which obtains the prospective juror indiscriminately and without regard to any standard other than the appearance of his name on the tax lists of the Tax Assessor⁴⁵ and his ability to assert under oath that he is a qualified voter and a householder in

⁴² Limitations of space prevent consideration of other systems in use, but it may be noted that in Los Angeles, California, an intelligence test is utilized; in Cleveland, Ohio, the personal interview by jury commissioners is used; in Detroit, Michigan, there is a conjunctive use of the questionnaire with personal interview, the emphasis being placed on the questionnaire.

As a practical matter, some attention must be given to the cost of the operation of such systems. Of this aspect, Judge Sarah T. Hughes has said, "The cost for petit jurors for a year in Cleveland amounts to \$89,000, while the annual average for 1935, 1936 and 1937 in Dallas County was \$71,000, although Cleveland is several times the size of Dallas County in population." Hughes, *Observations on the Method of Selecting Jurors* (1939) 4 THE DALLAS BAR SPEAKS 57, 61.

⁴³ The following item appeared in the Dallas Morning News, Feb. 28, 1947, sec. 2, p. 3, col. 8: "Selection of a jury to try James Jett, 18, for rape was completed Thursday night after four days of examining veniremen. . . . Five hundred seventy men were called as veniremen before the twelve jurors were selected. . . . 194 men (remained to be) examined after excuses were heard. . . ."

⁴⁴ This has been criticized as resulting in ". . . an unnecessary waste of good money and of the jurors' time." Watkins, *Selecting Jurors* (1941) 48 W. VA. L. Q. 47.

⁴⁵ TEX. REV. CIV. STAT. (Vernon, 1936) art. 2094 specifies ". . . the list of qualified jurors . . . as shown by the tax lists in the Tax Assessor's office for the current year. . . ."

the county or a freeholder in the state.⁴⁶ The paucity of jurors who are reasonably intelligent and emotionally stable is often keenly felt by the prosecuting attorney when the *voir dire* stage of the proceeding has been reached, for it is at this point that the defense counsel will seek the elimination of such jurors⁴⁷ by means of the challenge for cause and the peremptory challenge.⁴⁸ The conclusion in favor of a thorough examination to assure that only the most competent persons in the community shall be called for jury duty seems obvious and compelling.

No objection is offered to the Texas statutes governing those counties in which jurors are selected by jury commissioners;⁴⁹ the exercise of a certain modicum of discretion is permitted, enabling the commissioners to call only those persons who are believed to possess the requisite qualifications.⁵⁰ But in those counties operat-

⁴⁶ TEX. CODE CRIM. PROC. (Vernon, 1925) art. 612: "In testing the qualifications of a juror after he has been sworn, he shall be asked by the court, or under its direction:

"1. Are you a qualified voter in this county and State, under the Constitution and laws of this State?

"2. Are you a householder in the county, or a freeholder in the State?

"If he answers both questions in the affirmative, the court shall hold him a qualified juror until the contrary be shown by further examination or other proof."

⁴⁷ "The woeful lack of intellectual endowment on the part of the average juror is no doubt a most serious difficulty of common occurrence. Such lack of endowment is, to the defense lawyer in a criminal case, the very highest qualification any juror can possess. If a prospective juror discloses intelligence and competency he is promptly excused by the defense. . . . The highest achievement of the defense lawyer with a guilty client rests in his successful effort to confuse and befuddle twelve inexperienced and sentimental jurors with issues completely foreign to the merits of the case. . . ." Miner, *The Jury Problem* (1946) 41 ILL. L. REV. 183, 184.

⁴⁸ TEX. CODE CRIM. PROC. (Vernon, 1925) art. 613 *et seq.*

⁴⁹ TEX. REV. CIV. STAT. (Vernon, 1936) art. 2110: "The Jury commissioners shall select . . . (persons) free from all legal exceptions, of good moral character, of sound judgment, well-informed, and, so far as practicable, able to read and write. . . ." Observe that this article prescribes a different and higher standard for jurors in counties operating under the commissioner system than is required in counties under the Jury Wheel Act.

⁵⁰ See *Cavitt v. State*, 15 Tex. Crim. App. 190, 197 (1883), where the court said, "There is no provision in the law which vests in the court, or in any other tribunal, the power to revise and control the selection of jurors by the commissioners. We do not say, however, that this power does not inherently exist in the court. We think it does, but it would be exercised only in a clear case of fraud or corruption in the action of the commissioners, or some great wrong committed in their selection of jurors, which would shock the sense of justice and defeat the ends of the law."

ing under the Jury Wheel Law, the construction placed by the courts on the statute⁵¹ forbids the exercise of any discretion or judgment, however limited, on the part of the selecting officers.⁵² The situation is not irremediable, however; as suggested by this brief study of methods in other jurisdictions, the Legislature can supply the remedy by the simple expedient of adaptation of proven methods to the particular needs of the communities which the Jury Wheel Act has served so poorly.

Manuel J. Edling, Jr.

⁵¹ TEX. REV. CIV. STAT. (Vernon, 1936) art. 2094.

⁵² In *Gunn v. State*, 90 Tex. Crim. Rep. 209, 234 S. W. 399 (1921), the court had directed the officers drawing the venire list to discard the names of persons who were known to be witnesses, absent from the county, or for other reasons. The appellate court held this reversible error, saying at 211, "If the court might use his discretion in one matter thus, no reason could be assigned why it might not be extended and the method fixed by statute for selecting such venire be entirely changed. . . ."

In *Atwood v. State*, 96 Tex. Crim. Rep. 249, 257 S. W. 563 (1924), there was testimony which showed that the wheel was filled from the poll tax list only, thus excluding those qualified voters who were exempt by age from paying the poll tax; also, the names of road overseers, lawyers, doctors, and other classes of citizens were excluded. In reversing the case for this action of the lower court, the appellate tribunal relied on *Gunn v. State supra*, saying at 255, ". . . if the officers entrusted with the filling of the wheel might exercise their discretion in excluding certain classes of jurors, there would be no limit, and the statutory method might be entirely abrogated. . . ."

See *Northern Traction Company v. Bryan*, 116 Tex. 479, 486, 294 S. W. 527, 530 (1927), where the court asserted that "The primary purpose of (the jury wheel law) was to abolish in counties containing a city of large population the element of discretion. . . ."