Civil Justice Digest

NEWS, RESEARCH & COURT DECISIONS ON THE U.S. CIVIL JUSTICE SYSTEM

Voir Dire: Choosing the Jury

In a fascinating new article, Valerie Hans and Alayna Jehle examine the ways in which voir dire is practiced and how those ways impact the selection of the jury. (Valerie Hans and Alayna Jehle , *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHICAGO-KENT L.R. 1179 (2003)).

Professor Valerie Hans is Professor of Criminal Justice and Psychology at the University of Delaware and holds a secondary appointment in the Legal Studies Program. She has been a visiting scholar at Stanford Law School, University of Pennsylvania's Law School and Wharton School of Business , and the School of Law at the University of Cardiff in Wales. Professor Hans received an M.A. and Ph.D. in Psychology from the University of Toronto and a B.A. from the University of California, San Diego.

Her research and writing have centered on the relationship between the public and the courts, and reflect her background in psychology as well as her interest in interdisciplinary approaches to the study of law. Professor Hans's prime research specialty is the institution of the jury. She is the coauthor (with Neil Vidmar) of JUDGING THE JURY (Plenum, 1986), which has been cited by a number of courts including the United States Supreme Court; and BUSINESS ON TRIAL (Yale University Press, 2000), which describes a decade of research she undertook to study how juries decide cases with business and corporate parties **[BUSINESS ON TRIAL was reviewed in the CIVIL JUSTICE DIGEST, vol 6, nos 3-4 (2001)]**

Professor Hans has written many articles and lectured widely on different aspects of the jury system, including jury selection, jury decision making, jury instructions, jury bias, the jury in death penalty cases, and jury reform. In other research, she has looked at public opinion about law and the courts, and the impact of the media on people's views of the legal system.

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Editor's Note: This article has been excerpted from the original article with permission of the authors and the law review. Citations are omitted for reasons of space. The full article, with citations included, can be easily accessed at: lawreview.kentlaw.edu/articles/78-3/hans_jehle.pdf.

Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection

The detection of juror bias is a serious challenge in contemporary jury trials. Prospective jurors have a host of attitudes, relevant experiences, and potential biases that merit full exploration during the voir dire questioning period in jury selection. Some attorneys, deeply concerned about possible juror bias but unable to examine it adequately during voir dire, have relied on demographic characteristics and stereotypes only slightly less preposterous than the avoidance of bald men and people with green socks. This article reviews what we know about the voir dire process, concludes that typical voir dire is often ineffective in detecting juror bias, and recommends specific changes in voir dire practice.

Juror Bias in Criminal Trials

Traditionally, there has been great concern about the problem of juror bias and the need for searching voir dire in criminal cases. In criminal trials, jurors make decisions that may profoundly affect defendants. The legal system must ensure that these critical decision makers are able

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to make fair and impartial decisions. Peremptory challenges and challenges for cause are the legal tools used to remove biased jurors. However, empirical data have shown that many jurors who sit for trials are influenced by prejudices and biases.

The necessity of examining potential jurors' attitudes gains importance from recent experimental work on how jurors reach their decisions. These studies show that jurors' life experiences and attitudes are prime factors in shaping perceptions of evidence. Life experiences and preconceptions contribute to the narrative or story that jurors develop as they listen to evidence and decide the case. Evidence that is inconsistent with jurors' preconceptions and the developing story may be discounted or ignored.

Studies have shown that about ten percent of verdict preference disparities can be predicted using statistical models based on the individual juror's attitudes, background characteristics, and personality traits. Attitudes tend to be more powerful predictors of verdict choices than demographic characteristics. Even though at times demographic variables such as a juror's gender, age, race, income, and occupation may be associated with favorable or unfavorable attitudes, their links to verdicts are usually modest. Furthermore, it is now unconstitutional to use a potential juror's race and gender as the basis for a peremptory challenge.

Jurors' pre-existing attitudes toward plaintiffs and corporate defendant may influence civil jury verdicts and awards.

Capital jury selection poses particular challenges. Pretrial publicity, vivid and gruesome evidence, and the awesome duty of the capital jury interact to create a greater potential for juror bias. A prospective juror's support for the death penalty, a major factor that is used to determine whether the juror is suitably impartial or "death-qualified," is related to a host of other criminal justice views and attitudes. Death penalty support and related attitudes are also linked to race and gender. Therefore, challenges based on death penalty attitudes may have a deleterious impact on the representativeness and impartiality of the capital jury.

Thus, the potential for bias in criminal jury trials, and empirical research about the role of attitudes and perceptions in shaping juror decisions, make it imperative to question prospective jurors during voir dire.

Juror Bias in Civil Trials

Juror bias appears to be a problem in the civil jury system. In recent years, national polls have produced some disquieting results about the views and attitudes of the American citizenry. For instance, significant minorities of poll respondents said that they could not be fair and impartial if they were asked to sit as jurors in cases involving tobacco companies, asbestos manufacturers, or health maintenance organizations. A national poll conducted in the fall of 2002, following a series of high-profile corporate scandals, found that many members of the public expressed negative views of corporate management.

On the other hand, many members of the public believe that jury awards are "out of control." Other research indicates that jurors and the public question the merits and credibility of civil plaintiffs, believing that there are substantial numbers of frivolous lawsuits. For instance, people have preconceptions about whiplash and other connective-tissue injuries, believing they are minimal or fraudulent, which can affect legal decisions about the merits of plaintiffs' claims of these injuries. These attitudinal patterns indicate that both defendants and plaintiffs in civil trials face the potential of juror bias.

The conclusion from the existing research is that jurors' experiences with and pre-existing attitudes toward civil litigation, plaintiffs, and corporate defendants shape perceptions of evidence and may influence civil jury verdicts and awards. These experiences and attitudes should be explored during voir dire to determine whether serious bias in prospective jurors exists.

The research we review below indicates that limited voir dire, as it is practiced in many United States jurisdictions, is not effective in identifying and vetting jurors with relevant experiences and attitudes. Jurors may misrepresent or withhold relevant information. However, the more frequent problem is that the structure of the voir dire does not facilitate the full disclosure of relevant information. This article describes how voir dire is practiced in different jurisdictions, and how features of voir dire contribute to judges' and attorneys' difficulty in identifying juror bias. It analyzes the factors that impede effectiveness, and recommends specific improvements in voir dire practice.

Variations in Voir Dire

The practice of voir dire and jury selection varies among the state and federal jurisdictions. There are a number of ways in which voir dire can be carried out. Table 1 shows the possible range of variations in voir dire practice.

At one end of the continuum is the most limited form of voir dire. Limited voir dire is characterized by judge-only questioning, a limited range and number of questions, questions asked exclusively in yes/no format, group rather than individual questioning of prospective jurors, and reliance upon jurors' self-identification as potentially biased. At the other end of the continuum is the most expansive form of voir dire. In this form, the judge and the attorneys both participate directly in the questioning of prospective jurors, the questioning is wide-ranging,

questions include both close-ended and open-ended items, jurors are individually questioned, and the judge and attorneys are able to make independent assessments of the potential bias of the prospective jurors rather than relying exclusively on the juror's self-assessment of bias.

There is minimal empirical work on how actual voir dire practice varies from state to state. The National Center for State Courts, in conjunction with the Bureau of Justice Statistics, has published comprehensive information about one dimension of voir dire, who conducts the questioning. Table 41 from the Bureau of Justice Statistics compendium, State Court Organization 1998, reports who conducts voir dire in state and federal trial courts of general jurisdiction.

Traditional Limited Voir Dire	**Expansive Voir Dire**
No pretrial juror questionnaire	Pretrial juror questionnaire
Limited number of questions	Larger number of questions
Questions very specific to trial	Broader range of questions
Close-ended questions that permit only yes or no responses	Combination of close-ended and open-ended questions
Group questioning of prospective jurors	Individual, sequestered voir dire
Judge alone conducts voir dire	Judge and attorneys both participate in voir dire

By far the most frequent practice is the combination of attorney and judge questioning, used in 42 jurisdictions (39 state courts of general jurisdiction, the courts in the District of Columbia and Puerto Rico, and the federal district courts). A total of 39 of these 42 jurisdictions are classified as "attorneys and judge" and the remaining 3 as "attorneys and/or judge" indicating that either might conduct the voir dire alone. In six states, judges conduct the voir dire alone. In five states, attorneys alone conduct the voir dire.

The Federal Judicial Center surveyed 124 federal judges in the 1990s to determine their actual voir dire practices. Fully 59% of the judges said that they ordinarily allowed counsel to ask questions during voir dire in civil cases, up from about 30% in 1977. About a third of all judges (33%) said they conducted the initial examination and then permitted attorneys to ask a limited number of additional questions. Another 18% said they conducted the initial exam and then gave counsel an extended opportunity to ask questions. Finally, 9% of the judges allowed counsel to conduct most or all of the voir dire. In an interesting finding, the extent of attorney involvement in voir dire bore no relationship to the reported amount of time typically spent on voir dire.

The Jury Summit 2001 conference brought together judges, court administrators, jury commissioners, lawyers, and other interested parties from 28 U.S. jurisdictions to exchange innovative practices and ideas about the conduct of jury trials. The participants completed a questionnaire that asked for the length of the typical non-capital felony voir dire in their jurisdictions. The average felony voir dire time was 5.13 hours, ranging from less than one hour to five days. The modal or most common response was two hours.

A study of 382 jury trials in four state courts (in Los Angeles, Maricopa County [Phoenix, Arizona], the District of Columbia, and the Bronx) also showed variation in voir dire across jurisdictions. The length of the average voir dire reportedly ranged between two and three hours, except in the Bronx, which had a median length of seven hours. Judges conducted voir dire in Los Angeles, but in the other three sites both judges and attorneys participated in voir dire questioning of prospective jurors. In Los Angeles and the Bronx, case-specific juror questionnaires were used in about a third of all jury trials, compared to 19% of DC trials and no trials in Maricopa County. All of the empirical evidence about the length and extensiveness of voir dire suggests that it differs substantially between jurisdictions.

Some jurisdictions have quite limited voir dire, and judges are reluctant to expand the range and types of questions asked of prospective jurors, particularly in lower-stakes cases. Attorneys who have pressed for expansion of voir dire face an uphill battle. What difference might it make to have a limited versus expanded voir dire? We turn to the research evidence on that question.

Consequences of Limited Voir Dire

Many commentators have observed that limited voir dire presents serious problems for identifying biased jurors. A project undertaken by District of Columbia Superior Court Judge Gregory E. Mize provides a compelling demonstration of the weaknesses of limited voir dire. Judge Mize's voir dire procedure was typical of judges in the D.C. Superior Court. After initially asking a set of questions to a group of about sixty prospective jurors in the open courtroom, he and the attorneys would follow up individually with those who had responded affirmatively to the initial questions. Thus, his typical voir dire procedure was quite comparable to the limited, or least expansive, voir dire approach described earlier.

However, in a new experimental procedure, Judge Mize decided to interview every potential juror regardless of whether they responded affirmatively to the initial questions. Under the experimental procedure, he prompted each juror who had not indicated a "yes" response to any of the initial questions, "I notice you did not respond to any of my questions. I just wondered why. Could you explain?" or "Is it because the questions did not apply to you?" Mize reports that although many jurors indicated that the questions did not apply to them, a significant minority said that they did have something to say in response to the questions. Some of these jurors

provided disturbing information that led to their removal for cause. For example:

- *"I do not understand your questions or remember the past very well."*
- *"I was frightened to raise my hand. I have taken high blood pressure medications for twenty years. I am afraid I'll do what others tell me to do in the jury room."*
- *"I was on a hung jury before – I don't know if I can follow instructions of the court for gun possession – that was the problem in my other trial." [In a trial for gun offenses]*
- *"My grandson was killed with a gun so the topic of guns makes my blood pressure go up." [In a trial for gun offenses.]*
- *"I'm the defendant's fiancée."*

What Judge Mize uncovered in his courtroom led him to conclude that individual voir dire of all prospective jurors is "an indispensable way of ferreting out otherwise unknown juror qualities."

A number of systematic studies reinforce Judge Mize's conclusion that a limited form of voir dire is not very effective in detecting which prospective jurors are biased. Most of the research on voir dire has been done with criminal cases, but the research findings should apply to civil cases as well.

Dale Broeder, a member of the Chicago Jury Project begun in the 1950s, undertook one of the earliest systematic studies of voir dire. Broeder interviewed 225 jurors after their trials had concluded. Broeder reported that a number of jurors had failed to reveal potentially prejudicial views or relevant information during voir dire. He concluded, "voir dire was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.' "

Zeisel and Diamond (1978) studied the use of peremptory challenges in federal district court. In twelve trials, prospective jurors who had been challenged by the prosecution or the defense remained in court, listened to the evidence, and were asked by the researchers to render a verdict. On the basis of post-trial interviews and information about what judgments the challenged jurors would have made if they had been selected, Zeisel and Diamond reached a conclusion similar to Broeder: "On the whole, the voir dire, as conducted in these trials, did not provide sufficient information for attorneys to identify prejudiced jurors."

In another study of the efficacy of voir dire, Seltzer, Venuti, and Lopes (1991) observed jury selection in 31 criminal trials in Superior Court in the District of Columbia, recording the questions asked of prospective jurors and their answers. They conducted post-trial interviews with 190 jurors who had been seated, and compared their voir dire responses with the information gleaned from the post-trial interviews. Seltzer and his colleagues observed a number of discrepancies. For instance, 25% of jurors who admitted that they or members of their family had been victims of crime nevertheless did not disclose that fact on voir dire. When data from jurors who were victims themselves were examined separately, the researchers concluded that over half of those who had been crime victims and should have come forward did not do so.

Research by Cathy Johnson and Craig Haney (1994) uncovered divergence between voir dire responses and views expressed during post-trial interviews. They observed four felony voir dires in California. The average time of the voir dire was 4 hours and 55 minutes. The judge, prosecutor, and defense attorney all participated in the questioning of prospective jurors, so the voir dire was more extensive than in some of the other projects we have reviewed. The researchers found that prosecutors and defense attorneys were somewhat effective in eliminating potential jurors who would have been hostile to their sides. However, some jurors served who disagreed with the presumption of innocence. Other jurors admitted they had not been able to set aside their personal feelings or biases during the trial.

Nietzel and Dillehay (1982) compared the effects of different types of voir dire in capital cases. They concluded that limited voir dire in capital cases decreases the likelihood of successful defense challenges for cause. In their first study, they compared four types of voir dire methods in thirteen Kentucky capital trials. The voir dire procedures varied. Some voir dires were conducted in a sequestered fashion, while in others the questioning of prospective jurors took place en masse in open court, in the presence of other potential jurors. The type of voir dire affected the rate of successful challenges for cause. Judges eliminated a greater percentage of jurors for cause for defense reasons when jurors were questioned individually. In a second study, Nietzel, Dillehay, and Himelein (1987) replicated the basic finding with a sample of capital voir dires from South Carolina, California, and Kentucky. The researchers undertook a number of analyses to determine why the defense challenges for cause were higher under more extensive voir dire, and concluded that the greater information about prospective jurors was responsible.

Stereotypes and Limited Voir Dire

A major consequence of limited voir dire is that it encourages attorneys to rely on stereotypes based on a juror's demographic characteristics, because that is often the primary information that they have about each individual juror. If jurors are questioned in groups instead of individually, then lawyers may know little about most prospective jurors except for obvious physical and demographic characteristics. Attorneys may have little alternative to exercising their peremptory challenges on stereotypes based on these factors.

Stanford Law School professor Barbara Babcock has analyzed the issue of stereotyping during voir dire. Babcock argues that the pool of information about prospective jurors must be expanded to avoid relying on stereotypes. Tailored questionnaires, for example, help the parties base their arguments for cause challenges and their peremptory challenge decisions on prejudice rather than the color of a person's skin.

Juror Privacy and Voir Dire

One issue that arises in the context of voir dire is the privacy of individual prospective jurors. Jurors reportedly feel that the judge and the attorneys are not sensitive enough to jurors' privacy concerns. When jurors are forced to divulge information that does not seem relevant to the case, such as their addresses or where their children attend school, jurors may experience dismay and distrust. They may see this as private information that is completely irrelevant to their potential for bias in the trial; some jurors even believe it is dangerous to allow access to it. Jurors may fear retaliation after their verdict. Jurors who do not understand how personal information and other lines of questioning are relevant to potential bias may be less likely to disclose the information.

Features of limited voir dire encourage lack of candor.

An empirical study by University of Texas sociology and law professor Mary Rose (2001) reveals that many jurors feel that some voir dire questions seem unnecessary or unrelated to the case; 43 percent responded so in her study. Jurors who sat for the whole trial were less likely than those excused from service to say that voir dire questions were irrelevant, yet 30 percent of them still did so. About a quarter responded that they felt uncomfortable with some questions, while a similar proportion felt that the questions seemed "too private." When asked how offended they were by voir dire questions, the average ratings were around the middle on the 7-point scale

Questions that the jurors interviewed by Rose found to be unnecessary, uncomfortable, or too private pertained to three broad categories. The first was their involvement with crime or the courts, including their family's experiences with crime and the courts and past crime victimization or criminal charges. Some examples are, "Have you ever been to court before?" or "Have you ever hired an attorney?" The second category dealt with the personal characteristics of the potential jurors and their families, including marital and parental status, general location of residency, and the juror's, spouse's, and children's type or place of employment. Some questions asked were, "Do you have any children?"; "What are their ages?"; and "Where do you work?" The third category of objectionable questions related to interests and associations, including religious affiliations, voluntary organizations, hobbies, and gun ownership. Most of the jurors felt these questions were not relevant and instead encouraged stereotyping about their proclivities.
One juror, for example, questioned how experiences with the courts and one's family's experiences have to do with a juror's ability to be fair.

> I could see a criminal record, but even with a misdemeanor, if you've served your time, why do you got to keep paying? The questions they asked had nothing to do with how a person could be as a juror. Your family isn't going to be on the jury, you are. If it's my [criminal] record, OK, but [a family member] could die in the gas chamber, and it's not you. They dig too much into the family, and that's why some don't want to be on the jury. They avoid it.

Jurors saw particular questions as objectionable. In one dug case, four jurors did not like being asked if they knew people with alcohol or drug problems. One man admitted to his own DUI, but said, "I didn't want to talk about it in front of a room filled with 100 or so people." Two potential jurors did not approve of another prospective juror being forced to share the medical condition of his ill wife with the panel. In one extreme case, a female juror admitted to having been raped, but never reported it to the police. The prosecutor did not believe her when she said she could be fair, so he bluntly described alleged facts and brought the juror to tears, getting her to say she could not be impartial. Several jurors cited this incident as being too private or uncomfortable

Despite their apprehensions with certain questions, the jurors still rated most questions as useful and comfortable; the attorneys' concern for the jurors' privacy was rated higher than the mid-point. The jurors questioned in this study seemed to have some concerns about how the court handled their privacy rights, but not to the level of outrage about their treatment. Thus, privacy concerns about prospective jurors are an issue to be considered in the conduct of voir dire, balanced against the needs of the court to assess bias.

Why is Limited Voir Dire So Ineffective?

There are a number of reasons why limited voir dire is an inadequate method of detecting juror bias. Some jurors, probably the minority, lie purposefully. More often, jurors fail to disclose pertinent information, because of privacy concerns or other factors. Still others may not recognize their own biases. Features of limited voir dire exacerbate these problems.

Sometimes prospective jurors do not plan to deceive

the judge and attorneys, and instead their false disclosure is due to their overestimation or underestimation of their attitudes and biases. Often people are unaware of how much influence certain experiences can have over the decisions they will make in the future. Others are so concerned with the pressure to be an impartial juror that they do not think that they are well suited enough for the task, whether or not they had any experiences related to the case that would cause their impartiality.

Even when jurors are able to recognize their biases and disclose them, the judge may still elicit a false response that is more in line with the desirable answer. If a judge asks if the juror could be impartial and the juror replies no, the judge may continue that it is the juror's duty to follow the law and ask the question again. Jurors may give in to the pressure to comply and say they can be impartial, even though their real feelings have not changed. The judge's approval is important to a lot of jurors and many will alter their responses or hide certain attitudes in order to be perceived favorably. Many prospective jurors who have a desire to serve on the jury want to appear desirable to the attorneys and the judge so that they are not excused.

The desire to appear favorably is a main concern of jurors, and that shapes the attitudes and opinions that they disclose during the voir dire. Therefore, jurors are hesitant to share embarrassing experiences and beliefs because of the broad audience that can learn of their responses. The lawyer, the judge, and other prospective jurors would hear them, in addition to the rest of the public and the court reporter who records their words into official documentation that can be seen by others later in the future. This large potential audience may create fear in those jurors who are too shy for public speaking. They may fail to volunteer their prejudices or will provide only limited responses to questions.

Another issue is that a small number of questions may not cover critically important areas of potential bias. With only modest information about prospective jurors, judges and attorneys may be completely unaware of prospective jurors' relevant experiences and background and may be oblivious to the importance of exploring such experiences during voir dire. For example, in an interview study one of us [Valerie Hans] conducted, it was not uncommon to discover that jurors had relevant experiences (for example, a juror's permanent limp caused by a childhood knee injury, in a case in which the plaintiff claimed knee problems) that had not arisen during voir dire questioning. Lack of information prevents judges and attorneys from reviewing and assessing pertinent data.

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The form of the question is critical. Is it a leading question, where the "correct" or legally and socially appropriate answer is obvious? Lawyers, of course, are well aware of the dynamics of asking leading questions, posed not to obtain information but to produce a desired effect. Social psychologists have documented a phenomenon they label the "social desirability effect." People are motivated to present themselves in a positive, socially desirable light. The leading questions typical of limited voir dire often suggest the right, socially desirable answer. For similar reasons, open-ended questions are often superior to close-ended questions for obtaining accurate information.

A major drawback of group voir dire is that it requires prospective jurors to identify their own potential biases and come forward. However, jury duty is often stressful for jurors and they may be too shy or nervous to come forward even if they have a pertinent experience to discuss. A criminal trial might involve drugs, sexual behavior, violent victimization, or other issues that are difficult for prospective jurors to discuss especially if they have had similar experiences. Civil litigation can involve accidents, personal injury, or medical operations. Jurors with similar experiences may be too embarrassed to volunteer their experiences. Even if jurors are willing to reveal all, they may be unaware of their own biases. Psychological research documents that many people are not conscious of some of the significant factors that shape their behavior.

Alternatives to group questioning include individual questioning and the use of juror questionnaires. Questioning prospective jurors individually allows the judge or attorneys to probe for relevant knowledge and experiences and to ask each juror specific questions about them. Use of questionnaires has another advantage. Instead of the immediate response required of any type of personal questioning, questionnaires are filled out in private and allow jurors to honestly reflect on the areas being examined and to search their memories for relevant experiences and beliefs. Although it is still possible for jurors to lie or withhold information, it is not as easy or as likely as it is with group questioning.

Who does the questioning may also play a role. Some studies suggest that judges are not as effective as attorneys in uncovering potential biases. Some of the advantage may accrue from the fact that the attorneys know much more about their case than the judge does and therefore are better able to pose good questions during voir dire. If judges and attorneys tend to ask different types of questions (with judges preferring close-ended questions and attorneys open-ended questions, for exam-

ple) that could make a difference in their effectiveness as well.

The role differential between judge and attorney on the one hand and the juror on the other may also affect a juror's candor. Suggs and Sales (1981) reviewed the research on self-disclosure, or people's willingness to reveal information about themselves. Suggs and Sales suggest that because judges have higher status than attorneys, they are more likely to inhibit jurors' self-disclosure. Susan Jones (1987) conducted an experiment to explore this hypothesis. She gave subjects selected from a voters' list a pretest measuring their attitudes toward a variety of social and legal issues. She measured attitudes toward minorities, courts, sociolegal issues, and deterrence. Then, the study participants experienced mock voir dire. The voir dire varied whether an attorney or a judge questioned the participants about their attitudes. Actors were assigned to play the role of either a judge or an attorney during the voir dire questioning.

Jones compared the participants' responses to the pretest and the voir dire, measuring the similarities and differences between the two. Interestingly, mock jurors changed their expressed attitudes more when questioned by judges, in line with the Suggs and Sales hypothesis.

In conclusion, features of limited voir dire encourage lack of candor. However, this conclusion also suggests the framework for a remedy. Expanding voir dire in specific ways can encourage jurors' honesty and full reporting, and improve the court's and advocates' ability to detect prejudice in potential jurors.

Group voir dire is an inadequate method of assessing juror bias.

Recommendations

There are a number of ways to improve the voir dire process. Below, we highlight four specific changes that would enhance the ability of counsel and the courts to identify potentially biased jurors during voir dire.

Increased use of juror questionnaires. The use of juror questionnaires allows jurors to answer voir dire questions in writing. Supplemental questionnaires have several advantages. Questionnaires are efficient in that they can quickly pinpoint for the court and the attorneys the specific areas that require individual follow-up questioning. The private nature of the questionnaire can be a relatively comfortable way to reveal sensitive material that might arise in criminal and civil cases, such as past crime victimization or medical experiences. It also encourages completeness, as prospective jurors have more time to contemplate their answers than they would if they answered them orally

In many cases, questionnaires can be filled out while jurors are waiting to be called, further increasing efficiency. If lengthier questionnaires are required in complex trials, they can be completed at home in advance of the trial and mailed to the court. Although there is some risk that others may provide input or even fill out the questionnaire if it is done at home, this approach has been used successfully in a number of high-profile trials where a lengthy questionnaire was required.

Most cases, though, might be able to use relatively brief questionnaires consisting of several background items along with case-specific questions. One option is to develop a standard form for particular types of civil jury trials that would be printed on a pressure-sensitive form with multiple copies. The bottom form would go to the jurors, and other copies would go to the judge, the plaintiff's attorney, and the defense attorney. The form would include the standard background questions and a supplemental set of questions appropriate for the specific type of trial. For example, in most automobile accident trials, the court and attorneys will want to know about any automobile accidents a prospective juror has had, and any injuries that occurred. Using a questionnaire to obtain this information (rather than relying on en masse questioning) increases the likelihood of getting complete information and does it in an efficient manner. It also identifies the prospective jurors with relevant accident experience who require individual follow-up.

Jurors whose names are called for a particular case could fill out the forms in the jury assembly room, and bring their completed forms with them to the courtroom, where the copies would be distributed prior to jury selection. Those jurors who are not selected for the case would get their copies back. In a one-day/one-trial system, they could then re-use the copies if appropriate for another jury selection. Jurors who serve on the case could also get their copies back unless the judge or parties require the copies for the duration of the trial or any appeals.

Changes in the method of questioning. Group voir dire, in which prospective jurors are asked en masse to identify potential biases and to come forward, is an inadequate method of assessing juror bias. Some method of obtaining specific information about key issues in the case from each juror, such as using juror questionnaires or asking individual questions, is needed. As Judge Mize discovered, even a brief opportunity to speak face-to-face with individual jurors produces relevant information that is not obtained in the group questioning method.

An intermediate approach that is used in some jurisdictions, particularly those with attorney questioning, is to ask a set of questions to small groups of jurors, varying whether questions are targeted to the group as a whole or to individual jurors by name. There could be some positive advantages of this method. For example, prospective jurors who disclose personal views and experiences can serve as a model, encouraging self-disclosure by oth-

er prospective jurors. Compared to juror questionnaires or individual questioning, however, a juror's responses are not as private, since they are given in open court, and they could taint the views of other jurors. Another disadvantage is time, since questions need to be repeated for subsequent groups of potential jurors.

Expand the types of questions that are asked during voir dire. In limited voir dire, it is typical to ask only a question or two, if that, pertaining to the subject matter of the case. More often, a general question about the potential for bias (Is there anything that would prevent you from being a fair and impartial juror in this case?) is all that is asked. For greater effectiveness, the voir dire should include a larger number and broader range of case-specific questions. The items should incorporate some open-ended questions in which jurors are encouraged to describe their views and experiences in their own words.Diane Wiley provides an example with automobile accident injuries, that combines yes /no close-ended questions with opportunities for potential jurors to explain the relevant events in their own words:

> Have you even been seriously injured or has anyone close to you been seriously injured or killed in an automobile accident...? If yes, please describe the circumstances. Was a complaint, lawsuit, or claim of some sort made about this? If yes, please explain. How was that complaint or claim resolved? How do you feel about that resolution?

In developing a set of questions, we recommend using case-specific questions that are linked to key issues and factors in the upcoming trial. A great deal of psychological research indicates that case-specific attitudes are most closely linked to actual decisions Thus, these types of queries are most likely to be productive in developing information for peremptory and for-cause challenges. Questions specifically linked to issues in the current case should be less likely to arouse questions about relevance among prospective jurors.

Include a period of attorney questioning. A final recommendation for those jurisdictions that now rely exclusively on judicial questioning is to include a period of attorney questioning during voir dire. Whether judges or attorneys should conduct the questioning, and their relative advantages and disadvantages, has been extensively debated. The Federal Judicial Center study indicates that in the federal courts, attorney involvement in voir dire has doubled over the past several decades. Although empirical research is modest, the research that is available points to the superiority of attorney voir dire in uncovering juror bias.

Initially, those jurisdictions that now use judge-only questioning may wish to provide attorneys with an opportunity to engage in supplemental and/or follow-up questioning, as is the modal practice in the federal courts. We also recommend that bar groups offer continuing education seminars to provide education and training in the art and science of effective questioning.

A Further Look at Mandatory Arbitration

In the last issue of the CIVIL JUSTICE DIGEST, we summarized three paper presentations and commentaries from the Symposium on *The Coming Crisis in Mandatory Arbitration: New Perspectives and Possibilities*, jointly sponosored by the Pound Institute and the Duke Law School Private Adjudication Center, in October, 2002. In this issue, we summarize two more paper presentations from the conference and the commentaries on them below. More material from the program will be published in subsequent issues of the CIVIL JUSTICE DIGEST.

This issue's summaries provide only a snapshot of the outstanding scholarship that went into the symposium. For that reason, we strongly encourage readers to read the full papers, which are available in draft form at www.roscoepound.org. While some authors focused their oral presentations on their papers, others used their papers as a starting point for discussion of the larger issues involved in the discussion of mandatory arbitration. The final versions of the papers will appear in a special issue of *Law and Contemporary Problems*, a Duke Law Journal, in Spring, 2004.**GET UP TO DATE CITATION.**

Editor's Note: In the summary of the paper presentations and commentaries, the participants are often quoted. These quotes are taken from a videotape recording of the program, thus there are no citations to published materials. The quotes have been edited for clarity, continuity, and readability on paper. Finally, although the Roscoe Pound Institute was a major sponsor of the program, it had no editorial control over the papers or the presentations that were based on them.

Lisa Bingham: The Design of Dispute Systems

Professor Lisa Bingham, from the Indiana University School of Public and Environmental Affairs, presented a paper entitled "Self-Determination in Dispute System Design and Mandatory Commercial Arbitration." In it, Bingham argues that scholars should focus their research on mandatory arbitration to examine how it is being structured and for what reasons, and how this impacts the outcome of disputes.

Bingham has written on bias in mandatory arbitration, demonstrating empirically that employers who are repeat players win in arbitration more frequently than employers that arbitrate only once in the sample. She manages the national evaluation of the United States

Postal Service's REDRESS Program, which is a mediation program for employment disputes, and has served as a consultant on the evaluation of conflict resolution systems to the National Institutes of Health, the United States Air Force, and the Occupational Safety and Health Review Commission (an independent Federal agency that adjudicates disputes arising from OSHA inspections of workplaces). Professor Bingham is a member of the labor arbitration panels of the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service, and a member of the AAA's National Employment ADR Task Force. She has also served as an Olympic sports arbitrator.

Professor Bingham began her presentation by noting that the manner in which arbitration systems are designed is an important, yet often overlooked, part of the mandatory arbitration discussion: "Self determination in dispute system design is the thing we haven't really been talking about," she observed, "and if we let that surface a little bit, it will help us to understand how mandatory arbitration is evolving."

Most of Professor Bingham's discussion was devoted to explaining the consequences of the three different variations of system design: one-party, two-party, and third-party. Generally, all three designs begin with an eye toward enacting steps that will most efficiently serve the interests of the designers.

When both parties design a dispute resolution system using arbitration, the resulting system has a natural, organic mutuality and balance.

Two-party Versus One-party Designs

Bingham praised the efficiency and fairness of two-party designed systems: "When both parties design a dispute resolution system using arbitration, the resulting system has a natural, organic mutuality and balance. It doesn't look the same as a system designed by one party unilaterally." Bingham cited the cotton industry's mandatory arbitration systems as an example of a successful two-party designed system. Cotton merchants and mills formed "a dispute resolution system, including arbitration, which they impose as a condition of membership in their professional associations—participation in the system. So this is mandatory arbitration. In order to be a member of these professional associations, you have to agree to use the arbitration system's rules."

Bingham noted an important factor that contributes to success. She stated, "One of the reasons that these systems work is that the members who are participating have negotiated very detailed, bright-line trade rules." Perhaps another reason for the systems' success is that the parties can elect not to participate under certain circumstances, such as when statutory rights are involved or when there is a forum non conveniens problem.

In sum, these two-party designed dispute resolution systems are easily distinguishable from one-party designed systems—not only in their design, but in their function. As Bingham noted, "These two examples basically illustrate systems that don't look like the systems that we're seeing in one-party designs. The parties have sat down together. They have done so either directly or through representative professional associations and the resulting system is a very balanced system. It's a quasi-democratic system. It looks, in some ways, more like labor arbitration."

Professor Bingham then described what separates one-party designed arbitration systems from two-party designed systems: "One-party designs occur when an institution or organization unilaterally adopts mandatory binding arbitration as part of its means of managing conflict." One-party designed systems typically include the following features: time limits for filing complaints; unilateral selection of arbitrators, often a third party; a set location for hearings; filing fees; allocation of attorneys fees, some of which reverse the "American rule" (under which each party pays its own attorney fees); and class action preclusion. Bingham asserted that these design elements are enacted to achieve certain benefits for the designer. She stated, "If you begin to think about the choices that a party setting up an arbitration plan makes, they altogether form a comprehensive plan or design, and that design then has certain impacts."

Three Design Elements That Can Reduce Settlement Value

The biggest impact brought about by the choice of design systems is a downward shift of the settlement range caused by increased transaction costs. Professor Bingham said, "One of the things that happens in mandatory, one-party system designs is that there's a shift in the transaction costs that alters the settlement value of the claim." In other words, the costs of the transaction shift from the company to the aggrieved client.

For example, the choice of third-party providers of arbitration services can affect the settlement value due to differences in fees, as Bingham said:

> The decision to pick one of these third party providers is a dispute system design decision. And if one party's making the decision, one party can choose the JAMS third-party administrator. [JAMS, formerly Endispute, is a private, for-profit Alternative Dispute Resolution (ADR) service.] And by doing that, if you calculate the

> difference between the JAMS filing fees, or mandatory fees, and small claims court fees, what you've got is a shift in the settlement value of the case of about $619—which, in a small claims case, is a significant shift in the settlement value.

An arbitration system that precludes potential plaintiffs from bringing class actions has a similar effect on the settlement value, due to the small amount for which an individual claim would settle. Bingham stated,

> Class action preclusion does the same thing.... To the extent that arbitration permits an institution to avoid class action litigation, it also prevents an individual litigant with a claim of very small value from teaming together with other litigants, pooling their resources, taking advantage of economy of scale, and sharing counsel fees. This essentially means that the cost of obtaining counsel can exceed the value of the claim, and that in turn can shift the settlement value of the claim to zero.

The problem is not so much that arbitration is mandatory. The problem is who is in control of designing the system, and for what purpose, and for whose benefit.

The third element that can reduce the settlement value of the case is a unilaterally chosen forum selection clause. The increased costs of traveling to a distant forum or obtaining local counsel could decrease the overall value of the aggrieved party's claim.

Third-Party Designs

Using her experience as an Olympic sports arbitrator as a springboard for her discussion of these designs, Bingham then discussed another model for arbitration systems: those designed by a third party (i.e., not a party to the dispute).

According to Professor Bingham, the gradual emergence of the international Court of Arbitration for Sport, a body that enforces mandatory arbitration, has improved the system of sports arbitration over the last decade. Agreeing to participate in the International Court is a prerequisite for competing in the Olympic games, and the disputes it hears are generally those involving the eligibility of athletes, which may be called into question on account of the use of performance-enhancing drugs. The Court was originally designed by the International Olympic Committee, which, according to Bingham, is a third party when compared to the other parties that might be involved in sports disputes, such as the individual athlete, national Olympic committees, national sports governing boards [NGB], national sports organizations [NSO], or international federations of sports.

The International Council of Arbitration for Sport is a twenty-member representative body that oversees the Court of Arbitration for Sport, and its members cannot be arbitrators or counsel for any of the litigants. Bingham notes that commentators have judged this system to be more independent. "The arbitrator panels are more independent and neutral; they are considered to be more experienced than those of the international federations or national governing boards that have set up their own panels in some countries, and they are considered to have expertise in transparency. In other words, the resulting system is regarded as fair and balanced."

She contrasts this third party approach with the approach to arbitration in amateur sports in Canada. There, the amateur sports organization unilaterally designed and adopted dispute resolution procedures, with the result that these systems are subject to a lot of criticism. Bingham notes that "Critics charge that there is a power differential between the NSO and the athlete: the arbitrators are not independent, the awards are secret, and the national sports organizations have experienced, expert counsel who are repeat players in sports disputes, and the athletes cannot get access to those kinds of counsel." One recommendation for improvement is that Canada take over the dispute system design and create a national system for the arbitration of sports, similar to what exists in the United States. In the U.S., after similar problems were investigated by a national commission, the Amateur Sports Act, 36 U.S.C. §17, was adopted by Congress in 1978. (After amendments in 1998, it is now titled the Ted Stevens Olympic and Amateur Sports Act.) The Act appointed the American Arbitration Association as the national system for arbitration of these disputes.

Bingham summarized the need to distinguish between the three system designs she described, saying, "The problem is not so much that arbitration is mandatory. The problem is who is in control of designing the system, and for what purpose, and for whose benefit." As she notes, it is no surprise that one-party designed systems seek to benefit the party writing the contract. "I was a management labor and employment lawyer," she told the symposium attendees. "You try to figure out how you can write the personnel manual to best serve your client. It's not surprising that these systems would attempt to shift the settlement value of cases to the extent possible within our legal system and public justice system," she said.

Professor Bingham went on to reaffirm her assertion that it is the design of the arbitration system, not its mandatory nature *per se*, that makes it unfair.

> The issue is not so much whether the system is

> mandatory. We can have mandatory, adhesive systems that are developed either by both parties together or by third parties in such a way as to operate with balance, mutuality, in a way that's transparent, in a way that is accountable, and in a way that doesn't obviously shift the settlement range of a particular dispute in favor of one party or the other.

Finally, Bingham offered a suggestion to alleviate the problem of unfairness resulting from one-party designed systems. She stated, "If the result of unilateral designs is unhappy from a public policy standpoint, then it is up to the legislative branch and the judicial branch, operating within constitutional authority, to change that result. In the meantime, we need to do better public policy research on how these one-party designed systems operate."

India Johnson: Commentary on Bingham Paper

India Johnson, of the American Arbitration Association (AAA), a nonprofit provider of ADR services, commented on Bingham's research and offered her own views on the arbitration issue. Johnson began by agreeing with much of what Bingham had said. "Maybe we need a good housekeeping seal of approval. . . . That's something we talk about at AAA, and you hear at other group meetings—some way for people who are handed one of these arbitration clauses to feel more confidence in the clause's design and feel that it's a fair forum. I think that makes good sense."

Johnson also agreed with Bingham's urging the Symposium attendees to encourage judicial skepticism toward unilaterally designed arbitration clauses. In fact, according to Johnson, the AAA has already taken steps in this direction. She said, "I personally mailed the Consumer Due Process Protocol to every judge in Alabama because they were constantly handling cases about arbitration clauses in their courts." The reason for this becomes clear after she explained the present status of arbitration in that state:

> You cannot buy a car in Alabama without signing an arbitration clause, and many of the dealers were actually videotaping the finance guy explaining the arbitration clause to the buyer so that when the buyer tried to get out of the arbitration clause in court, they would have this video to play. So this goes back into the mid to late '90s. Then we sent two AAA people who had some expertise in the consumer protocol to the judges' conference at a retreat out in the woods in Alabama, and actually gave them Power Point slides and went through the protocol. And they recently said that you can't deny punitive damages in an arbitration clause in Alabama.

Johnson then discussed her experiences with systems design procedures, or the lack thereof, and described the various system design methods she has encountered. She said, "I have a lot of experience with very highly compensated lawyers getting in a room and designing 19-page-long arbitration clauses for a 100- page-long contract, and I have to tell you, those are some of the worst arbitration clauses I've ever seen." Johnson remarked that the clause designers are another problem that needs to be addressed. She stated, "When you talk about 'the great unwashed,' the people out there drafting and designing are the great unwashed, and they could use some help."

Because the AAA normally becomes involved after the dispute arises, they can encounter very different designs. "We face, at AAA, . . . parties who submit to arbitration after a dispute occurs and they design a complicated arbitration scheme and we have to get them through it and our rules don't really matter to them. We face people who just have the commercial arbitration rules written into a document and we have to apply that."

Johnson noted that some take extraordinary steps in designing arbitration systems, while others rely on the tried and true:

> In the employment area I've seen tremendous, bilateral, trilateral, group planning for an employer ADR program . . . from having focus groups, to having joint design teams and spending two years to come up with an employment ADR program. And then you see exactly the opposite where some company, in its infinite wisdom, will just say, "All the employment claims here will be resolved by the commercial arbitration rules of the AAA."

Johnson concluded by addressing the U.S. Supreme Court's holdings, in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) and *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), that arbitration is merely a change in forum, and urged that this categorization be honored in system design. "The U.S. Supreme Court really only looks to arbitration to be a change in forum and not a change in rights. And why people think that it can be so much more, and so different, and why there is overreaching in some of the lopsided designs, I don't understand."

Paul Carrington: The Ancient Revocability of Dispute Resolution Agreements

Since his teaching career began in 1957, Professor Paul Carrington has taught in fifteen American law schools, as well as several in other countries including the University of Tokyo and Albert Ludwigs Universität in Freiburg. He has been at Duke since 1978, serving as dean from 1978 to 1988. He has been active in judicial law reform efforts, particularly with regard to the jurisdiction of appellate courts, the rules of civil litigation, and the selection and tenure of judges in state courts. From 1985 to 1992, he served as reporter to the committee of the Judicial Conference of the United States advising the Supreme Court on changes in the Federal Rules of Civil Procedure. He teaches couses on civil procedure, international civil litigation, and the role of lawyers in American history.

Professor Carrington approached the mandatory arbitration issue from the point of view of contracts. Carrington said he has nothing against arbitration, and sees it as a good idea, having been "in the arbitration business for twenty years." But arbitration, according to Carrington, "is only a good thing if that's what people want to do." The problem Carrington has with mandatory arbitration is the use of contracts to distort people's intentions. This concern about compelling people into arbitral forums dates back to the 1800s, as Justice Joseph Story discussed, in *Tobey v. County of Bristol,*

> A court of equity ought not to compel a party to submit the decision of his rights to a tribunal, which confessedly, does not possess full, adequate, and complete means, within itself, to investigate the merits of the case, and to administer justice. The common tribunals of this country do possess these means; and although a party may have entered into an agreement to submit his rights to arbitration, this furnishes no reason for a court of equity to deprive him of the right to withdraw from such agreement, and thus...[to compel him] to submit all his rights and interests to the decision of another tribunal, however defective or imperfect it may be, to administer entire justice.

Tobey v. County of Bristol, 23 F.Cas. 1313 (CCD Mass. 1845).

Carrington also cited an 1887 Supreme Court decision on contracts of adhesion that said a carrier cannot put into a bill of lading a provision that prohibits a shipper from suing the carrier when they lose the goods. The bill of lading in this case, as Carrington pointed out, is a paradigm of a contract of adhesion, which is recognized in the Uniform Commercial Code. As Carrington noted, "Contracts of adhesion aren't really contracts. They are 'sort of' contracts. They may be very useful, but they are not exchanges of mutual benefit." And, as he pointed out, "they shouldn't contain things we wouldn't agree to if we were thinking about it."

But Carrington argued that that is the intention of those who design mandatory arbitration clauses:

> Anybody who writes this stuff [contracts of adhesion] knows that we are not thinking about them. They know some of the people these affect cannot read, or cannot read English, or if they could read English, wouldn't understand what they are reading. In that context, arbitration clauses, or any clause that undertakes to control the dispute resolution process, is very likely to be unconscionable. And that is the sort of thing that Joseph Story would have said you just can't enforce.

Carrington argued that another important reason for writing mandatory arbitration clauses is how they impact the settlement of disputes: "If you can write an adverse dispute resolution provision into the contract, it will have an effect on the settlement value of any claim that might be brought by the other party to the deal. It doesn't even matter very much what the nature of the claim is. It's just going to be the case that if I don't have access to court and I've got to go to some other forum, I'm going to have to settle that case for less money. So there's a kind of universal economic implication." Carrington wryly observed that he would love to see an example of an arbitration clause in a standard form contract that benefitted the other party in some way. As he said, "we know that what's going on when they write these clauses is a little self-help at the expense of the other party."

These contracts are, according to Carrington, a relatively new phenomenon. A key landmark in their emergence is Justice Harry Blackmun's decision in *Carnival Lines v. Shute,* 499 U.S. 585 (1991), which essentially argued that consumers benefit from mandatory arbitration clauses because they help keep down the costs of tickets. Carrington found that reasoning astonishing, in its suggestion that consumers ought to be happy for provisions, such as ones that require all litigation to be held in Florida, simply because they are getting cheaper tickets.

He identified a second important factor in the rise of mandatory arbitration contracts in the early 1980s–the idea that corporate managers were public benefactors, and will act in the public's best interests. Carrington said, "The idea that business is predatory went into the shadows. People kind of forgot that the purpose of business is to make money and sometimes they will do that at the expense of consumers and workers." Though this idea of "the benign businessman" was accepted for around twenty years, Carrington suggested that has changed. But the damage may have been done: "During that period we got used to the idea of the use of contracts of adhesion with dispute resolution provisions in them that benefitted the bottom line of the corporation or enabled it

to improve the value of the stock, but didn't do a thing for the other party."

Paralleling these developments was a change in policy towards arbitration, fueled by the U.S. Supreme Court. The Court, according to Carrington, " started talking about a national policy favoring arbitration derived from FAA, which had been passed in 1925. But nobody talked about a national policy in the first fifty years of the FAA. The Court started doing all these fancy things with the FAA that facilitated the use of arbitration."

But as Carrington pointed out, arbitration itself is not the problem. To Carrington, "[t]he main problem is all the bells and whistles that are written into arbitration clauses that make them not just arbitration clauses, but load the process, in a variety of different ways, to facilitate settlement on terms favorable to the person who wrote the standard form and who are going to try to make use of this clause, in effect, to enrich themselves at the expense of whoever else they may be dealing with."

There is not a single legislative body in the U.S. that would ever vote for the policy that the Supreme Court pursues.

Carrington took exception with favoring arbitration as a national policy because he does not think "there is a single legislative body in the United States that would ever vote for the policy that the Supreme Court announces and pursues." The end result of the Court's actions, according to Carrington is that "...they have allowed predatory businesses to self-deregulate, to 'repeal' unwelcome laws, burdensome laws, in effect, by arranging to have all of the disputes in which they may be involved enforced in some forum that is so favorable to them that the other party will either give up or sacrifice some substantial part of their entitlement."

Professor Carrington argued that the relatively new Supreme Court policy favoring arbitration goes against a long-standing national policy of private law enforcement, a policy that has been in place for over 200 years. He noted that "[i]n the U.S., we rely on private plaintiffs represented by private lawyers to send cases to juries as a way to regulate predatory businesses." Carrington suggested that if you ask businessmen who complain about this system of private enforcement if they would rather have a bigger bureaucracy, and would have to pay taxes to support such a system, they will support the present system of trial by jury.

Even some businessmen have sought protection against the kind of arbitration agreements that consumers now face. Carrington, who disclosed that he was hired by the Automobile Dealers Association to write a memorandum of law in support of federal legislation to exempt dealers from the FAA, noted that "the practice of arbitration is savaging the effect of the Automobile Dealers Day in Court Act [ADDCA] of 1956."

ADDCA was passed because some dealers, such as those in rural states like Wyoming, were not given premium cars to sell, but instead were given less popular cars. Though given cars that were harder to sell, the dealers were still expected to meet certain quotas. The Day in Court Act required manufacturers to deal "in good faith." Carrington pointed out that there was no definition of good faith, but the statute was plainly written to be administered by a civil jury. "The threat of going in front of a jury made manufacturers treat dealers with more respect." Professor Carrington noted that the federal law was not enough for the dealers, as they got 49 of the 50 states to enact laws that protected dealers from manufacturers.

But arbitration clauses were reducing the effect of these protective laws. Professor Carrington pointed out that that relationship is not without its irony and that it is somewhat entertaining that you can go buy a car from a dealer "...who will try to impose an arbitration clause on you when you want to buy a car, while they are up in arms over the idea that General Motors...can make them sign an arbitration clause when they want to be a franchisee."

Carrington argued that the Court's current interpretation of the FAA goes against the explicit language of several subsequent Federal laws, including the Moss-Magnuson Act of 1975 and the Federal Truth in Lending Act. For example, both explicitly contemplate class actions, yet many arbitration clauses prohibit consumer involvement in class action suits. Also, Carrington noted,

> The idea you would have to arbitrate a claim under the Moss-Magnuson Act is also totally contrary to other provisions in the act which encourages people who sell goods to create non-binding arbitration programs for consumers. And it specifies 'non-binding' arbitration....The Federal Trade Commission is supposed to enforce this statute and see to it that the non-binding arbitration programs are suitably balanced, fair, and have a procedure that will meet the standards that are prescribed by Justice Story.

Professor Carrington argued that while no arbitration case has been brought under the Moss-Magnuson Act before the Supreme Court, it would be hard to imagine how the Court could reconcile it with their current interpretation of the FAA.

He explained that under the Moss-Magnuson Act, consumer warranties that are misleading are considered fraudulent. Carrington suggested that the arbitration provision involved in the *Gateway* case [Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997)] which required con-

sumers with defective computerd to go to Chicago to arbitrate their claim no matter where they lived, is illusory. He argued that somebody should have sued Gateway under tort, possibly for punitive damages, because they knew that the effect of that provision, which would require somebody to spend more than the computer cost to exercise their rights, was to make the warranty a joke.

To Carrington, the most troubling way arbitration has been used is to essentially repeal a lot of state law. "There's a whole lot of state law out there that is regulatory. And the regulations are to be enforced by private parties represented by private lawyers who, not always by jury trial, but in any event by private lawsuit, are going to create standards of conduct for business."

Carrington offered a few suggestions about how to deal with the problems raised by the use of arbitration clauses. His first suggestion was facetious–create your own personal arbitration clause, and publish it on a website:

> Make your wife an agent of service of process. Stipulate that disputes must be settled in courts where you live, and will be decided by a jury, with no review of the verdict allowed. Don't allow any peremptory challenges, that is, you have take the first twelve jurors that come in. If your lawyer objects to any of these provisions you'll agree to fire him and not replace him.

The purpose of this personal arbitration clause is essentially to innoculate yourself against someone else's clause. As Carrington concluded, "[t]he Uniform Commercial Code has provisions that deal with the use of such forms. If there the forms are inconsistent with each other, then none of them apply. So if you buy a book from Amazon.com and they want you to agree to a form with fine print, my theory is, your fine print form cancels it."

Carrington's second suggestion is to sue some of the lawyers who write arbitration clauses. He argued that there may be a basis for a fraud claim under Magnuson-Moss. He said, "Lawyers who are co-tortfeasors with their clients share liability and might be sued. It is even imaginable that one could seek punitive damages against a law firm for deliberately writing overbearing, unconscionable provisions in order to discourage them [consumers] from pursuing their claims."

The third suggestion offered by Carrington is for governmnet to regulate standard form contracts and prevent them from being used to strip people of their rights. Carrington has co-authored a law that seeks to protect the rights of people who are faced with standard form contracts. Carrington noted that, if after the dispute has arisen, people still want to abide by the arbitration clause, that is not a problem. He said, "At that point, you ought to be able to make an intelligent decision about what kind of dispute resolution mechanism you want to use."

But Carrington believes that, until a dispute has arisen, there are things that a contract should not bind people to do. They should not have to adhere to a specified location of forum; pay the other party's attorney's fees if they lose; be limited on discover; face a biased forum; be in a forum that does not obey the law; give up their right to join a class action; nor give up their right to punitive damages. He elaborated as follows:

Location of Forum. The only reason to specify the location of the forum in the contract, according to Carrington, is to discourage people from seeking redress. "To say to somebody you have go to Florida to litigate something that happened in Seattle is plainly designed to intimidate and prevent people from be able to assert their rights effectively."

The American Rule. Carrington is against allowing arbitration clauses to specify that the loser must pay the winner's attorney fees. As he said, "Part of our system is that you're entitled to present your case in court, hire your own lawyer on terms that are agreeable to you– it's part of the principle of freedom of contract....The contingent fee and the 'American rule' are very fundamental parts of the idea that private parties enforce the law." Carrington argued that tradition cannot be changed by contract, at least not irrevocably. If a party wanted to agree to that stipulation after the dispute arises, that would not be a problem to Carrington, however.

No limit on discovery. Because a party involved in a dispute may need discovery to uncover what was done wrong, Carrington argued that you cannot take discovery irrevocably away from people through contract. In one specific area, Carrington noted, discovery is absolutely vital: "In anti-trust cases, it's very often critical to get access to information that may be in the adversary's files and if you bargain that access away ignorantly, you've just bargained away any rights you might have in the anti-trust laws." Indeed, Carrington noted, "The anti-trust laws were designed to protect exactly the party who is being asked to give up their discovery rights."

Bias. Carrington argued that the forum cannot appear to be connected in some way with one party, nor can that arbiter view that party as the more frequent user, which could possibly bias any resulting judgment.

Accountability in law. The forum must obey the law. Even though it is conventional practice in American commercial arbitration that the arbitrator can make Solomonic judgments, and can decide the dispute without regard to what the controlling law should be, "[y]ou can't make people submit their claim of a federal right under these statutes or the investment laws and say the law doesn't matter, the arbitrator doesn't have to obey the law. There needs to be some way for the process to convince us and reassure us that the law is being obeyed and enforced."

Class actions. To give up class actions, which are sometimes necessary because of the nature of the claim, before the dispute is even known, just cannot work, according to Carrington. He said, "[t]here are lots of

things wrong with class actions, but there are statutes that you can't enforce any other way."

Punitive damages. Without knowing what the dispute is, Carrington argued, one doesn't know whether punitive damages would be reasonable or justified. As such, a contract should not irrevocably take punitive damages off the table.

In conclusion, Carrington wryly observed, "if you had an arbitration clause that observed all of those constraints, it would no longer be any fun for the repeat player. If you have to make it fair and recognize other people's rights, then what's the point?"

John Vail: Commentary on Carrington Paper

John Vail provided commentary on Professor Carrington's presentation. Vail is Senior Litigation Counsel with the Center for Constitutional Litigation and also serves as Associate Director for Constitutional Litigation at the Association of Trial Lawyers of America (with which the Roscoe Pound Institute is affiliated). He has been counsel on several cases in the United States Supreme Court, and spearheads ATLA's research and policy development on arbitration. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School.

Vail began his commentary of Duke Law professor Paul Carrington's presentation and paper by suggesting that Carrington should not have limited his analysis to statutory rights:

> When we talk about the legal rights that go away here, we shouldn't talk about just statutory rights. I think we want to talk about positive policy judgments that are embodied in the law, be they embodied in statutes or in common law norms....[A] lot of the cases talk about statutory rights, but I think it's very important to talk more broadly about any right, be it statutory or common law that embodies the kind of policy judgment that is a public judgment.

He cited the UCC provision governing missing price terms as an example of the law serving a practical function without embodying a policy judgment. Vail mentioned the rule prohibiting contracts to sell lottery tickets as an example of rules in contract and tort that embody the kind of policy judgments to which he was referring.

Vail then shifted his focus to the constitutional dimension of the arbitration clause debate and encouraged Symposium attendees not to ignore the full scope of the constitutional rights at stake. "It's not just a constitutional right to a jury; there's a constitutional right to go to court. Recently, the executive director of the Common Good Foundation said there's no constitutional right to sue. Well, that's absolutely wrong, as a matter of both federal and state law," Vail argued. He cited the holding of *Downes v. Bidwell,* 182 U.S. 244 (1901), that the right of access to the courts is coequal to the right to freely practice religion and the right to be free of unreasonable searches and seizures. As further proof that the Supreme Court has continued to recognize the right of access to courts, Vail mentioned noted that the Court defined the elements of a cause of action for deprivation of the right of access to courts in *Harbury* [*Christopher v. Harbury,* 536 U.S. 403 (2002)].

On a more philosophical level, Vail compared the right of access to courts to the national defense in terms of social contract theory. "One of the primary reasons that people leave the state of nature to make the social contract is to have a reliable body that will resolve the private disputes between them," Vail said. According to Vail, this idea is of "huge public importance to the civil justice system that is often neglected in this discourse about arbitration."

> ***It's not just a constitutional right to a jury; there's a constitutional right to go to court.***

Moving on to Carrington's discussion of revocability and special enforcement, Vail discussed what the Supreme Court has held to be the main purpose of the FAA– to make certain arbitration agreements specifically enforceable. He added that courts would recognize a cause of action for damages caused by a denial of arbitration prior to the FAA, but would not specifically enforce arbitration agreements. Vail noted that damages would be difficult to prove in this context. "I expect the reality is you may have had a cause of action, but you didn't bring it, and you didn't bring it because you couldn't prove any damages." Referring to the *Ting* case [*Ting v. AT&T,* 126 F.3d 1247 (9th Cir. 2002), *cert. deinied* 124 S.Ct. 261 (2003)]as an example, Vail stated, "How would AT&T be damaged if the Ting clause wasn't enforced? I'd love to see AT&T's proof of damages on that. They would never put it on."

Vail noted that this pre-FAA court policy may have been a type of positive policy judgment.

> I think the courts, when they refused to grant specific enforcement to arbitration agreements, were making a profound policy judgment, and a constitutional judgment, about using the machinery of the state to force someone not to use the dispute resolution mechanism that the state had provided with all its procedural protections, with its publicity....This idea of the

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The staff is continually searching for material that would be of interest to our readers, and welcomes suggestions for items that might be included in a future issue. We are also interested in expanding our mailing list to include individuals who would benefit from receiving the DIGEST.

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