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Book Reviews: Jury Selection Procedures: Our Uncertain Commitment to Representative Juries

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JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURIES. By John M. Van Dyke.* Ballinger Publishing Company, Cambridge, Massachusetts. 1977. Pp. 426.

Jury Selection Procedures is an ambitious examination of the status of the jury in the American legal system. Professor Van Dyke has surveyed the current procedures for selecting juries in the state and federal courts, compared these procedures with Constitutional and Supreme Court guidelines, and has offered his recommendations for achieving truly representative juries.

The U.S. Constitution is, unfortunately, silent on the subject of jury selection. The sixth amendment does require that juries in federal courts be "impartial."[1] This requirement has also been applied to state courts, through the selective incorporation doctrine and the fourteenth amendment.[2] The problem of how an impartial jury is to be selected remains an issue, however.

The Supreme Court has stated that in order for the jury to be an "instrument" of "public justice," it must be "a body truly representative of the community,"[3] and that it should be a "cross section of the community."[4] The general public includes many minorities and persons biased in every way possible. Therefore, to accurately represent their community, juries should not be limited to the white male middle class.

Professor Van Dyke offers convincing statistics that indicate that our nation's juries are not truly representative of the communities in which they are located. Studies conducted in state and federal courts across the country show that blue collar workers,[5] nonwhites,[6] the young and the elderly[7] and women[8] are all underrepresented to varying degrees.

Operating from the premise that juries should "reflect the complex fabric of society as faithfully as possible,"[9] Professor Van Dyke makes wide-ranging suggestions for improving jury selection procedures. He divides the process of jury selection into three stages, and points out the difficulties at each stage.

The first stage is the assembly of a master list of eligible individuals. Congress has provided that Federal jury "wheels" are to

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1. U.S. CONST. amend VI.
2. Duncan v. Louisiana, 391 U.S. 145 (1968).
3. Smith v. Texas, 311 U.S. 128, 130 (1940).
4. Glasser v. United States, 315 U.S. 60, 86 (1942).
5. J.M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURIES at app. F, 293-310 (1977) [hereinafter VAN DYKE].
6. *Id.* at app. G, 311-30.
7. *Id.* at app. H, 332-47.
8. *Id.* at app. I, 350-71.
9. *Id.* at 23.

be compiled from the list of registered voters in each jurisdiction, supplemented by additional lists where necessary to achieve a "fair cross-section of the community."[10] Most states also use voters' lists as a basis.[11] It is argued that non-whites, the young and blue collar workers are all underrepresented on voter registration lists simply because these groups register to vote less often. In order to achieve a more valid cross section of the community, Professor Van Dyke suggests that voter registration be simplified. He also states that the voters' lists should be supplemented by other lists, such as the list of licensed drivers in a jurisdiction and the census rolls.

The second problem area in the jury selection process occurs after potential jurors have been randomly selected from the jury wheel. Sixty percent of these potential jurors request excusal from jury service for such reasons as economic hardship, illness, problems with child care, and transportation difficulties.[12] Van Dyke attacks the liberal way in which requests for excusal are granted. He argues that the persons to whom these excuses are offered will usually take advantage of the offer. Since jury service involves a major commitment of time, but provides only minimal financial rewards, usually only those who are required to serve will do so.

The groups of people who qualify for excusal from jury service are to a large degree those which are already underrepresented on the master jury wheel. The excuse of economic hardship is particularly applicable to the young, blue collar workers and others receiving hourly wages. Women with children are excused almost automatically. The elderly are also granted excuses by statute in twenty-eight states, and by practice in most of the other jurisdictions.

Professor Van Dyke advocates easing the economic burden on jurors while tightening and standardizing the requirements for excusal from jury service. He believes that the daily monetary allowance should be raised and that the length of the term of service should be reduced. He also advises granting allowances for child care and transportation or lodging expenses in those instances warranting such measures. Van Dyke argues that this dual program of making jury duty more attractive but also more difficult to avoid, will result in more minorities appearing in the jury box.

The third stage at which fault is found in the jury selection process involves challenges. Professor Van Dyke advocates a modification of the current system of peremptory challenges and challenges for cause. The purpose of challenges for cause is to remove those potential jurors who have demonstrated certain biases. The problem with this type of challenge is that every human being has biases of some sort. In fact, the reason for wanting a

10. 28 U.S.C. §§ 1861-1869 (1976).
11. VAN DYKE, *supra* note 5, at app. A, 258-62.
12. *Id.* at 111.

representative cross-section of the community is so that these biases will balance out each other. When one set of biases is completely eliminated, the jury becomes less representative. The author therefore favors limiting the scope of voir dire questioning to determining whether potential jurors have any specific biases toward a particular case, e.g., to ascertaining if a juror is acquainted with a party. Successful challenges for cause would be required to show this type of specific bias.

Van Dyke contends that the number of peremptory challenges should also be reduced. These challenges are seen as tools by which each attorney seeks to achieve a jury biased in his favor by eliminating those jurors whom he thinks may favor his opponent's case. This practice means that the resulting jury will be less representative than the panel which is first sent into the courtroom. If abused, the procedure can also serve to eliminate a certain segment of the population from jury duty. The appellant in *Swain v. Alabama*,[13] a young black, argued this point when he complained that, although an average of six or seven blacks usually appeared on a trial jury list, not one black person had served on a criminal jury in his jurisdiction in fifteen years. The Supreme Court ruled however, that to constitute a reversible error, the burden was on the accused to prove a deliberate and systematic exclusion of a race no matter what the crime, the defendant, or the circumstances.[14]

Professor Van Dyke believes that the number of peremptory challenges should be reduced for the accused and reduced or eliminated for the prosecution.[15] He also suggests that once the accused presents a prima facie case of improper exclusion in his trial, the burden of proof should shift to the prosecutor to explain how this has occurred.[16]

The premise that runs through all of Van Dyke's suggestions is that jury selection should be based on a truly random selection from the community at large. He cautions that two recent developments — the acceptance of juries of less than twelve and less than unanimous verdicts — detracts from the goals sought. When juries of six[17] are permitted, he argues, there is even less of a chance for minorities to reach the jury box. When 9-3 decisions are accepted,[18] the minorities who do succeed in being accepted for jury service have less of a chance of controlling the verdict. It is argued that by allowing these trends, the Supreme Court has even further reduced the voice afforded minorities in the jury system.[19]

13. 380 U.S. 202 (1965).
14. *Id.* at 223-24.
15. VAN DYKE, *supra* note 5, at 166-68.
16. *Id.* at 167.
17. Williams v. Florida, 399 U.S. 78 (1970).
18. Johnson v. Louisiana, 406 U.S. 356 (1972).
19. VAN DYKE, *supra* note 5, at 214.

In summary, *Jury Selection Procedures* is an appeal by the author for a revamping of our current procedures. Professor Van Dyke has very effectively pointed out the problems which exist. The evidence, as provided in the text and the appendices to the book, clearly indicates that our current system is not as faithful to the concept of representative juries as it should be.

The author has also provided his recommendations for correcting these three problem areas. His suggestions, wide-ranging and expansive in nature, are not as convincingly presented as they might have been. Instead of showing how he believes the changes should be enacted, Professor Van Dyke merely lists possible reforms. All of these recommendations merit consideration, but there is no indication as to the priority he gives each suggestion. Without this, the book loses some of its vigor and continuity. Instead of being a campaign for an integrated series of reforms, it is simply a list of possible measures that may work in certain instances. The reader is left to determine his own set of priorities.

The book also lacks continuity in the Postscript, in which the author discusses jury nullification. The topic of jury nullification instructions is not dealt with to any degree in the book until the Postscript. Because of this, the impact of the author's discussion is lessened. The reader is forced to wonder why, if the topic is so important, it was not more effectively covered in the main text. The result is a lack of cohesiveness.

Jury Selection Procedures, when accepted as an historical study of the evolution of the jury in our current system, is a valuable contribution to society. It is written without too much technical language, so that it can be understood by most readers. This is beneficial, since only through widespread understanding of current problems in jury selection procedures can the type of reforms that Professor Van Dyke advocates be enacted.

G. Mitchell Mowell