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Public Law Reform Organization
Indiana University School of Law

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Jury Selection in the State of Indiana

Public Law Reform Organization

The Public Law Reform Organization was formed in 1971 by students and faculty members of Indiana University School of Law to undertake in-depth studies of statutes, laws, and legal institutions in Indiana which seem to be in need of reform or change. Financed through small contributions from the Law Student Division of the American Bar Association and Indiana University Foundation, the organization chose the Indiana system of jury selection as its topic for investigation by a task force in 1972-73. The task force was aware of some criticisms of the method of selection of jurors in Indiana courts, raised primarily by attorneys in motions and appellate briefs. A few court cases in Indiana, the federal courts, and other states, had also indicated possible constitutional flaws in a system of juror selection such as Indiana's. With an awareness of these complaints and possible defects, the organization conducted an empirical study of juror selection in Indiana in an attempt to find out how jurors are selected in actual practice, and then began legal research to determine if, in fact, there are legal or constitutional defects in the Indiana system. The task force believes this study provides evidence that reform of Indiana laws concerning selection of juries is needed. The force has, thus, drafted proposed legislation for remedying the defects found, relying heavily upon the model legislation proposed by the commissioners for Uniform State Laws.

The Public Law Reform Organization wishes to express its thanks to the Law Student Division of the American Bar Association and the Indiana University Foundation for their financial support for this task force study, to the Indiana County Clerks who took the time from their busy schedules to complete our survey questionnaire, and especially to the County Clerks of Brown, Owen, Greene, and Monroe Counties and Superior Court Judge of Morgan County for their considerable assistance in permitting use of court records to make our in-depth survey.

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PROVISIONS FOR SELECTION OF JURORS IN INDIANA

Selection of jurors in Indiana is governed by legislation passed in 1881. Under the Indiana Constitution, there is a right to trial by jury in both criminal prosecutions (Art. I, §13) and civil cases where such right existed at common law at the time the Indiana Constitution was adopted in 1851 (Art. I, §20). The state legislature established the method for selection of jurors in 1881, now found in IC 1971, 33-45-1, Burns Ind. St. Ann. §4-7101 *et seq.*

Reliance on Jury Commissioners and Tax Duplicates

The Indiana juror selection statutes provide that the judge of the Circuit Court of each county shall appoint two persons who must be freeholders and voters within the county to serve as jury commissioners. The commissioners must be of opposite political parties. They are required to select names which go into a jury box from which names will ultimately be selected for calling jury venire panels when needed. The jury commissioners are required,

“from the names of legal voters and citizens of the United States on the latest tax duplicates and the tax schedules of the county, examine for the purpose of determining the sex, age and identity of prospective jurors and proceed to select and deposit, in a box furnished by the clerk for that purpose, the names written on separate slips of paper of uniform shape, size, and color, of twice as many persons as will be required by law for grand and petit jurors. . .” (Emphasis added) IC 1971, §33-4-5-2, §4-7104.

In selecting the names to go into the box, the commissioners are bound by statutorily prescribed oath and must:

“select none but persons whom you believe to be of good repute for intelligence and honesty. . .” IC 1971, §33-4-5-1, Burns, §4-7101.

Thus, there are three principal statutory requirements for selection of names to be put into the box—the individual must be a legal voter and citizen, his name must be on the latest tax duplicates or tax schedule of the county, and the jury commissioner must believe him to be of good repute for intelligence and honesty.

Judicial Elimination of Tax Duplicate Requirement

The statutory requirement that the names of potential jurors must be on the county tax duplicates or schedules meant, of course, that they must own property, real or personal, which is taxable in the county. In a day when Indiana was largely a rural state and most farmers owned

some land of their own, this requirement may not have excluded a large number of citizens. However, with the increase of urbanization and rental housing, substantial numbers of citizens were excluded from eligibility for jury service. One mitigating factor was that motor vehicles, house trailers, and boats, were listed as taxable personal property on county tax schedules. Hence, many non-property owners were made eligible for jury service if they owned a car, trailer, or boat.

In 1970, however, when the state motor vehicle department was given responsibility for collecting fees for registration and ownership of motor vehicles, house trailers, and boats, these owners were removed from county personal property tax schedules. This drastic reduction in the number of names available for jury service was raised in a criminal case in Vanderburgh County. The Circuit Court judge, after finding the statutory method of juror selection did not now comply with the requirements of the Indiana and United States Constitutions, ordered the jury commissioners to ignore the tax duplicate requirement and instead select names from the master file of registered voters in the county. The county prosecutor challenged the judge's order, but the Indiana Supreme Court, in a unanimous decision, upheld his order. The Court stated use of voter lists¹ "would include a representative cross-section of all segments of the citizenry and thereby assure representation of all classes."

Although the Indiana Supreme Court sanctioned the method of selection ordered by the Vanderburgh County circuit judge, its decision only directly affected that county. The statutory requirement that potential jurors be on tax duplicates remains in the Indiana statutes.

To determine the use of the *Vanderburgh* decision in the State, the task force sent a questionnaire to all ninety-two county clerks. Replies indicated all counties now ignore the statutory requirement that potential jurors be on the tax duplicates, using voter registration rolls instead. However, a number of counties use additional requirements for juror eligibility, and the survey showed considerable disparity among county officials as to their understanding of what juror qualifications the state law now requires. Thus, elimination of the present statutory tax duplicate requirement from the Indiana statutes and passage of a clear statutory rule on juror eligibility seems to be needed.

Discretion in Jury Commissioners to Choose Persons of Good Repute for Intelligence and Honesty

The *Vanderburgh* Circuit Court case did not alter the statutory requirement that persons whose names are put in the box "be of good repute for intelligence and honesty." Since guidelines are provided in

the statute or elsewhere as to which standards the commissioners are to apply in making this determination, commissioners are vested with virtually absolute discretion in determining qualified persons. Often referred to as the “key man” or “blue ribbon” method of jury selection, commissioner discretion was common in many states in the 19th century, and no doubt served some useful purpose in a day when many citizens could neither read nor write and communities were often small enough that jury commissioner could be personally familiar with the repute of most citizens. Today, however, jury commissioners are rarely in a position to know more than a small percentage of potential jurors. There is the further question today as to whether this discretionary power is needed, given modern procedures for screening potential jurors through questionnaires and for *voir dire* of venire panels with ample opportunity for eliminating clearly unqualified jurors in the courtroom.

Since the statutory provision concerning jury commissioners’ determination of repute is vague, the task force felt it necessary to determine how, in fact, this requirement is applied in the various counties. The survey revealed considerable disparity. Many county clerks indicated jury commissioners exercised virtually no discretion and simply used a random method of selection from voter registration roles. Others commented that commissioners complied with “repute” requirement by scrutinizing the names that had been selected at random. Still others indicated that commissioners used their own judgment throughout the selection process, adding names of persons whom they considered of good repute while excluding others.

The survey further indicated great disparity as to attributes on which commissioners base their decision as to repute. Some counties, it seems, use character traits of a highly subjective nature which are not specified in the statute. For example, in one county, one jury commissioner exercises considerable personal judgment, adding to the box names of persons whom he believes would be good jurors and scrutinizing the names of persons provisionally selected by random selection from the voter list. The other commissioner, who is frequently absent from Indiana on business, generally has a secretary take names in certain numerical sequence (as every twentieth name) from the voter list.

Number of Names Placed in the Juror Box by Commissioners

The Indiana statute provides that “twice as many persons as will be required by law for grand and petit jurors” be placed in the juror box from which the venire panels will ultimately be selected (IC 1971, §33-4-5-2). The purpose of this requirement would seem to be to limit the ability of the commissioners to insure the selection of persons for

venire panels by putting in the box approximately the same number of names which would ultimately be drawn. In other words, it seems to have been an attempt to impose a certain degree of randomness of the commissioners' selection process. However, the task force's survey and interviews indicated that this provision is not being uniformly followed in the counties. In some counties, a certain number of names are placed in the box periodically (for example, 200 every three months), but that number is rarely twice the number of names actually needed for selection of venire panels. Sometimes, the number of names put in the box is just about equal to the number of names needed for venire panels, thus enabling the commissioners to virtually pick the verinemen. Sometimes, the number of names put in the box is not sufficient for the venire panels selected, and the commissioners are asked to add additional names. In one county, the names in the box were exhausted, the sheriff's deputies were instructed to go out on the street and bring in persons to serve on juries for cases about to go to trial. The survey also indicated considerable uncertainty among county clerks as to how many names were to be added each time and how often. It appears in many counties that there is little concern for estimating how many veniremen would be required and insuring that twice that number of names were placed in the box, the procedure instead being that of a set number of names which had traditionally been used.

Thus, the randomness that might be achieved by the "twice the number" rule is often lost. The rule itself, of course, only contemplates a limited degree of randomness, and a rule requiring that the number of names placed in the box be a percentage of the population, rather than an estimate of the court's potential need for jurors, would be more satisfactory to achieve genuine randomness.

Indiana Constitutional Requirements Respecting Juror Selection

The Indiana Supreme Court has stated that the method of selection of jurors must not be arbitrary and that complete imparity should be sought.² There has been no suggestion that the Court consider the use of jury commissioners from the two major political parties to contravene that standard. The Court has not spoken comprehensively as to what qualifications can be used for juror eligibility, although it stated in the *Vanderburgh* case that use of voter lists, rather than tax duplicates, was satisfactory because it "would include a representative cross-section of all segments of the citizenry and thereby assure representation of all classes." (255 Ind. at 513). It would appear that the statutory requirement that prospective jurors must be on the county tax rolls would be found to be constitutionally defective since it excludes a

large percentage of the community. The voluntary changeover to voter lists seems to have removed the need for such a decision.³ The Indiana Supreme Court has not, however, endorsed a standard requiring a wholly representative cross-section of the community. In *Shack*¹ the defendant in a murder prosecution challenged his conviction on the grounds that the jury commissioners' application of their statutory discretion excluded a particular class of potential jurors, one jury commissioner having admitted attempting to limit jurors to those "somewhat successful in life." The Court found no constitutional violation since systematic exclusion of a group was not shown. The Court did rule that "the more random the selection process, the less will be the appearance of arbitrariness." Thus, the Court seems to have adopted a test that discrepancies in the representation of various groups is not enough, absent actual systematic exclusion of a group.

It would seem difficult to prove that the limitation of potential jurors to voter registration lists results in such systematic exclusion of groups, although the task force findings indicate that certain groups, namely females, lower economic classes, young, and possibly minority groups, tend to be underrepresented by the present juror selection methods. This result is probably not entirely due to the use of voter lists, but rather arises from the manner in which the juror selection system works—the subjective application of discretion by the commissioners, the failure to attempt to trace persons whose jury notice has been returned because they have moved, the liberal granting of excuses from jury duty, and the financial requests and personal hardship of jury duty on certain classes and groups which encourages failure to respond and requests to be excused. It is clear that there are better sources than voter lists for achieving a random selection of the community and preventing under-representation of groups; in fact, no one source is generally adequate, and a combination of sources—such as voter lists, telephone directory, and motor vehicle registration—is most likely to achieve the best cross section of the community. However, the test thus far applied by the Indiana Supreme Court seems to fall short of requiring an attempt at achieving a representative cross-section. It appears likely, therefore, that reliance only upon voter lists in the present statutory judicial scheme for juror selection in Indiana is constitutional, although the entire juror selection system might well prove constitutionally defective because of systematic exclusion.

Perhaps more questionable under state constitutional standards is the statutory provision for jury commissioners to determine "good repute." The absence of any guidelines and therefore the potential for use of highly subjective standards raises constitutional questions. The task

force findings that county clerks and jury commissioners differ widely in their understanding of the commissioner's use of discretion raises further constitutional doubts. However, "key man" provisions have generally survived constitutional attack in federal and other state courts. The Indiana Supreme Court in *Shack* held that limited use of this discretion as provided for by statute is constitutional. The Court, disappointingly, did not provide much enlightenment as to the type of situation in which limited use of discretion might be exceeded. Judge DeBruler, in a concurring opinion, warned that any subjective test for prospective jurors is "bounded only by the whim or caprice of the one applying the test and is contrary to the goal of eliminating individual discretion and potential discrimination, from the selection process." (288 N.E. 2d at 165.)

It will, of course, be extremely difficult to prove that jury commissioners have used only limited discretion and have not abused limited discretion. The task force found some reluctance on the part of officials to discuss frankly the selection process and defensiveness as to what actually occurs; many county clerks simply restated the statutory requirements in describing how jurors were selected. Some admitted in further questioning that in fact, such standards are not followed (as, for example, the tax duplicates list requirement). It seems unlikely that a jury commissioner will admit systematic exclusion of any group, or bias for or against certain types of persons. Thus, commissioner's use of discretion, not regulated by any standards, seems to be, as in many other situations, involving vague administrative standards, a virtually unreviewable action.

Little criticism has been devoted by counsel in cases of juror selection procedures in Indiana except for juror qualifications and commissioner discretion. However, the task force findings indicate at least in certain counties, the overall administration of the juror selection process might be constitutionally defective. It seems possible a series of administrative procedures and actions can combine to result in serious underrepresentation on juries of certain groups in the community. For example, the task force found that in many counties, the voter registration lists used are a year old or older. Sometimes, this seems to be done for administrative convenience so that the juror selection officials would not use the same lists or files being used by voter registration personnel. However, the result is that a sizable percentage of the persons on outdated voter lists have changed addresses and newly registered voters are not picked up. Thus a voter registration drive which may register substantial numbers of groups who are not normally registered in large numbers (such as union members, old age pensioners, or students) will not

result in their consideration for jury duty until after those lists are retired by the voter registration office. In addition, persons may be purged from the voter registration lists for not having voted for a certain number of elections. They are thus rendered ineligible for jury duty.

Procedures used for notification of potential jurors can also result in greater exclusion for some groups than others. Persons who move frequently (lower income groups and young people are more likely to fall in this category) may not be at the address shown on the voter registration. The task force found that a high percentage, sometimes as high as 50%, of juror notices are returned to county clerks because the individual does not reside at the given address. Use of outdated voter lists increases the likelihood that the address will be wrong. It was found that most clerk's offices do not attempt to locate individuals when a juror notice is returned.

The administration of excusals from jury service can also result in underrepresentation of certain groups. Excuses are sometimes routinely granted upon request by judges, and in some counties, by a bailiff or clerk. In many counties, judges require proof of hardship, though employment, school classes, and other inconveniences suffice. The low pay given jurors and the requirement that a jury panel sit for a lengthy period (perhaps three months) make jury service for certain individuals, (such as self-employed, employees of employers who do not compensate them for lower jury service pay, full-time students, and mothers with children) extremely difficult. Also, such persons as retired individuals, federal or state employees (who continue to draw their salary while serving on jury duty) and housewives may be overrepresented. Obviously, particularized evidence would be required in individual cases to prove that the combination of administrative actions has resulted in systematic exclusion of a group.

U.S. Constitutional Requirements Respecting Juror Selection

The 7th Amendment right to trial by jury in civil cases only applies to trials in federal courts,⁵ but the 6th Amendment right to trial by jury in criminal cases is applicable to state trials through incorporation of the 6th Amendment into 14th Amendment due process,⁶ except for certain features not considered basic to that right, such as the unanimous verdict,⁷ and the twelve-person jury.⁸ However, the Supreme Court has held that the principle of federalism requires that the federal government refrain from imposing its own qualifications for jury service upon the states.⁹ Thus, federal courts have not found unconstitutional *per se* state juror selection procedures like the "key man" system (officials nominating "reputable" individuals to recommend prospective jurors

or themselves have the power to select those persons they believe to be qualified for jury duty) and the “blue ribbon jury” system (officials, sometimes after drawing the name of a prospective juror, apply certain tests to determine eligibility, including tests as to character and intelligence.)

These systems were rejected, however, by Congress in passing the Federal Jury Selection Act, 28 U.S.C. 1861 *et seq.*, which calls for random selection from sources such as voter lists, telephone directories, city directories, or a combination of them, to achieve the objective of a representative cross section of the community, and their constitutionality as applied continues to be questioned. (See “The Key Man System of State Jury selection as a Source of Violation of the Fourteenth Amendment,” 77 Dickinson L. Rev. 117 (1973).

In *Carter*,¹⁰ *supra*, the Supreme Court rejected the plaintiff’s argument that an Alabama juror selection statute that permitted commissioners to select persons “generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character and sound judgment” was invalid on its face. It also found that the practice of appointing all white commissioners by the governor was not necessarily proof of racial discrimination. Thus, the Court left open an attack upon a jury selection scheme where there is evidence of racial discrimination in its application.

The possibility was opened later.¹¹ The Court ruled that although the statistical data were insufficient to make a *prima facie* case of invidious discrimination in juror selection, the fact that the cards for potential jurors indicated their race “provided a clear and easy opportunity for racial discrimination” by the officials. It held that although there was “no evidence that the commissioners consciously selected by race”, the statistics made it sufficiently likely that they did so, at least unconsciously, and therefore the burden to prove nondiscrimination was shifted to the state. It found that the state did not adequately explain the elimination of blacks during the selection process and therefore held it unconstitutional. Thus, a procedure permitting officials to apply non-racial standards (such as honesty and intelligence) may not be unconstitutional on its face, if it can be unconstitutional as applied.

The Supreme Court¹² declined to decide whether the same standards would apply to cases involving sex discrimination, although Justice Douglas, in a concurrence, stated that it does. Commentators have generally agreed that discrimination based on economic status would also be ground for a finding of unconstitutionality.¹³ The findings of the task force which suggest that certain groups—especially women, lower economic groups, transients, students, and possible minority groups—are

underrepresented in venire panels in some Indiana counties seem to raise issues of a constitutional dimension. The Indiana statute, by permitting jury commissioners to determine whether jurors are of “good repute for intelligence and honesty”, without any additional guidelines or safeguards against arbitrariness, certainly does provide an opportunity for discrimination against such groups. Under the *Alexander* standard, there would be grounds for shifting to the state the burden of proving that the juror selection system is not discriminatory in a case where statistical evidence shows that certain groups are underrepresented.

The *Alexander* case seems to be a warning from the court that although a state may have a juror selection system that uses valid, non-discriminatory tests or standards for juror eligibility, many of such tests are unduly vague and, therefore, potential vehicles for discrimination by administering officials. Tests concerning age, literacy, residence in county, and lack of physical and mental handicaps provide an objective standard which can be applied and reviewed, but subjective character traits, like “good repute for intelligence and honesty,” do not. As stated in the *Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States*,¹⁴ such standards “are almost impossible to administer properly and uniformly. The requirements for services can too easily mean one thing to one clerk and another to a second.” For this reason, as stated in the *Report*, at 363, the use of such requirements was rejected in the Federal Jury Selection Act:

“The committee is in accord with those who emphasize the importance of obtaining competent jurors, but it believes that ‘the desire for competency must not be pursued to the extent that a fair cross-section is prevented.’ *Rabinowitz v. United States*, 366 F. 2d 34, 55 (5th Cir. 1966). The committee disagrees with those who suggest that the elimination of the key man system or subjective methods for determining “intelligence” or “common sense” will result in packing Federal juries with misfits and incompetents. Jurors still will be screened by the use of voting lists, by the statutory qualifications, by the court’s power to exclude unqualified jurors under specific circumstances, and by the use of preemptory and cause challenges (which are left undisturbed by the bill). We believe that jurors so selected will possess sufficient intelligence to understand the trial and adequate judgment to render a proper verdict.”

Recent Supreme Court developments indicate continued desirability of achieving a representative cross-section of the community in state juries. The decision in *Miller*¹⁵ permitting juries to apply “community” standards in the application of obscenity laws, makes it especially im-

portant that juror selection procedures insure fair cross-section representation on juries. It appears that although a “key man”, “blue ribbon” system of juror selection such as Indiana’s is probably constitutional on its face, the system is suspect in providing greater likelihood of discrimination. As applied in any particular county, it might be found unconstitutional because of actual exclusion of or serious under-representation of certain groups. The task force does not believe the findings provide sufficient evidence to make such a case, but that the administration of the selection system in a number of counties indicates arbitrariness and underrepresentation of certain groups which might be proven with sufficient investigation and adequate discovery devices.

FOOTNOTES

1. *State v. Vanderburgh Circuit Court*, 255 Ind. 505, 513, 265 N.E. 2d 524, 528 (1971).
2. *Harrison v. State*, 231 Ind. 147, 106 N.E. 2d 912 (1952); *State v. Bass*, 210 Ind. 181, 1 N.E. 2d 927 (1936).
3. Compare *Turner v. Fouche*, 396 U.S. 46 (1970) (holding unconstitutional a Georgia statute requiring school board members to be selected from “freeholders”).
4. *Shack v. State*, 249 Ind. 60, 288 N.E. 2d 155 (1972).
5. *Slocum v. New York Life Insurance Company*, 228 U.S. 364 (1913).
6. *Duncan v. Louisiana*, 391 U.S. 145 (1968).
7. *Apodaca v. Oregon*, 406 U.S. 404 (1972).
8. *Williams v. Florida*, 399 U.S. 78 (1970).
9. *Carter v. Jury Commission*, 396 U.S. 320 (1970).
10. *Carter v. Jury Commission*, *supra*.
11. *Alexander v. Louisiana*, 405 U.S. 625 (1972).
12. *Alexander v. Louisiana*, *supra*.
13. *Cassell v. Texas*, 339 U.S. 282 (1950).
14. *Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States*, 42 F.R.D. 360, 362 (1967).
15. *Miller v. California*, U.S. 93 S. Ct. 2607 (1973).