

JURIES, VOIR DIRE, *BATSON*, AND BEYOND:

ACHIEVING FAIRNESS IN CIVIL JURY TRIALS



2021 FORUM FOR STATE APPELLATE COURT JUDGES



FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.

JURIES, VOIR DIRE, *BATSON*, AND BEYOND:

ACHIEVING FAIRNESS IN CIVIL JURY TRIALS



2021 FORUM FOR STATE APPELLATE COURT JUDGES



FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.

When quoting or reprinting any part of this report, credit should be given to the Pound Civil Justice Institute. Permission to reprint a paper should be requested from:

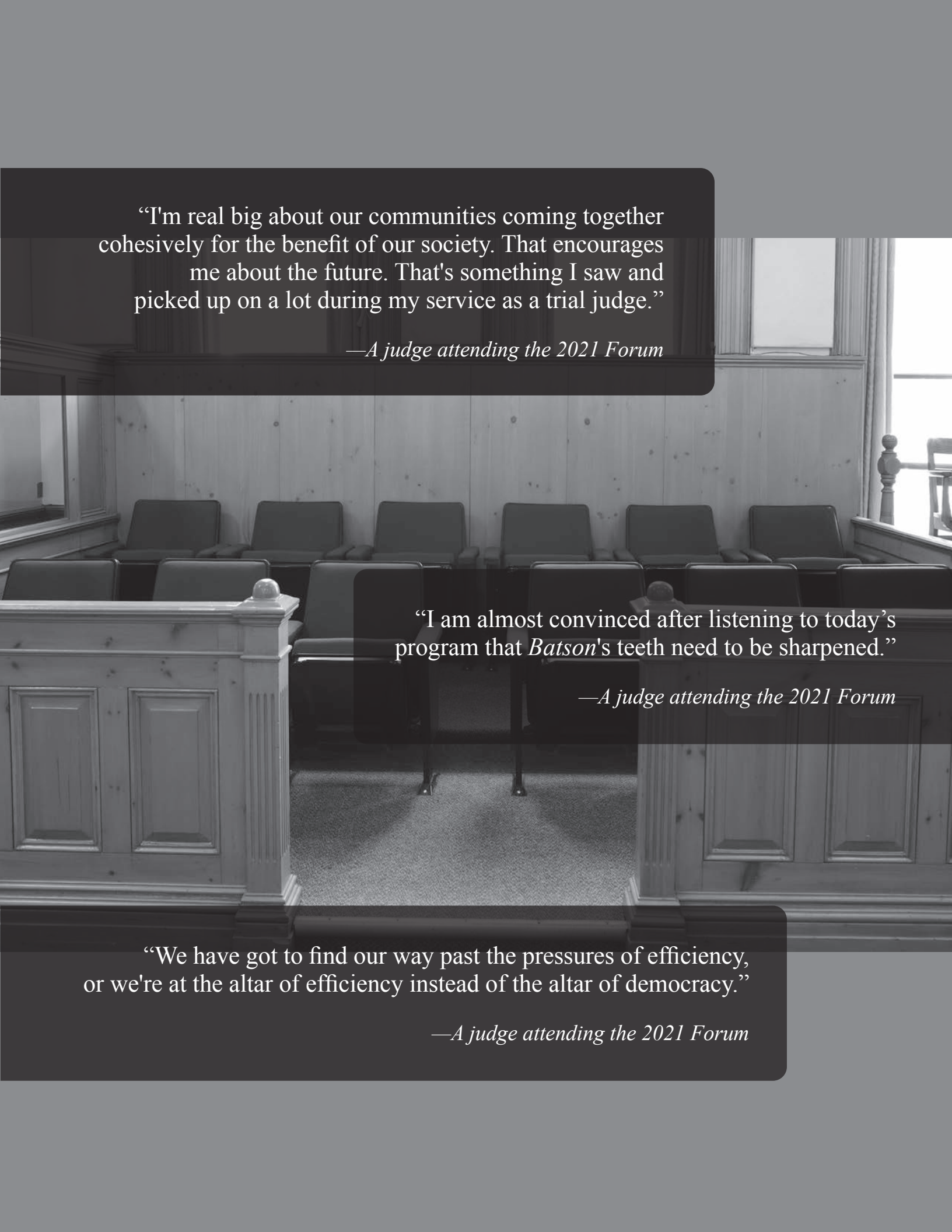
Pound Civil Justice Institute
777 Sixth Street, NW, Suite 200
Washington, D.C. 20001
www.poundinstitute.org
info@poundinstitute.org

The Endower, Habush Habush & Rottier S.C., and the Forum underwriters have no control over the content of the Forum, the makeup of faculty or attendees, the placement of information in Forum materials, or the editorial content of the 2021 Forum Report.

Library of Congress Control Number: 2022902742

ISBN: 978-0-933067-31-8

©2022 Pound Civil Justice Institute



“I’m real big about our communities coming together cohesively for the benefit of our society. That encourages me about the future. That’s something I saw and picked up on a lot during my service as a trial judge.”

—*A judge attending the 2021 Forum*

“I am almost convinced after listening to today’s program that *Batson*’s teeth need to be sharpened.”

—*A judge attending the 2021 Forum*

“We have got to find our way past the pressures of efficiency, or we’re at the altar of efficiency instead of the altar of democracy.”

—*A judge attending the 2021 Forum*

TABLE OF CONTENTS

FOREWORD	1
INTRODUCTION	3
MORNING PAPER, ORAL REMARKS, AND COMMENTS	5
“Challenges to Achieving Fairness in Civil Jury Selection”	5
Professor Valerie P. Hans, Cornell Law School	
Oral Remarks of Professor Hans	29
Comments by Panelists, Response by Professor Hans, Questions from Participants	33
LUNCHEON ADDRESS	51
“Where Do We Go from Here?”	51
The Honorable Gregory E. Mize, District of Columbia Superior Court (ret.)	
National Center for State Courts, Center for Jury Studies	
Questions From Participants	56
AFTERNOON PAPER, ORAL REMARKS, AND COMMENTS	59
“Judicial Rulemaking for Jury Trial Fairness”	59
Professor Shari Seidman Diamond, Northwestern Pritzker School of Law	
Oral Remarks of Professor Diamond	84
Comments by Panelists, Response by Professor Diamond, Questions from Participants	88
CLOSING SESSION	107
THE JUDGES’ COMMENTS	113
POINTS OF CONVERGENCE	137
APPENDICES	143
Faculty Biographies	143
Judicial Participants	150
Forum Underwriters	152
About the Pound Civil Justice Institute	153
Officers and Trustees of the Pound Civil Justice Institute, 2020-21	154
Papers of the Pound Civil Justice Institute	155

FOREWORD

The Pound Civil Justice Institute’s twenty-ninth Forum for State Appellate Court Judges was held on July 17, 2021. As with all of our past forums, it was both enjoyable and thought-provoking. In the Forum setting, judges, practicing attorneys, and legal scholars considered crucial issues related to jury trial and the achievement of fairness in our civil justice system.

The Pound Institute recognizes that state courts have the principal role in the administration of justice in the United States, and that they carry, by far, the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue at which judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is inevitably fruitful. Forum participants always bring different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Institute’s Fellows. That diversity of viewpoints emerges in our Forum reports.

Our Forums for State Appellate Court Judges have been devoted to many cutting-edge topics, ranging from the court-funding crisis, to the decline of jury trial, to separation of powers, rulemaking, forced arbitration, judicial transparency, state constitutionalism, aggregate litigation, and confidentiality in our public courts. We are proud of our Forums, and are gratified by the growth in interest and attendance we have experienced since their inception, as well as by the very positive comments we have received from judges and faculty members who have participated. A full listing of our prior Forums is provided in an appendix to this report, and their reports and research papers—along with most of our other publications—are available for free download on our website: www.poundinstitute.org.

The Pound Institute is indebted to many people for the success of the 2021 Forum:

- Professors Valerie Hans and Shari Seidman Diamond, who wrote and presented the papers that started our discussions;
- Honorable Gregory E. Mize, Senior Judge of the District of Columbia Superior Court, who delivered our lunch keynote address;
- Our panelists—Professors Mary Rose and Nancy Marder, Chief Justice Steven C. González, Judge Edwina Mendelson, Douglas Burrell, Kim Boyle, Roxanne Conlin, and Preston Tisdale;
- The moderators of our small-group discussions—Janet Abaray, David Arbogast, Linda Atkinson, Kathryn Clarke, Michael Doyle, Deborah Elman, Misty Farris, Raymond Jones, Justin Kahn, Chris Nace, Roger Mandel, Florence Murray, Kathleen Nastri, Amber Pang Parra, Gale Pearson, and Peggy Wedgworth; and
- The Pound Civil Justice Institute’s dedicated and talented staff—Executive Director Mary Collishaw, who once again organized and executed a successful remote conference; and Forum Reporter Jim Rooks.

Most of all, we appreciate the participation of the distinguished judges who took time from their busy schedules so that we might all learn from each other. We hope you enjoy reviewing this report of the Forum, and that you will find it useful to you in your consideration of matters relating to the role of juries in our civil justice system.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Stephen J. Herman

President, Pound Civil Justice Institute, 2020-2021

INTRODUCTION

On July 17, 2021, 67 judges representing 28 jurisdictions, as well as academics and attorneys, took part in the Pound Civil Justice Institute’s twenty-ninth annual Forum for State Appellate Court Judges. Once again, because of the global pandemic, the Forum was conducted remotely, with attending judges, academics, and attorneys viewing the presentations via a dedicated online platform, and with judges participating in discussion groups online.

The judges examined the topic “Juries, Voir Dire, *Batson*, and Beyond: Achieving Fairness in Civil Jury Trials.” Their deliberations were based on original papers written for the Forum by Professor Valerie P. Hans of Cornell Law School (“Challenges to Achieving Fairness in Civil Jury Selection”) and Professor Shari Seidman Diamond of Northwestern University Pritzker School of Law (“Judicial Rulemaking for Jury Trial Fairness”). The papers were distributed to participants in advance of the meeting, and the authors made less-formal presentations of their papers to the judges during the video general sessions.

The paper presentations were followed by discussion among panels of distinguished commentators: Professor Mary Rose of the University of Texas at Austin; Chief Justice Steven C. González of the Washington State Supreme Court; and attorneys Douglas Burrell; and Roxanne Conlin in the morning panel; Professor Nancy Marder of Chicago-Kent College of Law; Deputy Chief Administrative Judge Edwina Mendelson of the New York State Unified Court System’s Office for Justice Initiatives; and attorneys Kim Boyle and Preston Tisdale in the afternoon panel.

The judges also heard a lunchtime keynote address by the Honorable Gregory E. Mize, a Senior Judge of the District of Columbia Superior Court, who is currently an Adjunct Professor at the Georgetown University Law Center and a Judicial Fellow at the National Center for State Courts. Judge Mize suggested numerous initiatives judges and lawyers can take to improve the role of the civil jury.

After each general session, the judges participated in small group discussions with Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators joined the groups to share in the discussion and respond to questions. The common ground achieved during the discussion groups, as well as discussion of any new concepts, appear in the “Points of Convergence” sections of this report.

At the concluding general session, all of the Forum faculty members had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Hans and Diamond, on accounts of discussion group moderators, and on the transcripts of the Forum’s general sessions.



James E. Rooks, Jr.
Forum Reporter

Challenges to Achieving Fairness in Civil Jury Selection

Valerie P. Hans,¹ Cornell Law School

EXECUTIVE SUMMARY

In her Introduction, Professor Hans proposes that “Achieving representative cross sections of the community in jury venires, and ensuring that our civil juries reflect the community as well, are essential components contributing to the fairness and legitimacy of our civil justice system.” She warns, however, that “the courts encounter substantial difficulty in achieving this important goal.” An analysis of the problems the courts face in this regard is the purpose of her paper.

In Part II, Hans briefly notes that the representativeness of juries is not merely an aspiration but a guarantee under state and federal constitutions and statutes. She continues, in Part III, to describe the benefits of jury representativeness, which include aid to decision-making, enhanced legitimacy of judicial outcomes, educational benefits for citizen jurors, increased regard for the courts, and greater overall civic engagement after jury service (e.g. through voting). These are benefits of representative juries that strengthen democracy, and they provide additional reasons for courts to take care in their jury selection procedures.

In Part IV, Professor Hans reviews the jury venire—the selection processes that occur in the courthouse but outside the courtroom. This includes summoning and qualifying prospective jurors; the use of source lists; the impact of qualifications, exemptions, and nonresponsiveness to jury service surveys and summonses; the special challenges of the COVID-19 pandemic; and legal challenges to the representativeness of jury pools.

Hans then turns, in Part V, to the in-courtroom jury selection procedures, discussing research on how they can address juror bias (including implicit bias). She considers voir dire procedures that can be used to uncover attitudes and views that can affect a prospective juror’s fact finding, with attention to negative consequences of limiting voir dire and reasons why limited voir dire is not effective for jury selection. She gives particular attention to voir dire in the pandemic era, including use of expanded jury questionnaires to minimize in-person collection of information, social distancing during voir dire, and virtual voir dire proceedings. Although some attorneys have been concerned about lost opportunities to observe juror behavior in person during voir dire, research indicates that the actual content of responses is a better indicator of their truthfulness than is nonverbal behavior.

In Part VI, Professor Hans considers juror challenges, both for-cause and peremptory, and reviews the research on conscious and unconscious bias in lawyers making the latter challenges. Expanding the scope of both virtual and in-person voir dire would help to offset the effect of pandemic-related health precautions.

I. INTRODUCTION

This paper identifies multiple challenges that courts face in achieving fairness in the selection of juries in civil cases. Achieving representative cross sections of the community in jury venires, and ensuring that our civil juries

Achieving representative cross sections of the community in jury venires, and ensuring that our civil juries reflect the community as well, are essential components contributing to the fairness and legitimacy of our civil justice system.

reflect the community as well, are essential components contributing to the fairness and legitimacy of our civil justice system. Although legal rules and practices attempt to maximize fair and representative juries, the courts encounter substantial difficulty in achieving this important goal. Problems arise in summoning citizens for jury service, in questioning them during voir dire, and in exercising peremptory and for-cause challenges. Systematic empirical research on representativeness and new psychological studies on implicit and unconscious bias raise questions about the efficacy of current jury selection procedures. This

paper identifies these problems and the challenges they present for producing representative and fair juries. Shari Seidman Diamond's companion piece explores the desirability and feasibility of potential solutions.²

II. JURY REPRESENTATIVENESS: LEGAL FRAMEWORK

The importance of jury representativeness has long been appreciated in the criminal jury context. It is also a crucial contribution to the fairness of civil juries. Federal and state constitutions and laws insist on the right to trial by juries drawn from fair cross sections of the community. New York state's law, for example, provides that:

It is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the county or other governmental subdivision wherein the court convenes; and that all eligible citizens shall have the opportunity to serve on grand and petit juries in the courts of this state, and shall have an obligation to serve when summoned for that purpose, unless excused.³

The Sixth Amendment to the U.S. Constitution guarantees litigants the selection of a criminal jury drawn from a representative cross section of the community.⁴ Many justifications for the right to a criminal jury drawn from a representative group from the community apply to civil juries as well.⁵ Although the Seventh Amendment, pertaining to civil juries, does not mention a cross sectional requirement, the Equal Protection clause of the Fourteenth Amendment forbids discrimination on the basis of membership in protected classes.⁶ The federal Jury Selection and Service Act of 1968 established statutory rights to a civil jury drawn from a representative cross section, and many states adopted similar provisions.⁷

III. BENEFITS OF JURY REPRESENTATIVENESS: RESEARCH EVIDENCE

There are sound reasons for maximizing the chances for a representative jury by requiring that jurors be randomly selected from a community cross section. Empirical research over the past several decades identifies a host of benefits that result from representative juries. Although the empirical work to date has largely focused on criminal juries, the results are informative for civil juries.

The benefits of representativeness include strengthening fact finding, increasing legitimacy, promoting education about the law, improving views of the courts, and encouraging civic engagement.

Empirical research over the past several decades identifies a host of benefits that result from representative juries.

A. Decision-Making Benefits

Juries that reflect the full range of community perspectives are in a position to incorporate these diverse views into their fact finding.

Compared to homogeneous juries, diverse juries engage in more robust and vigorous deliberation.⁸ Jurors with diverging interpretations of the evidence test one another's construals of the evidence during deliberation.

Samuel Sommers conducted a mock jury experiment in which he asked participants to arrive at a decision in a racially-charged case.⁹ Half of the mock juries were composed entirely of white jurors, whereas the other half were racially diverse juries of four whites and two Blacks. Comparing the deliberations of all-white and racially-mixed juries, Sommers discovered that diverse jury deliberations were more accurate, more expansive, and longer. It was not simply that the minority jurors contributed new and different information. The white jurors acted differently in all-white versus mixed-race juries. They made fewer factual mistakes, and raised more issues and evidence, during the deliberation. In short, they appeared to be more careful in their decision-making in a diverse, as opposed to an all-white, jury.

Another mock jury experiment compared all-white and diverse juries deciding a murder case, examining how they responded to differences in the race of the parties.¹⁰ All-white juries mentioned more case facts

when the defendant and victim were white compared to Black; diverse juries did not show a significant difference in the number of case facts mentioned between the cases with white or Black parties.¹¹ Thus, jury diversity reduced the disparity in facts discussed during the deliberation between cases with Black and white parties.¹²

The presence of racial minorities on the jury is likely to limit the expression of prejudice during deliberation.

The presence of racial minorities on the jury is likely to limit the expression of prejudice during deliberation. The University of Michigan psychology and law professor Phoebe Ellsworth observed, "White people worry about being racist when they're reminded of it,

but when it's all white people, it just doesn't occur to them to remember their egalitarian values."¹³ Concern about being considered racially prejudiced appears to lead to greater self-monitoring.¹⁴

Some might worry that, because of their members' different backgrounds and experiences, diverse juries will be less able to agree on a final verdict. Hung juries are rare, even more so in civil cases, but in most cases

a hung jury is an unsatisfactory outcome. However, an in-depth study of hung juries in criminal cases in state courts analyzed the factors associated with hung juries, and found that the jury's diversity bore *no* relationship to the likelihood of a hung jury.¹⁵ Therefore, there is no evidence that improving the jury's diversity would make it more difficult for juries to arrive at a verdict.

B. Legitimacy Benefits

In addition to salutary effects on their decision-making, representative juries are more likely to be seen as legitimate decision-makers, which in turn contributes to public confidence in the justice system.¹⁶ A jury's racial representativeness appears to be especially important. U.S. Supreme Court Justice Thomas observed in one case that news stories often included the phrase "all-white jury," suggesting readers' interest in knowing the race of the jurors as they consider jury verdicts.¹⁷

In addition to salutary effects on their decision-making, representative juries are more likely to be seen as legitimate decision-makers, which in turn contributes to public confidence in the justice system.

Leslie Ellis and Shari Seidman Diamond tested how a jury's racial composition affected perceptions of fairness in a hypothetical trial in which the African-American defendant was charged with shoplifting and the witnesses against him were white.¹⁸ Half the participants were told that the jury was all white; the other half learned instead that the jury included four African Americans and eight whites. Overall, the study participants thought a not guilty verdict was the fairest outcome in the case, based on the evidence they read. When the verdict was not-guilty verdict, and thus consistent with the evidence, there was no difference between the perceived fairness of the verdict reached

by the homogeneous all-white jury and heterogeneous mixed-race jury. However, when the jury reached a guilty verdict, the verdict reached by the racially-mixed jury was seen as more fair than the verdict of the all-white jury. Another way to look at the results is that when a racially heterogeneous jury decided the case, the verdict did not influence the perceived fairness of the trial. However, when a verdict that seemed inconsistent with the facts was reached, observers' fairness judgments were affected by the racial representativeness of the jury as it was described to them.

C. Educational Benefits

Distributing jury service equitably across different groups of our diverse citizenry is also important for its educational potential. The French thinker Alexis de Tocqueville considered the jury as "one of the most effective means of popular education at society's disposal."¹⁹ Jury service allows members of the public a close-up view of what happens in our legal system.

D. Increased Regard for the Courts

Reassuringly, most jurors come away with enhanced regard for the legal system, the judiciary, and the jury system.²⁰ That is especially important because preexisting views of government institutions, including the jury

system, differ by race and ethnicity.²¹ Mary Rose, Christopher Ellison, and Shari Seidman Diamond surveyed Texas residents and found that non-Hispanic whites expressed greater preference for trial by jury over trial by a judge than did African-American residents and Hispanic residents. However, jury service more robustly boosted the positive regard for the jury among minority residents. Compared to non-Hispanic whites who served on juries, minorities who served on juries expressed a stronger preference for a jury over a judge in civil cases.²²

Most jurors come away with enhanced regard for the legal system, the judiciary, and the jury system.

E. Civic Engagement Benefits

Representative civil juries are highly desirable, not only because they are robust factfinders but also because they strengthen democracy by encouraging civic engagement and enhancing the regard for and legitimacy of its institutions.

Participating as a juror increases other forms of civic engagement such as voting; this benefit has been found for both criminal and civil jury service. John Gastil and his colleagues examined the connection between jury service and voting records.²³ In a study of seven U.S. jurisdictions, they obtained jury service data and voting history records. Comparing jurors' voting history before and after jury service, Gastil and his colleagues discovered that low-propensity voters who served as jurors in criminal cases were more likely to vote after jury service.²⁴

In a separate analysis of civil jury service and voting records, Valerie Hans, John Gastil, and Traci Feller found that the link between jury service and voting was affected by structural characteristics of the jury. Jurors who served on civil juries of 12 persons or juries that were required to reach a unanimous decision—in short, the traditional form of trial by jury—were significantly more likely to vote following their service, controlling for their pre-service voting history.²⁵ Jurors who decided cases with organizational (as opposed to individual) defendants also increased their voting after jury service.²⁶

F. Summary

Representative civil juries are highly desirable, not only because they are robust factfinders but also because they strengthen democracy by encouraging civic engagement and enhancing the regard for and legitimacy of its institutions. For all these reasons, courts should ensure that jury selection procedures serve the goal of maximizing the representativeness of jury pools and civil juries.

IV. JURY SELECTION PROCEDURES: THE JURY VENIRE

In contrast to some other countries that require the jury that decides the case be composed of a specific demographic makeup,²⁷ in the U.S. there is no guarantee that the trial jury itself be representative of the community. The assumption is that “the laws of statistics will produce representative juries most of the time.”²⁸ And therein lies the rub.²⁹ The American Bar Association's *Principles for Juries and Jury Trials* lists as a key principle that

“Courts should use open, fair and flexible procedures to select a representative pool of prospective jurors.”³⁰ But multiple steps in the jury selection process undermine the representativeness of sitting juries.

A. Summoning and Qualifying Prospective Jurors

It is undisputed that jury pools and juries are more representative of the community than in previous times. Historically, jury duty was limited to white men. Even as legal barriers to the participation of racial and ethnic minorities and women fell,³¹ use of literacy tests and special exemptions and reliance on “key man” systems in which jury commissioners selected individual community members for jury service limited the pool of individuals who reported for jury duty.³²

Jon Van Dyke’s 1977 book, *Jury Selection Procedures*, offers a snapshot in time of the incomplete progress in achieving representative jury panels a decade after the 1968 Jury Selection and Service Act required that voter lists be the source for summoning citizens in federal jury trials. He compiled then-current data about jury venires and jury representativeness from multiple federal and state jurisdictions.³³ Summarizing his findings at that moment, he noted:

Despite recent gains, in most courts in the United States significant segments of the population are still not included on juries as often as they would be in a completely random system aimed at impaneling a representative cross section. Blue-collar workers, non-whites, the young, the elderly, and women are the groups most widely underrepresented on juries, and in many jurisdictions, the underrepresentation of these groups is substantial and dramatic.³⁴

The intervening four-plus decades have seen substantial progress in moving toward greater representativeness, with the elimination of key man systems, reductions in the number of exclusions and exemptions from jury duty, and the emergence and current dominance of computer-assisted random selection from source lists. Nonetheless, the states differ in the specific approaches they take to forming the list of residents to qualify and summon for jury service.

B. The Importance of Source Lists

Summoning prospective jurors begins with the source lists. To assess national practices with respect to jury selection, I sought out systematic information about current procedures in the different states. The National Center for State Courts *State-of-the-States Survey of Jury Improvement Efforts* is an especially valuable resource.³⁵ Table 1, based on NCSC data, shows both overlap and divergence in the approaches that states take to the developing their jury pools. The most frequent source list is the voter registration list, followed by the drivers’ license list. A majority of states require each of these lists. A minority of states also include non-drivers’ identification cards and tax rolls. No more than a handful of states require the use of any other source. Many states do permit courts to rely upon additional source lists, although their use is not mandatory.

Summoning prospective jurors begins with the source lists.

It is understandable that some jurisdictions might rely on different source lists. Consider the fact that residents in urban areas are less likely to have drivers’ licenses and own cars, compared to residents in rural areas where

car ownership is higher. Some states are also able to draw upon unique and relatively comprehensive lists of community residents. For example, by statute, localities in Massachusetts conduct an annual census; Alaska relies on a list of residents who receive benefits from the Alaska Permanent Fund.

However, we now know through empirical research that most of the source lists—including the two that are most frequently relied upon, lists of voters and drivers' license holders—do not fully capture the entire community of jury-eligible voters. Hence it is good practice to include multiple source lists to maximize the representativeness of the jury list.³⁶ Indeed, Paula Hannaford-Agor, Director of the Center for Jury Studies at the National Center for State Courts, asserts that: “The use of multiple source lists to improve the demographic representation of the master jury list is perhaps the most significant step courts have undertaken since they abandoned the key-man system in favor of random selection from broadbased lists.”³⁷

We now know through empirical research that most of the source lists—including the two that are most frequently relied upon, lists of voters and drivers' license holders—do not fully capture the entire community of jury-eligible voters.

C. Additional Difficulties in Obtaining Representative Jury Venires: Qualifications, Exemptions, and Differential Nonresponse

In addition to source lists that do not fully represent the jury-eligible population, factors that contribute to a lack of jury pool representativeness include qualifications, exemptions, and failures to respond to qualification questionnaires and summonses.

Eight percent of U.S. residents have felony convictions. The majority of states continue to ban from jury service these residents, and many impose the ban even if their punishment has concluded and they are no longer under supervision.

Qualifications. Citizenship, residency, an age of 18 or above, absence of a serious criminal record, and fluency in English are basic qualifications for jury service in virtually all states.³⁸ A handful of states have explored allowing noncitizen residents to participate as jurors, but those states remain in the minority.³⁹

One common disqualification has become the subject of recent debate: felony disenfranchisement. In James Binnall's recent comprehensive book on the subject, he observes that the felon-juror exclusion is “far and away the most extreme form of civic marginalization in the United States.”⁴⁰ Eight percent of U.S. residents have felony convictions. The majority of states continue

to ban from jury service these residents, and many impose the ban even if their punishment has concluded and they are no longer under supervision.

Just one state, Maine, currently has no restrictions. Twenty-six states and the federal government permanently ban convicted felons from jury service, and another thirteen forbid jury service until the completion of the felon's sentence.⁴¹ Eight states and the District of Columbia use hybrid approaches, in which the ban depends on the felony charge, the sentence, the type of jury, or the term of years. Two states provide for lifetime for-cause challenges for prospective jurors who are felons.⁴² Because of the racially disproportionate existence of felony records, the disqualification makes it more difficult to assemble representative juries.⁴³

Recent research by Binnall and others suggests that traditional justifications of the felon-juror exclusion are not well supported.⁴⁴ Binnall draws on empirical research in social psychology and personality showing the strong situational determinants of human behavior, which weighs against the lifetime bans on jury service of those with felony convictions.⁴⁵ He also surveys attitudes toward the courts, finding considerable variability in prosecution views among those with felony records, which suggests that individualized voir dire rather than the complete bans could address juror bias among prospective jurors with felony records.⁴⁶ Although Binnall's research and book focus on criminal jury participation, the arguments for felon-juror exclusion are even weaker in the civil jury context.

Exemptions and Excuses. Most states include statutory exemptions from jury service. In addition to previous jury service, citizens may claim an exemption on the basis of age or by virtue of their occupation, with political office holders, law enforcement officers, and judicial officers being the most frequent statutory exemptions.⁴⁷ Not surprisingly, jurisdictions that have greater numbers of statutory exemptions have significantly higher exemption rates: if a court offers an exemption, it is often taken.⁴⁸

Some studies document the effects of excuses on representativeness. For example, in one jurisdiction that tracked the removal through excuses by race and ethnicity, members of minority racial groups requested and were granted temporary hardship excuses (for example, for job or childcare reasons) more frequently than members of other racial groups, increasing departures from representativeness.⁴⁹

Nonresponse to Qualification Questionnaires and Summonses. Differential rates of response to jury qualification questionnaires and summonses can dramatically undermine the ability to achieve representative jury venires. Nationally, the undeliverable rate is estimated to be 12%, and up to 15% in large urban areas.⁵⁰ The problems of nonresponse persist even if best practices are followed by frequently updating the source lists and sending multiple follow-ups to nonresponders.

Differential rates of response to jury qualification questionnaires and summonses can dramatically undermine the ability to achieve representative jury venires.

Observing that its jury pools did not appear to reflect census data, the jury commissioner in Monroe County in upstate New York undertook a comprehensive study of the multiple stages of qualification and summoning of prospective jurors.⁵¹ I was one of the external consultants on the Monroe County study.

The project compared the Monroe County census figures with information about: (1) people responding to the qualification questionnaires and summonses; (2) people who requested excuses; and (3) people who reported to jury duty. Monroe County, like most other counties in New York, uses a two-step summoning system, with an initial mailing of jury qualification questionnaires and a second mailing of jury summonses. The study confirmed that the mailings went to a geographic cross section of the county, as intended. However, mailings sent to the geographical areas of the county with higher proportions of racial and ethnic minorities and poorer residents were disproportionately more likely to be returned as undeliverable or did not result in responses. According to census figures, Black residents constituted 12% of the Monroe County jury-eligible population,⁵² but they were 9.7% of those who responded to the jury qualification questionnaires. This pattern of greater nonresponse in areas with lower incomes and higher racial and ethnic minorities has been observed in a number of other jurisdictions.⁵³

To address differential responses to qualification questionnaires, some federal district courts, including the Eastern District of Massachusetts, the District of Kansas, and the Northern District of California have put special procedures in place. When jury qualification questionnaires are returned as undeliverable, or there is no response from the individual who is sent a questionnaire, the district sends a replacement questionnaire to another randomly selected individual who resides within the same zip code.⁵⁴ Some strongly endorse the approach,⁵⁵ others object to the zip code-replacement procedure as a departure from fully random selection of the jury venire.⁵⁶

D. Pandemic-Era Jury Selection

The COVID-19 pandemic has created new challenges in the selection of citizens for jury service. After a pause at the start of the pandemic, a number of state and federal courts have resumed trials, including jury trials. I am aware of no systematic studies of how pandemic-era jury pools compare to the pre-pandemic-era jury pools (or how the composition of petit juries themselves differ). State trial court judges who have presided over virtual jury trials during the pandemic have reported that they have seen jury pools that are at least as diverse and perhaps even more diverse than pre-pandemic jury pools.⁵⁷ Statistical analyses are reportedly underway.⁵⁸ Presumably, courts have not modified the basic source lists they use to recruit jury pools as a result of the pandemic. However, it seems possible, even likely, that the response rates to jury qualification questionnaires and summonses have changed. In addition, jury commissioners and judges have undoubtedly been more generous in their willingness to accept requests to be excused from jury duty.

The COVID-19 pandemic has created new challenges in the selection of citizens for jury service.

During the pandemic era, jury trials have been conducted in person and virtually.⁵⁹ Each of these provide particular challenges to jury representativeness. Commissioned by the National Center for State Courts, a national poll of 1,000 U.S. registered voters in June 2020 asked questions about their views about serving on a jury during the pandemic.⁶⁰ Over half identified one or more obstacles to reporting for jury duty, including childcare, elder care, or health conditions.⁶¹ Many expressed concern about jury service, although the majority indicated they would feel more comfortable if protective measures such as mask wearing, social distancing, and coronavirus testing were in place.⁶² Twice as many respondents said they would be more comfortable with remote (virtual) jury service than in-person jury service.⁶³

One serious concern about the potential drawback of virtual jury trials has been inequality in access to the technology required to connect to the internet. However, the survey found that 85% subscribed to the internet at their homes, and 95% of respondents had a cell phone (with 85% having a smartphone). Just 2.4% of the respondents had no home internet and no cell phone.⁶⁴ States that have conducted virtual jury trials include alternative options for those without existing reliable technology, including participating at alternate locations such as courthouse kiosks or library carrels, and providing tablets for those without the technology.

The reported concerns about in-person jury service are hypothetical responses taken at one point in time, of course. The pandemic situation in the United States is shifting, particularly with the widespread availability of vaccination. Now that the majority of people in older age groups are fully vaccinated, they face lower health risks, and could be more willing than younger age groups to serve on an in-person jury.

E. Legal Challenges to Jury Pool Representativeness

Duren v. Missouri lays out a well-known three-step procedure for challenging the representativeness of the jury pool.⁶⁵ First, the litigant must show that a group that is claimed to be underrepresented or excluded is a distinctive or cognizable group in the community; second, the group's representation in the pool is not fair and reasonable considering its numbers in the community; and third, the underrepresentation is the result of systematic exclusion during the jury selection process.⁶⁶ Successful legal challenges typically offer proof of substantial

Successful legal challenges typically offer proof of substantial underrepresentation of members of a protected class, and point to one or more aspects of the selection process that resulted in underrepresentation.

underrepresentation of members of a protected class, and point to one or more aspects of the selection process that resulted in underrepresentation.⁶⁷ The requirements for the third step differ for criminal and civil cases. In a civil case, "the Equal Protection question is what percentage makes out a prima facie case of purposeful exclusion."⁶⁸ Once the prima facie case is made out, the burden shifts to the state to justify its practice.

What counts as underrepresentation? *Berghuis v. Smith* identified multiple measures of underrepresentation, including absolute disparity, comparative disparity, and statistical significance, but declined to identify the one best way to measure it.⁶⁹ Paula Hannaford-Agor and Nicole Waters of the NCSC point out serious limitations with both absolute and comparative disparity measures. They observe that, for many jurisdictions, jury pool sizes are too small to be confident that variations have not occurred by chance.⁷⁰

Even though the possibility exists to conduct empirical research on representativeness, litigants in state courts who attempt to assess whether the jury pool procedures are discriminatory, and whether the pool represents the community, encounter significant difficulties. Nina Chernoff observes that, although federal courts have recognized litigants' rights to have access to records of jury selection

Litigants in state courts who attempt to assess whether the jury pool procedures are discriminatory, and whether the pool represents the community, encounter significant difficulties.

procedures, state courts have not universally followed suit.⁷¹ She makes a compelling argument that the states' failure to grant litigants access to jury selection records makes it close to impossible to mount a successful challenge to the jury pool on representativeness grounds.⁷²

V. JURY SELECTION PROCEDURES: IN THE COURTROOM

Courtroom jury selection procedures, including voir dire, peremptory challenges, and challenges for cause, may also influence the representativeness of the trial jury. Once a randomly-selected subgroup of potential jurors is chosen from the source list and summoned for service in a specific case, the focus turns to courtroom procedures that are designed to assess the individual prospective jurors' ability to serve as fair and impartial fact finders. In the courtroom, during voir dire questioning of prospective jurors, the judge and/or attorneys for the parties inquire about jurors' backgrounds, experiences, and attitudes that might undermine their impartiality and thus

would justify exclusion through either a successful challenge for cause decided by the judge or through the attorneys' peremptory challenge. Here, the need for impartiality may eclipse the desire to seat a representative jury.

Jury selection procedures were developed in earlier times, and appear to be based on several key assumptions which now appear questionable in light of new psychological research. The first assumption is that prospective jurors are well aware of their own biases and prejudices. A second assumption is that the procedures will allow, even encourage, prospective jurors to admit these biases. And a third assumption is that, if a prospective juror admits to a bias, in many cases the judge or attorney will be able to successfully rehabilitate the juror so that the juror's fact finding is purged of bias.⁷³ Yet, given what we now know about the often unconscious or implicit biases that influence decision-making, the traditional approaches to these jury selection procedures for detecting bias and removing prejudiced prospective jurors are likely to fall short.

The traditional approaches to these jury selection procedures for detecting bias and removing prejudiced prospective jurors are likely to fall short.

A. Juror Bias, including Implicit Bias, in Civil Trials

Although juror bias, especially racial bias, has been the focus of great concern in criminal trials, the preexisting backgrounds, experiences, and attitudes of prospective jurors can also undermine the fairness of decisions in civil jury trials. Juror bias may stem from conscious prejudice, implicit or unconscious bias, preexisting attitudes, and experiences. New research on implicit bias, combined with an extensive body of research on juror decision-making, has provided us with a better grasp of how jurors' backgrounds, life experiences, and attitudes are significant.⁷⁴ Jurors' characteristics shape their perceptions of evidence, which feed into their construction of a narrative account of what happened in the dispute at the center of the litigation.⁷⁵ Evidence that is inconsistent with expectations and with the juror's developing narrative account may be minimized or even ignored.

General views about plaintiff credibility and the existence of a litigation crisis affected civil jury decisions.

Speaking specifically about potential juror biases in civil cases, research has amply documented the ways in which experiences with and attitudes toward civil litigation influence civil jurors' perceptions of evidence and ultimate decisions.⁷⁶ In one study, researchers asked a group of prospective jurors in a Wisconsin jury pool to provide their estimates of how often a typical plaintiff's case had merit (on average, they estimated 52%).⁷⁷ These prior beliefs predicted their evaluations and verdicts in a hypothetical civil case. In other research studies that my students and I conducted with actual civil juries, mock civil juries, and opinion surveys, we found that general views about plaintiff credibility and the existence of a litigation crisis affected civil jury decisions.⁷⁸ Other researchers have discovered that preexisting views about businesses can influence civil case judgments.⁷⁹ These studies suggest the value of exploring attitudes toward civil litigation, plaintiffs, and corporate defendants during voir dire.

Another experiment documented the ways in which implicit racial biases might affect civil jury decision-making.⁸⁰ My collaborators and I developed short scenarios (many based on famous tort cases, such as *Brown v. Kendall*⁸¹) and presented them to participants. We experimentally varied the names of the plaintiff and the

defendant in the scenarios, using stereotypically Black (Tyrone, Malik) or white (Brendan, Art) names. After the participants made judgments about liability and deserved damages, participants went to the Project Implicit website and completed an Implicit Association Test (IAT) for Black and white races. Overall, we found that race, and implicit racial bias, affected how participants judged the defendant's responsibility and how they assessed damages. Participants with high IAT scores, reflecting strong preferences for whites over Blacks, gave more legal responsibility to Black defendants compared to white defendants who had engaged in the same actions. They also recommended higher awards for plaintiffs who sued Black defendants. Dollar awards for Black plaintiffs were lower than dollar awards for white plaintiffs who experienced the same negligently-caused injuries.

These results converge with the findings of a recent field study, which examined the effects of a plaintiff's race on pain and suffering decisions in tort cases in three states.⁸² The researchers used U.S. Census information to impute the race and ethnicity of parties through their surnames.⁸³

Black plaintiffs received less than white plaintiffs in noneconomic (pain and suffering) damages.

They analyzed the economic and noneconomic damage awards for plaintiffs of different (imputed) races and ethnicities. For economic damages such as medical expenses and lost income, no race differences in awards emerged. However, Black plaintiffs received less than white plaintiffs in noneconomic (pain and suffering) damages, even when the researchers controlled for the amount of economic damages that the plaintiffs were awarded.⁸⁴ The study

offers suggestive evidence of arguments that the injuries of racial and ethnic minorities are devalued relative to whites.⁸⁵ As the IAT study found, implicit racial bias might shape this differential perception of the seriousness of a plaintiff's injury.

A juror's gender may also affect civil jury decision-making. Meta-analyses of research on gender differences in perceptions of potential sexual harassment have found reliable differences between men and women respondents in their views of what constitutes sexual harassment.⁸⁶ Although there is substantial overlap between women and men, women define a broader range of behaviors as constituting harassment.⁸⁷ The gender difference is larger for actions that are categorized as reflecting a hostile work environment than for actions that would constitute quid pro quo harassment.⁸⁸

A juror's gender, race, and other demographic characteristics may at times be associated with distinctive attitudes toward the issues in a specific type of civil jury trial, as the example of gender differences in sexual harassment cases indicates. However, even those cases show varying differences depending on whether the case involves quid pro quo or hostile work environment. As a general matter, demographic characteristics are typically not robust predictors of bias toward one side or the other in civil litigation.⁸⁹ Instead, attitudes—especially attitudes that are specifically relevant to case issues—are more successful predictors of a prospective juror's likely biases. A fair jury selection process should provide an opportunity for the court and the parties to explore these potential sources of bias, and should take into account the fact that prospective jurors may be unaware of the potentially biasing effects of their backgrounds, experiences, and attitudes.

A juror's gender, race, and other demographic characteristics may at times be associated with distinctive attitudes toward the issues in a specific type of civil jury trial.

B. Voir Dire Procedures

The sections above provide a justification for voir dire procedures that allow the probing of attitudes and views that could bias a prospective juror's fact finding. Voir dire procedures differ substantially across jurisdictions, across judges within jurisdictions, and even across cases. A 50-state survey of the legal rules governing jury selection practices in civil jury trials illustrates the considerable variation across the states in the methods used to examine jurors, and in the number and method of exercising peremptory challenges.⁹⁰ The NCSC State-of-the-States Survey, which surveyed both lawyers and judges in different states, also provides a useful summary of the varied jury selection practices in the states.⁹¹

One dimension that typically differentiates limited and expansive voir dire is who conducts the voir dire. The 50-state survey shows that only a handful of states have laws or court rules that specifically allocate the questioning to the parties and their attorneys. Instead, most states give that authority to the judge—it is within the judge's discretion to allow or not allow voir dire participation by the parties and their attorneys. Not surprisingly, judicially controlled voir dire tends to be shorter, on average.⁹²

A second key distinguishing feature in the scope of voir dire is the number and subject matter of questions posed to prospective jurors. Prospective jurors may complete questionnaires to provide information relevant to qualification, potential bases for exclusion, and other matters. Questionnaires, too, may be limited or more expansive.

Voir dire procedures in the states run the gamut. Consider the characteristics of a limited voir dire, conducted by a judge alone. Typically, the judge will conduct questioning with prospective jurors as a group, posing a small number of closed-ended questions requiring only a yes or no answer. The questions will be specific to the trial; one or more questions will ask prospective jurors to indicate whether they will be impartial. Prospective jurors will indicate, by raising hands or another method, whether they have a positive response to any of the questions. Thus, the identification of juror bias depends largely upon the prospective juror's self-assessment as potentially biased.

Voir dire procedures in the states run the gamut.

Contrast the limited voir dire with an expansive approach. Prospective jurors may complete a pretrial questionnaire about their backgrounds, experiences, and case-relevant views prior to voir dire questioning in the courtroom. Both the judge and the parties or their attorneys will participate in the questioning, which will benefit from the information obtained in the pretrial questionnaire on potential sources of juror bias. In an expansive voir dire, questioning is wide-ranging, and includes both closed-ended and open-ended questions. If there is a concern about tainting other members of the jury pool, questioning may be conducted individually, outside the presence of other prospective jurors. In this approach, rather than relying on the prospective juror's self-assessment of bias, the judge and attorneys are able to make independent judgments about the possibility of juror bias.

A recent civil mock jury experiment that I undertook with colleagues demonstrated the benefits of expanded and case-relevant questions over a traditional limited set of questions.⁹³ We recruited participants online and randomly assigned them to answer either no voir dire questions, minimal voir dire questions about demographic characteristics and general background information, or extended voir dire questions that were more specifically focused on views about civil litigation, parties, and laws. We presented each participant one of three different civil cases and asked them to make judgments about liability and damages. The responses to the minimal voir

dire questions were unrelated to their case judgments, but responses to many of the extended voir dire questions significantly predicted their decisions on liability and damages. What is more, a significant number of participants gave such extreme answers to the extended voir dire questions that they would likely be candidates for challenges for cause. The results reinforce our sense about the benefits of expansive voir dire in civil jury trials.

Attorney participation in voir dire may be especially helpful.

Attorney participation in voir dire may be especially helpful. A Massachusetts study of attorney participation in voir dire—undertaken by the National Center for State Courts—found that when attorneys participated (which they tended to do in more complex cases), the empanelment time was slightly longer than judge-conducted voir dire, less than one minute per juror.⁹⁴ Approximately a quarter of the challenges (26%) for cause took place during attorney questioning; 62% of these challenges were allowed.⁹⁵ These findings suggest that attorney questioning had a valuable effect on the identification and removal of biased prospective jurors.

C. The Negative Consequences of Limited Voir Dire

Numerous commentators agree that limited voir dire poses significant difficulties for identifying bias in prospective jurors.⁹⁶ This is not a novel discovery linked just to recent research on implicit bias; research documenting the inability of limited voir dire goes back to some of the earliest systematic studies of the American jury trial.⁹⁷ Dale Broeder was a member of the famous Chicago Jury Project that started in the 1950s. He conducted post-trial interviews with 225 jurors, and discovered that a number of jurors failed to tell the court about relevant information bearing on their ability to serve as fair and impartial jurors. He noted, “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.’”⁹⁸ Subsequent research, most of which has examined voir dire in criminal cases, has confirmed the inadequacy of typical voir dire procedures to identify juror bias.⁹⁹

Research, most of which has examined voir dire in criminal cases, has confirmed the inadequacy of typical voir dire procedures to identify juror bias.

During his 12 years as a trial judge on the Superior Court of the District of Columbia, Gregory Mize experimented with an expansion of his typical voir dire practice, first in criminal trials and then in civil trials.¹⁰⁰ His routine practice was to begin voir dire with a panel (usually about 60 prospective jurors) with an introduction about the purpose and importance of voir dire. He would then ask a series of questions to the group as a whole, and tell individuals that if they answered “yes” to any of the questions they should alert the courtroom staff. Those prospective jurors with affirmative responses would then be individually questioned outside the presence of other members of the jury panel. The whole approach was quite efficient—but, Judge Mize wondered, at what cost?

Judge Mize noticed a fair number of prospective jurors who did not respond “yes” to any of the questions. He decided to interview each one individually, in a nearby jury room. He would ask, “I notice you did not respond to any of my questions. I just wondered why. Could you explain?” As a follow-up, he would further inquire, “Is it because the questions did not apply to you?” Most said the questions did not apply, but the individual questioning of these silent jurors resulted in the court obtaining information that resulted in numerous excusals for cause.¹⁰¹

A silent juror candidate in an auto accident case, for example, shared this in the individual interview with Judge Mize: “I was in an auto accident last month. I was a driver, rear-ended, have a sore back still. I have treatment scheduled this afternoon.” Another, whose breath smelled of alcohol, blurted out, “I’ll tell you straight up, I am an alcoholic. I’m starting to shake already today.” Yet another indicated that the plaintiff’s attorney in the current case had previously represented him in a personal injury case. Another silent juror could not speak English. Judge Mize excused all these (and more) prospective jurors for cause; other prospective jurors shared information that led to their removal through an attorney’s peremptory challenge.¹⁰² These clear examples underscore the benefits that can come from even a fairly modest expansion of voir dire practice.

Expanded voir dire procedures, particularly using jury questionnaires and open-ended questioning that allows prospective jurors to speak in their own words, are also valuable because they help attorneys ground their peremptory challenges on relevant experiences and attitudes rather than merely on demographic information, a point relevant to our later topic of peremptory challenges.¹⁰³

D. Reasons for Ineffectiveness of Limited Voir Dire

The examples above suggest some of the reasons why limited voir dire is inadequate in uncovering bias. Some silent juror candidates appear to have been unable or reluctant to volunteer their concerns or their biases until they were confronted in an individual setting with Judge Mize. Although some prospective jurors may purposefully lie, either to get out of jury duty or to serve, I suspect the numbers are low. It is likely more often the case that prospective jurors are unaware of or underestimate the effects of their own biases. They may be concerned about appearing prejudiced, the very opposite of being the ideal impartial juror. Many juror candidates try hard to achieve that socially desirable state and to gain the judge’s approval.

Some silent juror candidates appear to have been unable or reluctant to volunteer their concerns or their biases until they were confronted in an individual setting.

Prospective jurors also express concern about privacy, and these concerns may undermine their willingness to share relevant information.¹⁰⁴ Mary Rose interviewed jurors about their experiences of voir dire, and found that a quarter of them felt that the questions they were asked seemed to them to be “too private” or otherwise objectionable.¹⁰⁵ Rose identified three broad types of concerning questions: their involvement and their family’s involvement in crime or the courts, their personal characteristics such as their marital status or children; and questions about their interests and affiliations, such as hobbies and membership in churches or voluntary organizations. Jurors thought these questions were irrelevant to their performance as jurors.

Prospective jurors also express concern about privacy, and these concerns may undermine their willingness to share relevant information.

E. Pandemic-Era Voir Dire

Conducting voir dire in a pandemic environment, including socially distant, in-person voir dire and virtual voir dire, has posed unique challenges. For courts that proceeded with in-person juries, assembling a panel of

prospective jurors for in-person voir dire during the pandemic had the potential to create a significant health threat because of the typically large size of jury panels. Even setting that aside, some attorneys were concerned about their inability to judge the credibility of juror candidates who were masked and socially distant.¹⁰⁶

Courts adapted in several ways. To minimize the information that had to be collected in person, some states expanded their use of jury questionnaires during the pandemic so that attorneys came to the jury selection better informed about the backgrounds, experiences, and views of prospective jurors and could more efficiently target their questioning. Other courts decided that the health risks were not worth bringing substantial numbers of citizens to the courthouse, and decided they would proceed with voir dire in a virtual format and bring the six or 12 jurors

The jury is still out on the relative effectiveness of virtual voir dire, masked and socially distant in-person voir dire, and traditional in-person voir dire.

to participate in the trial in person. Perhaps recognizing the increased difficulty that attorneys faced in assessing the suitability of juror candidates in virtual voir dire, courts in at least one state reportedly became more generous in allowing attorney participation in the questioning.¹⁰⁷

The jury is still out on the relative effectiveness of virtual voir dire, masked and socially distant in-person voir dire, and traditional in-person voir dire. Some attorneys put great

stock in observing the nonverbal cues of prospective jurors during questioning. Research on the detection of deception indicates that the content of a person's response is a much better indicator of their truthfulness than their nonverbal behavior. Allowing questionnaires and expansive questioning during voir dire should help to counteract whatever limitations the virtual environment or masking and distance create.

VI. CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES

Challenges to individual prospective jurors, either peremptory challenges or challenges for cause, create additional avenues for departure from jury representativeness. Even if the source lists fairly represent the community, and the group of prospective jurors that appears at the courthouse (or on Zoom) is generally representative, the judge's decision to remove prospective jurors when they are challenged for cause and the attorneys' peremptory challenges can significantly alter the composition of the sitting jury.

Challenges to individual prospective jurors, either peremptory challenges or challenges for cause, create additional avenues for departure from jury representativeness.

A. Challenges for Cause

Judges have the ability to remove an unlimited number of prospective jurors if they conclude that the individuals are unlikely to meet the standard of being a fair and impartial juror. Attorneys have a limited number of peremptory challenges. In state civil cases, the most common number of peremptory challenges is three. A line of U.S. Supreme Court cases concludes that challenges may not be based on race and gender.¹⁰⁸

A number of issues discussed above bear on the ability of judges and lawyers to exercise fully-informed challenges. Unconscious and implicit biases that shape jurors' decision-making can also influence legal

professionals.¹⁰⁹ My Cornell Law School colleague Jeffrey Rachlinski and his collaborators have undertaken a series of studies of judicial decision-making.¹¹⁰ They find that judges, like the rest of us, are influenced by a variety of heuristics (mental shortcuts) and biases, including implicit racial biases, in their decision-making. To cite one illustrative research finding, Rachlinski and his collaborators presented municipal court judges with a case involving a nightclub's noise violation. Some judges were told that the nightclub's name was Club 11,866 (after its street address); others were given the name Club 58. In line with the anchoring heuristic, the judges fined Club 11,866 three times as much as Club 58.¹¹¹ More concerning, Rachlinski and his collaborators have also found that judges have implicit racial biases that can affect their judgments in hypothetical scenarios.¹¹²

There is relatively little systematic empirical research on how judges decide challenges for cause in the civil context and how the sum total of their challenges affect the civil jury's representativeness.¹¹³ In one study using criminal cases, Mary Rose and Shari Seidman Diamond examined for-cause challenges in an inventive scenario experiment.¹¹⁴ They presented to judges and lawyers a number of voir dire scenarios

There is relatively little systematic empirical research on how judges decide challenges for cause in the civil context, and how the sum total of their challenges affect the civil jury's representativeness.

in which juror candidates expressed certainty about their ability to be fair and impartial ("I would be fair") or equivocated about their ability ("I'm pretty sure I could be fair"). The juror candidate's likely bias was also varied. For example, one was described as either a member of the church also attended by one of the lawyers in the case (low likely bias), or as a police officer (high likely bias). Judges were asked about their perceptions of the juror's impartiality. Judges' views relied strongly on the subjective certainty of the juror.¹¹⁵ As we noted earlier, people are often unaware of the effects of their experiences and attitudes on their decision-making, making reliance on the juror's subjective certainty a concern.

The civil jury experiment I discussed above that showed the benefits of extended voir dire included another set of conditions.¹¹⁶ After the voir dire questions, but before they heard and decided the civil lawsuit, half the participants were randomly assigned to either watch a short judicial rehabilitation video or not. At the end of the experiment, we asked our participants to assess their own biases in decision-making. We then compared those who had heard the rehabilitation video with those who had not. You'll recall that the extended voir dire questions revealed decision-making biases. They were just as strong for those who received the rehabilitation video and those who did not. But, those who heard it were more likely to say they had been unbiased in their decision-making. Thus, the judge's exhortation to the jurors, encouraging them to reflect on their biases and urging them to be unbiased, had a paradoxical effect—it did not reduce decision-making bias, but the jurors thought it had!

B. Peremptory Challenges

In contrast to challenges for cause, there has been extensive research on attorneys' use of peremptory challenges, and in particular the role of race and gender in exercising those challenges. Reliance on race and gender is banned in both criminal and civil cases. However, virtually all of the empirical research has examined peremptory challenges in criminal cases rather than civil cases. The research has routinely shown prosecutors exercising peremptory challenges against racial and ethnic minorities, and defense attorneys taking the opposite tack.¹¹⁷

An experimental study suggests how stereotypes and unconscious biases can operate in the peremptory challenge context in criminal trials. Samuel Sommers and Michael Norton gave students, law students, and practicing lawyers a hypothetical case of robbery and assault with a Black defendant.¹¹⁸ They also gave them two juror profiles including pictures: a journalist who wrote stories about police misconduct, and a business executive who was skeptical of forensic evidence. The Black or white race of the jurors was varied through the photographs such that for half the participants, the journalist was shown as a Black person and the executive was shown as a white person; for the other half, the races were reversed. The researchers asked the participants to assume the role of a prosecutor and choose one of the potential jurors to strike peremptorily. The juror candidate's race affected these hypothetical peremptory strikes. The practicing lawyers struck the journalist 79% of the time when he was shown as Black but just 43% of the time when he was portrayed as white; in contrast, the business executive was

challenged 57% of the time when he was portrayed as Black and 21% when he was portrayed as white. The research participants rarely mentioned race as the motivator for their peremptory strike; instead, they pointed to race-neutral reasons in the juror's background and attitudes.

The extent to which implicit racial biases might operate in civil cases is interesting to contemplate.

The extent to which implicit racial biases might operate in civil cases is interesting to contemplate. Attitudinal differences in views of the police, crime, and punishment as a function of race are fairly well-established, and prosecutors and defense attorneys trying criminal cases are likely to be well aware of them. Jurors of different races and ethnicities may well take different views in civil cases, but their preexisting attitudes and views may be less sharply distinguished. This could have multiple effects, my Cornell Law School colleague Sheri Lynn Johnson argues. It could influence: “1) the likelihood that attorneys will want to discriminate in the exercise of their peremptory challenges; 2) the likelihood that attorneys on the other side will be on the lookout for such discrimination; and 3) the stake that opposing counsel has in making a *Batson* challenge.”¹¹⁹

Johnson's intuitions are borne out. In a small study of *Batson* challenges in 36 criminal and civil cases, Anna Roberts found that just four of them were in civil cases.¹²⁰ A 2008 survey of attorneys about their views and practices with respect to *Batson* challenges in civil trials showed that a number reported serious reservations about raising a *Batson* challenge, and as a consequence that they made them infrequently.¹²¹ Most had not raised such challenges. Among the reasons, some noted that it was difficult with a small number of peremptory challenges in civil cases to show a pattern of discriminatory strikes.¹²² Other civil attorneys were concerned about essentially calling their opponent a racist or angering the judge, and thought their clients would be better served by not raising the challenge.¹²³ The low likelihood of success given the significant burden of proof that they faced also militated against raising a *Batson* challenge.

Peremptory challenge patterns in civil jury selection, however, suggest that civil attorneys may be influenced by conscious or unconscious biases. In Chicago civil jury trials, civil defendants were about twice as likely as civil plaintiffs to remove Blacks through peremptory challenges. In contrast, plaintiff attorneys exercised their challenges disproportionately against white prospective jurors.¹²⁴ In Maricopa County, Arizona, civil defense attorneys were twice as likely as plaintiff attorneys to exercise their peremptory challenges against Hispanic prospective jurors.¹²⁵

C. Exercising Challenges in Pandemic-Era Jury Trials

The decision to remove a prospective juror for cause or peremptorily has never been easy; it is difficult to estimate with certainty how jurors will be influenced by their background, experiences, and attitudes. However, judges and attorneys face additional difficulty when the cues they have traditionally relied upon, including in-person observation of responses and nonverbal behavior during voir dire, are muted or even absent through masking and social distancing, or virtual questioning. As noted above, research on the ability to detect deception suggests that a focus on the verbal content as opposed to the nonverbal aspects of responses is more informative. Considering the fact that masking and social distancing or virtual voir dire provide unfamiliar settings for obtaining information on which to base challenges for cause and peremptory challenges, it seems prudent to expand the scope and content of both in-person and virtual voir dire.

VII. CONCLUSION

This paper has surveyed some of the difficulties that courts face in meeting the objective of representative, fair, and impartial civil juries. Empirical research has demonstrated the value of diverse juries. However, problems in attaining jury diversity begin with attempting to assemble representative cross sections of the population using source lists that do not fully represent the community. These problems are further exacerbated by differential nonresponse to jury summonses and the disproportionate effects of disqualifications, exemptions, and excuses. Even so, litigants face substantial barriers to raising successful objections to the representativeness of jury venires. Many jurisdictions take a limited approach to voir dire questioning of prospective jurors, often relying on prospective jurors to recognize and volunteer their own biases. Yet psychological research on jury decision-making and implicit bias suggests the importance and value of

Empirical research has demonstrated the value of diverse juries.

Psychological research on jury decision-making and implicit bias suggests the importance and value of expansive voir dire that allows for the examination of case-relevant attitudes and experiences.

expansive voir dire that allows for the examination of case-relevant attitudes and experiences. Holding jury trials during the pandemic, taking place either virtually or in person with masking and social distancing, has been accompanied by new challenges to effective jury selection in civil trials. Despite these difficulties, empirical research also points to a variety of ways that courts may address them to achieve the important goal of representative, fair, and impartial civil juries.

Table 1. Number and Type of Source Lists Used in Summoning Jurors by the States

SOURCE LIST	MANDATORY	PERMISSIBLE	TOTAL
Voter registration	37	12	49
Driver's license	33	18	51
Non-driver's ID card	8	3	11
Tax roll	8	10	18
Department of Labor	3	0	3
Motor vehicle registration	2	11	13
City/county directories	1	9	10
Department of Social Services	1	0	1
Homestead Rebate filers	1	0	0
Non-operator ID	1	0	0
Numbered resident list (MA)	1	0	1
Permanent Fund Dividend applicants (AK)	1	1	1
Temporary Assistance for Needy Families	1	0	1
Utility roll	1	12	13
Persons listing property for ad valorem taxation	0	1	1
Property tax roll	0	1	1
Registered in any gov't program or service	0	1	1
Reliable source (not voter registration)	0	1	1
Telephone directory	0	1	1
Water roll	0	1	1

To access the source list table, go to <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz>; click on the box labeled "Juror Selection and Service Terms."

Notes

- 1 Valerie P. Hans is the Charles F. Rechlin Professor of Law, Cornell Law School. Contact information: Professor Valerie P. Hans, Myron Taylor Hall, Cornell Law School, Ithaca, NY 14853. Phone: 607-255-0095; email: valerie.hans@cornell.edu. Paula Hannaford-Agor, Jeffrey Rachlinski, James Rooks, and Andrew Wistrich made extraordinarily helpful comments on earlier drafts of the paper. I am also grateful to Jacob Sayward, Director for Collections, Faculty and Scholarly Services, Cornell Law Library, for excellent research assistance.
- 2 Shari Seidman Diamond, *Judicial Rulemaking for Jury Trial Fairness*. Paper to be presented at the Pound Civil Justice Institute's 2021 Forum for State Appellate Court Judges (July 2021).
- 3 New York Consolidated Laws, Judiciary Law—JUD § 500.
- 4 U.S. Const. Amend. VI; *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).
- 5 NANCY GERTNER, JUDITH H. MIZNER & JOSHUA DUBIN, *THE LAW OF JURIES* 34-35 (11th ed. 2020).
- 6 U.S. Const. Amend. VII; U.S. Const. Amend. XIV.
- 7 GERTNER ET AL., *supra* note 5, at 35. The Jury Selection and Service Act of 1968 was codified as 28 U.S.C.A. §§ 1861 to 1878 (1988).
- 8 Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003) (summarizing research), <https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss3/5>.
- 9 Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. & SOC. PSYCHOL. 597 (2006).
- 10 Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 LAW & HUM. BEHAV. 232 (2019). In this experiment, racial diversity was achieved by including two Black confederates in mock juries along with white participants. White mock jurors' behavior differed when they were in all-white versus racially mixed juries, as found in the Sommers research.
- 11 *Id.* at 241.
- 12 *Id.*
- 13 Quoted in Steve McGonigle, Holly Becka, Jennifer LaFleur & Tim Wyatt, *A Process of Jury Elimination*, DALLAS MORNING NEWS, Aug. 21, 2005.
- 14 M. C. Stevenson, B. L. Lytle, B. J. Baumholser & E. W. McCracken (2017). *Racially Diverse Juries Promote Self-monitoring Efforts During Jury Deliberation*, 3 TRANSLATIONAL ISSUES IN PSYCHOL. SCI. 187 (2017).
- 15 Instead, evidentiary factors, the perceived fairness of the legal outcome, and jury dynamics were associated with hung jury outcomes. PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, *ARE HUNG JURIES A PROBLEM?* (National Center for State Courts, 2002), <https://ncsc.contentdm.oclc.org/digital/collection/juries/id/27/>.
- 16 Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003).
- 17 An analysis of the frequency of the phrase “all white jury” in three major newspapers found that it occurred more than 200 times during a five-year period. *Georgia v. McCollum*, 505 U.S. 42, 61 n.1 (1992) (Thomas, concurring).
- 18 Ellis & Diamond, *supra* note 16.
- 19 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252-53 (J. P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1848).
- 20 Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 285-86 (Robert E. Litan ed., 1993). In one of the largest surveys, Janet Munsterman and her colleagues surveyed 8,468 jurors in 16 federal and state courts, finding that 63 percent of the jurors reported that their views of jury service were more positive following their service. JANET T. MUNSTERMAN ET AL., *THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE* (National Center for State Courts, 1991).
- 21 Mary R. Rose, Christopher Ellison & Shari Seidman Diamond, *Preferences for Juries Over Judges Across Racial and Ethnic Groups*, 89 SOC. SCI. Q. 372, 372-73, (2008) (summarizing research on racial and ethnic minorities' lower positivity toward government institutions, and surveying 1,465 Texas residents and finding racial and ethnic differences in support for jury trial).
- 22 *Id.* at 384-85.
- 23 John Gastil, E. Pierre Deess & Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POLITICS 585 (2002); John Gastil, E. Pierre Deess, Phil Weiser, & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POLITICS 1 (2008); JOHN GASTIL, E. PIERRE DEESS, PHIL WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010).
- 24 GASTIL ET AL., *THE JURY AND DEMOCRACY*, *supra* note 23.
- 25 Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 710-12 (2014).
- 26 *Id.* at 710-12.
- 27 Consider Argentina's new jury systems, for example, which require that trial juries be composed of half men and half women. Two provinces also require that juries in cases with aboriginal parties include jurors from their community. Vanina Almeida, Denise Bakrokar, Mariana Bilinski, Natali Chizik, Andrés Harfuch, Andrea Ortiz, Sidonie Porterie, Aldana Romano & Shari Seidman Diamond, *The Rise of the Jury in Argentina: Evolution in Real Time*, in *JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE* (Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy Marder eds., 2021). Another example is Canada, which has two official languages (English and French); defendants are entitled to have their cases heard by jurors who speak their language. Regina Schuller & Neil Vidmar, *The Canadian Criminal Jury*, 86 CHI.-KENT L. REV. 497, 499-500 (2011).
- 28 JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 18 (1977).
- 29 Misquoting Hamlet, “aye, there's the rub.” In *Taylor v. Louisiana*, the Court emphasized that: “in holding that petit juries must be drawn from a source fairly representative of the community, we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition [citations excluded]; but the jury wheels, pools of names, panels, or venues from which juries are drawn must not systematically exclude distinctive groups in the community, and thereby fail to be reasonably representative thereof.” *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

- 30 AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS (2005), https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf.
- 31 For example, *Strauder v. West Virginia*, 100 U.S. 303 (1880) (Fourteenth Amendment prohibits race-based exclusions from jury duty). A number of states gave automatic exemptions to women or required that they affirmatively register to serve, dramatically reducing their representation on juries in these states. *Taylor v. Louisiana*, 419 U.S. 522 (1975), declared these special practices unconstitutional.
- 32 VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 53-54 (1986).
- 33 VAN DYKE, *supra* note 28.
- 34 *Id.* at 24.
- 35 GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS (National Center for State Courts, 2007) (hereinafter STATE-OF-THE-STATES SURVEY), https://www.ncsc-jurystudies.org/data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf. See also <https://www.ncsc-jurystudies.org/state-of-the-states/state-of-states-survey>. NCSC resources on fair cross-section law and summoning practices may be found at <https://www.ncsc-jurystudies.org/what-we-do/fair-cross-section>.
- 36 The merging of the lists should include the removal of duplicate names that appear on more than one list, so that each individual is included no more than once. STATE-OF-THE-STATES SURVEY, *supra* note 34, at 13, recommends “that the master jury list include at least 85 percent of the total community population.”
- 37 Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761 (2011).
- 38 In New Mexico, both English and Spanish speakers serve on juries; a state constitutional provision forbids the restriction of the right of citizens to serve on juries because of an inability to speak, read, or write English. Constitution of New Mexico, art. VII, § 3.
- 39 A Connecticut Jury Selection Task Force recommended that noncitizen residents be permitted to serve as jurors to remedy the underrepresentation of certain subgroups in the community. Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson 7 (December 31, 2020). In 2013, the California legislature passed legislation allowing noncitizens who were legal residents in the United States to serve as trial jurors, but Governor Brown vetoed the bill. Eyder Peralta, *Calif. Gov. Brown Vetoes Bill Giving Non-Citizens Jury Duty*, NPR (Oct. 7, 2013), <https://www.npr.org/sections/thetwo-way/2013/10/07/230242924/calif-gov-brown-vetoes-bill-giving-non-citizens-jury-duty>.
- 40 JAMES BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM 20 (2021). See also NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 80 (2007).
- 41 BINNALL, *supra* note 40, at 19-20, 149-59 (Appendix A, Felon-Juror Exclusion Policies by Jurisdiction). See also Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013).
- 42 BINNALL, *supra* note 40, at 19-20, 149-59.
- 43 Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LOUISIANA L. REV. 55 (2020), <https://digitalcommons.law.lsu.edu/lalrev/vol81/iss1/7/>; Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Juror Exclusion in Georgia*, 32 JUST. SYS. J. 335 (2011) (using U.S. census data and Georgia Department of Corrections data to calculate that the felon-juror exclusion reduces the number of African Americans eligible for jury service statewide by a third).
- 44 BINNALL, *supra* note 40, at 43-44. In addition, on the ability of felon-jurors to participate in group deliberation, Binnall reports a mock jury experiment that compared mock juries that had at least one felon-juror to those that did not. Interestingly, felon-jurors participated proportionately more and mentioned more novel case facts. *Id.* at 71-73.
- 45 *Id.* at 30-45.
- 46 *Id.* at 50-61.
- 47 STATE-OF-THE-STATES SURVEY, *supra* note 35, at 14-15.
- 48 *Id.* at 22-23.
- 49 See, for example, Jury Representativeness: A Demographic Study of Juror Qualification and Summoning In Monroe County, New York. (Office of Court Research for Chief Administrative Judge Ann Pfau, Aug. 25, 2011) (hereinafter Monroe County Study).
- 50 Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?* 52 U. MICH. J. L. REF. 1 (2018).
- 51 Monroe County Study, *supra* note 49. See discussion in Valerie P. Hans, *It's No Joke: Jury Representativeness in the State of New York*, THE ISSUE SPOTTER, CORNELL J. L. & PUB. POL'Y, January 20, 2012, <http://jlp.org/blogzine/jury-representativeness-its-no-joke-in-the-state-of-new-york/>.
- 52 Census data were adjusted to exclude non-citizens, non-English speaking people, and those under 18, none of whom are eligible for jury service in New York. Monroe County Study, *supra* note 49.
- 53 *Id.* (citing other projects). See also Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, Unequal Jury Representation and its Consequences (NBER Working Paper Series, March 2021), https://www.nber.org/system/files/working_papers/w28572/w28572.pdf.
- 54 MASS. GEN. LAWS ANN. ch. 234A, § 11 (West 2000); U.S. DIST. CT. R. D. KAN. 38.1(g)(2); Plan for the Random Selection of Grand and Petit Jurors, U. S. District Court for the Northern District of California, General Order No. 6, https://www.cand.uscourts.gov/wp-content/uploads/general-orders/GO_06_8-7-2017.pdf. See discussion in Hannaford-Agor, *Systematic Negligence*, *supra* note 36, at 795-96.
- 55 Abramson, *supra* note 50. See also discussion in GERTNER ET AL., *supra* note 5.
- 56 Hannaford-Agor, *supra* note 37, at 795-96.
- 57 King County, Wash., Superior Court Judge Matthew Williams and Administrative Judge Jennifer Bailey of Florida both reported their experiences that pandemic-era jury pools were equally or more diverse than pre-pandemic jury pools. The Online Courtroom Now and Post-Pandemic: Skills and Tools for Remote Advocacy. NITA online seminar, April 23, 2021.
- 58 *Id.*
- 59 The National Center for State Courts has an excellent collection of materials related to coronavirus and the courts: <https://www.ncsc.org/newsroom/public-health-emergency>.

- 60 State of the State Courts in A Post Pandemic World, National Center for State Courts webinar (March 26, 2020). The link to slides reporting the poll results were updated on June 18, 2020, and may be found at: <https://nationalcenterforstatecourts.app.box.com/s/n7w8zu89tbayfjr0qz6h7mn6nrg0x6qh/file/680542851103>.
- 61 Id. at Slide 6.
- 62 Id. at Slide 8.
- 63 Id. at Slide 13.
- 64 Id. at Slide 12.
- 65 Duren v. Missouri, 439 U.S. 357 (1979). For a critique that argues that the three-step process unfairly undermines the jury, see David M. Coriell, *An (Un)Fair Cross Section: How the Application of Duren Undermines the Jury*, 100 CORNELL L. REV. 463 (2015).
- 66 Duren v. Missouri, 439 U.S. 357, 364 (1979).
- 67 GERTNER ET AL., supra note 5, at 41.
- 68 Id. at 50.
- 69 Berghuis v. Smith, 559 U.S. (2010). To obtain a measure of absolute disparity, one subtracts the percentage in the jury pool from the percentage in the jury-eligible population. To obtain comparative disparity, one divides the absolute disparity percentage by the group's percentage representation in the jury-eligible population. The statistical approach employs significance tests to determine whether the observed underrepresentation could have occurred by chance.
- 70 Paula Hannaford-Agor & Nicole L. Waters, *Safe Harbors from Fair-Cross Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool*, 8 J. EMPIRICAL LEGAL STUD. 762 (2011) (concluding that absolute and comparative disparity tests would lead to immunity from fair cross-section challenges in the majority of U.S. jurisdictions).
- 71 Nina W. Chernoff, *No Records, No Rights: Discovery and the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719 (2016). See also Nina W. Chernoff & Joseph B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, 33 JUST. SYS. J. 47 (2012).
- 72 Chernoff, supra note 71.
- 73 Jessica M. Salerno, John C. Campbell, Hannah J. Phalen, Samantha R. Bean, Valerie P. Hans, Daphna Spivack & Lee Ross, *The Impact of Minimal versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases* (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733136.
- 74 Jennifer K. Elek & Andrea L. Miller, *The Evolving Science on Implicit Bias* (National Center for State Courts Report, March 2021). The substantial body of research on jury decision making is summarized in VIDMAR & HANS, supra note 40; BRIAN H. BORNSTEIN & EDIE GREENE, *THE JURY UNDER FIRE* (2017); and DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* (2012).
- 75 Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 42 (Reid Hastie ed., 1993); VIDMAR & HANS, supra note 40, at 132-35.
- 76 Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1181-82 (2003).
- 77 Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL.: APPLIED 91 (2001).
- 78 VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* 58-78, 222-49 (2000).
- 79 Shari Seidman Diamond, Michael J. Saks & Stephan Landsman, *Jurors' Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 309 (1998).
- 80 Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 SO. CAL. L. REV. 507 (2020), https://southernjournaloflawreview.com/wp-content/uploads/2020/07/Hans_Website.pdf.
- 81 In *Brown v. Kendall*, 60 Mass. 292 (1850), the defendant was attempting to break up a fight between his dog and the plaintiff's dog, but hit the plaintiff in the eye with a stick. It became famous for introducing the reasonable person standard.
- 82 Erik Girvan & Heather J. Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. AGGRESSION, CONFLICT & PEACE RES. 247 (2016). The states were Florida, Illinois, and New York.
- 83 Id. at 248.
- 84 Id. at 252-53.
- 85 MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 21 (2010) (arguing that U.S. tort law in practice devalues the injuries of women and racial and ethnic minorities); Cardi et al., supra note 80, at 510-11 (summarizing commentary in task force reports and elsewhere of disadvantages of African-American plaintiffs and defendants in civil case outcomes).
- 86 Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33 (1998); Maria Rotundo, Dung-Hanh Nguyen & Paul R. Sackett, *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCHOL. 914 (2001).
- 87 Rotundo et al., supra note 86.
- 88 Id.
- 89 Hans & Jehle, supra note 76, at 1180 (summarizing research).
- 90 50 State Statutory Surveys: Civil Laws: Civil Procedure. Selection of Jurors (Westlaw, April 2020).
- 91 STATE-OF-THE-STATES SURVEY, supra note 35, at 27-31 (reporting variation).
- 92 Id. at 30 (showing that when judges had an exclusive or primary role in voir dire questioning, voir dire took less time).
- 93 Salerno et al., supra note 73. The minimal voir dire questions were drawn from Susan Oki Mollway, Sample voir dire subjects covered by Judge Susan Oki Mollway in civil trials, https://www.hid.uscourts.gov/regmnts/SOM/SOM_standard_civil_voir_dire.pdf?pid=19&mid=63. See Salerno et al., supra note 73, for the list of sources of the extended voir dire questions.
- 94 Supreme Judicial Court [Massachusetts], Committee on Juror Voir Dire, Final Report to the Justices 7 (July 12, 2016).
- 95 Id. at 7-8.

- 96 Hans & Jehle, *supra* note 76. Debora A. Cancado, *The Inadequacy of the Massachusetts Voir Dire*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 81, 83-84 (2000) (criticizing limited voir dire); JURYWORK: SYSTEMATIC TECHNIQUES, 4 (Will Rountree, Elissa Krauss & Beth Bonora eds., 2nd ed., 2004).
- 97 Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 SO. CAL. L. REV. 503 (1965).
- 98 *Id.* at 505.
- 99 See Hans & Jehle, *supra* note 76, at 1188-90 (summarizing studies).
- 100 Gregory E. Mize, *On Better Jury Selection—Spotting UFO Jurors Before They Enter the Jury Room*, 31 CT. REV. (1999) (experience with criminal trials); Gregory E. Mize, *Be Cautious of the Quiet Ones*, VOIR DIRE, Summer 2003, at 1 (experience with both criminal and civil trials).
- 101 In civil trials, 44 of the 427 silent prospective jurors reported a legally significant piece of information, including information that merited removal by a challenge for cause. That amounted to approximately one legally relevant piece of information for every two civil jury trials. Mize, *Be Cautious of the Quiet Ones*, *supra* note 100, at 13. Mize reports that he discovered a greater number of silent juror candidates with problematic responses in his expanded criminal voir dire interviews.
- 102 *Id.* at 13.
- 103 Barbara Allen Babcock, *Jury Service and Community Representation*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 460, 480 (Robert E. Litan ed., 1993).
- 104 Mary R. Rose, *Jurors' Views of Voir Dire Questions*, 85 JUDICATURE 10 (2001); Paula Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18 (2001).
- 105 Rose, *supra* note 104, at 13.
- 106 Robert A. Clifford, Valerie P. Hans & Richard Jolly, *Jury Trials in the Era of COVID19*, Civil Justice Research Initiative webinar (May 22, 2020), <https://civiljusticeinitiative.org/berkeley-boosts-jury-trials-in-the-era-of-covid-19/>.
- 107 The Online Courtroom Now and Post-Pandemic, *supra* note 57.
- 108 *Batson v. Kentucky*, 476 U.S. 79 (1986); *Flowers v. Mississippi*, 588 U.S. ____ (2019), 139 S. Ct. 2228 (2019). *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), held that *Batson* applies in civil trials.
- 109 Elek & Hannaford-Agor, *supra* note 74. See also Jeffrey J. Rachlinski, Sheri L. Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195 (2009).
- 110 Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203 (2017).
- 111 *Id.* at 215. Anchoring refers to the “process in which irrelevant values provide a starting point for a judgment; adjustments are then made away from the anchor, but are often insufficient.” JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 211 (2016).
- 112 Rachlinski et al., *supra* note 109. The authors write: “Our research [using scenario experiments] supports three conclusions. First, judges, like the rest of us, carry implicit biases concerning race. Second, these implicit biases can affect judges’ judgment, at least in contexts where judges are unaware of a need to monitor their decisions for racial bias. Third, and conversely, when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.” *Id.* at 1221.
- 113 A substantial amount of research on capital jury selection finds that challenges for cause disproportionately eliminate women and African American prospective jurors from capital juries, at least in part because of their greater opposition to the death penalty. For a summary of the research, see Amelia C. Hritz, Caisa E. Royer & Valerie P. Hans, *Diminishing Support for the Death Penalty: Implications for Fair Capital Case Outcomes*, in CRIMINAL JURIES IN THE 21ST CENTURY: PSYCHOLOGICAL SCIENCE AND THE LAW 41 (C. Najdowski & M. Stevenson eds., 2019).
- 114 Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC’Y REV. 513 (2008).
- 115 *Id.* Interestingly, the lawyer participants generally did not show this same reliance.
- 116 Salerno et al., *supra* note 73.
- 117 See VIDMAR & HANS, *supra* note 40, at 97-99 for a summary.
- 118 Samuel R. Sommers & M. I. Norton, *Race-based Judgments, Race-neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007).
- 119 Sheri Lynn Johnson, Personal communication, April 26, 2021.
- 120 Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359 (2012).
- 121 Approximately two-thirds of the 138 attorneys surveyed reported civil case experience, either exclusively with civil cases (33%) or with both civil and criminal cases (32%). V. HALE STARR & MARK MCCORMICK, *JURY SELECTION*, § 17.08 Attorney Survey (4th ed. & Supp. 2016).
- 122 “Attorneys performing only (or mostly) civil trials stated that being limited to three (or four) peremptory challenges made it nearly impossible to prove a pattern of racially motivated strikes, even with the existence of suspicious strikes.” *Id.* at § 17.08(C). A pattern of discriminatory strikes is not required, but it may be relevant to meeting the challenger’s burden of proof of discriminatory intent.
- 123 *Id.* at § 17.08(E).
- 124 Shari Seidman Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 441 (2009). The analysis showed that a prospective juror’s race and gender together were linked to civil defense attorneys’ peremptory challenges. “The defense excused 25.3 percent of available Black males and 21.5 percent of available Black females, but 13.4 percent of available nonBlack males and 15.4 percent of nonBlack females. Thus, the strong effect of being Black on defense challenges was more pronounced for Black males than for Black females.”
- 125 Judicial Branch of Arizona, Maricopa County, *Racial and Ethnic Representation through the Jury Selection Process: An Analysis of 2019 Jury Data from the Superior Court of Arizona in Maricopa County* (May 2021).

Oral Remarks of Professor Hans

I am grateful to the Pound Civil Justice Institute for giving me the opportunity to speak to this distinguished audience. My task today is to talk about problems in assembling representative, fair, and impartial juries. I will discuss several problems, and in a later session, Professor Diamond will talk about solutions.

I want to talk about two different sets of challenges. First, I want to discuss the difficulties that many courts experience in assembling representative jury venires and why it's important to have jury panels that reflect the community. Second, I want to highlight what I see as a disconnect between some of the courtroom jury selection procedures currently in use and what we've learned from research on juror biases. I will suggest that the procedures currently in use often fall short in helping judges and lawyers seat fair and impartial juries.

When we talk about jury biases, often we focus on biases in criminal cases. We should acknowledge that biases exist in civil jury trials as well. In assessing the responsibility of defendants and plaintiffs, and in calculating and assessing damages, jurors' backgrounds, experiences, knowledge, and biases can all play a role. Jury representativeness—having a jury that is fully representative of the community—can partially counter some of those concerns. That's the first issue that I'd like to discuss.

In assessing the responsibility of defendants and plaintiffs, and in calculating and assessing damages, jurors' backgrounds, experiences, knowledge, and biases can all play a role.

The Benefits of Juries Drawn from a Representative Cross Section of the Community

Federal and state constitutional statutes and other laws protect the right to a civil jury drawn from a representative cross section of the population. The Sixth Amendment preserves a right to a jury drawn from a cross section of the community in criminal trials. Cases interpreting the Seventh Amendment right to a jury in civil cases also identify the benefits of a jury drawn from a representative cross section. The Equal Protection Clause forbids discrimination against members of protected classes, and the Federal Jury Selection Service Act in 1968 established statutory rights to civil juries drawn from a cross section.

Research shows multiple benefits from jury representativeness. It strengthens fact finding, increases the legitimacy of the trial, educates a broad range of citizens about the law, improves their views about courts, and encourages civic engagement.

As you're well aware, many state constitutions and other legal frameworks have similar kinds of guarantees. The important thing to note is that, in contrast to some other countries, in the United States the cross section requirement applies to venires, not trial juries.

Does the representativeness of the actual jury deciding the case matter? Will decisions reached by representative juries differ from decisions reached by juries that do not include a representative cross section of the community? In a word: Yes. It makes a difference. Research shows multiple benefits from jury representativeness. It strengthens fact

finding, increases the legitimacy of the trial, educates a broad range of citizens about the law, improves their views about courts, and encourages civic engagement.

I want to offer you a concrete example of how diverse and representative juries can promote better fact finding. I'd like to describe the results from a mock jury experiment conducted by Sam Sommers with community residents who were solicited from a jury pool and from newspaper ads.¹ He placed participants in two different kinds of six-person juries: a homogeneous all-white jury; or a diverse jury that included four whites and two African Americans.

Mock jurors watched a summary of a sexual assault trial with a Black defendant. Professor Sommers discovered that when he compared the deliberations and judgments of the two types of juries, being in a diverse jury had some striking effects.

First of all, even before deliberation began, initial judgments about whether the evidence was strong enough to merit a conviction were affected. Black jurors had the lowest percentage of initial guilty verdicts. But for white jurors, their initial judgments depended on whether or not they anticipated being in a jury that was diverse or in a jury with all other white people.

The content of the deliberations also differed. Diverse juries had longer deliberations. More of the facts of the case were discussed and debated. Furthermore, the deliberations were more accurate, on the whole.

The educational and civic education benefits of jury service are distributed throughout society.

The differences were not simply due to the fact that Black jurors were contributing their own distinct perspectives, although that was the case. Instead, whites on diverse juries mentioned more novel case facts, were more accurate, and raised more questions about missing evidence than their counterparts in all-white juries did.

In addition to creating more accurate fact finding, there are other advantages of representative juries. They include having more public confidence in jury verdicts. There are democracy-enhancing effects, too. Jury service, as many of you may know, typically increases regard for the courts and for judges.² At least one study has found that that effect is enhanced further for minority jurors.³ And the educational and civic education benefits of jury service are distributed throughout society.

I hope I have convinced some of you that there are lots of benefits that accrue to having a representative jury—but getting there is another matter.

Challenges in Assembling Representative Jury Venires: Source Lists, Qualifications, Exemptions, and Excuses

I want to examine how jury selection procedures sometimes interfere with achieving the goal of a representative jury. It starts with the source list. Table 1 in my paper, which is based on information from the National Center for State Courts, shows that the states vary quite a bit in the approaches they take to generating lists of eligible residents for jury service. The most common are voter registration and driver's license lists. But these, and most others that are relied upon by the courts, fall far short of fully representing our nation's communities. Paula Hannaford-Agor, the Director of the Center for Jury Studies of the National Center for State Courts, maintains that courts need to combine multiple lists to have any hope of fully representing our communities.

A second challenge, and it is also a serious one, is that many jury summonses don't reach their intended targets. Even when they do, some prospective jurors do not respond. These problems are more frequent in some communities with higher mobility and lower wealth.

A final issue undermining jury representativeness has to do with some of the qualification requirements for jury service. Courts also vary in the extent to which they give jurors with hardships or special circumstances a break through exemptions or excuses.

In a recent book,⁴ Professor James Binnall argues that, with 8 percent of the U.S. population having felony convictions, the felon exclusion rule is far and away the most extreme form of civic marginalization in the United States. A permanent ban on felon jury service seems especially inapt in civil jury trials.

Conducting jury selection in a pandemic has added a new twist to the challenge of assembling representative cross sections from the community.

Conducting jury selection in a pandemic has added a new twist to the challenge of assembling representative cross sections from the community. Representativeness can be affected for in-person jury trials, which present novel public health concerns related to COVID-19. Some states have experimented with virtual or remote jury selection, which raises other potential concerns about jury representativeness because of differential lack of access to the internet.

State trial court judges who have presided over virtual jury selections in civil trials in state courts have remarked that the representativeness of virtual jury panels appears to be as diverse, if not more diverse, than pre-pandemic jury panels.

Interestingly, although I haven't seen much systematic data on this, state trial court judges who have presided over virtual jury selections in civil trials in state courts have remarked that the representativeness of virtual jury panels appears to be as diverse, if not more diverse, than pre-pandemic jury panels.

A final point is jury size. Many states use smaller juries of six or eight members instead of 12. It's a straightforward mathematical exercise to demonstrate that larger juries do a better job representing the range of individuals in the community. A substantial line of empirical research confirms that larger juries are better fact finders, as well.⁵

Challenges in Assembling Representative Juries: Voir Dire and Challenges

Now, I want to turn to what happens inside the courtroom as judges and lawyers work to seat the jury that will hear the case. Here, too, there are challenges. In many states, the trial court judge is the one who conducts the voir dire questioning. Often it tends to be limited to demographic questions, some potentially relevant background or experiential questions. One global question that is characteristic of most voir dieres is asking the prospective jurors themselves to assess whether they can be fair and impartial in the case.

It is no news that limited voir dire will miss potential juror biases. Back in 1965, Dale Broeder was a part of the famous Chicago Jury Project, and he interviewed jurors who had served on jury trials. He had also previously watched their voir dieres. His conclusion from these two streams of information, the observation of the voir dieres

and what he heard from jurors afterwards, led him to report that: “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.”⁶

Back in the 1960s, these kinds of limited approaches might have been understandable. But we’ve come a long way in understanding how conscious and unconscious juror biases might affect jury decision-making. A lot of voir dire questions are asked in a yes/no format. They rely on jurors identifying their own biases, even though psychological research suggests that some biases are not in conscious awareness. People may try to minimize bias but are unable to do so. Again, they might not even be aware of the biases that they hold.

When you rely on jurors themselves having to come up with whether or not they’re going to be biased, it’s a real disadvantage. Giving them an opportunity to talk about their backgrounds, experiences, and attitudes has the potential to offer lawyers and judges more insight into a prospective juror’s thinking.

Of course, these problems are even more exciting and challenging in pandemic-era jury selection, whether you’re talking about trying to make inferences about potential juror biases with masked and socially distant individuals, or in small squares on a Zoom screen.

During the pandemic, a number of judges have been more permissive in allowing extensive pretrial questionnaires that jurors receive in advance of the online or in-person jury selection.

Perhaps this is one reason why, during the pandemic, a number of judges have been more permissive in allowing extensive pretrial questionnaires that jurors receive in advance of the online or in-person jury selection. Also, some judges have been more generous in allowing attorneys to ask questions themselves. I think that’s a good thing, because both of these approaches have been found to enhance the ability of lawyers and judges to identify juror biases.

I want to talk about the issue of race in jury selection and *Batson* challenges. When we think of *Batson*, we usually think about criminal trials. When I researched the issue for this presentation, I was able to find only a handful of civil *Batson* challenges. But two recent studies, one in Arizona’s Maricopa County and the other in Chicago, Illinois, examining data on peremptory challenges by defense and plaintiff attorneys, have found some concerning patterns with respect to race in the exercise of peremptory challenges.⁷ It’s an issue that we should not be ignoring.

Summing Up

Let me sum up: Our nation has identified the ideal jury, one that fully represents the community, and there are good research-based reasons to applaud that and to support that ideal. Nonetheless, challenges remain in bringing representative cross sections of the public to the courtroom, and in assessing their biases during voir dire. The pandemic has only exacerbated these challenges.

The identification of these challenges is the first step, but don’t despair—you’re at the right place. In subsequent sessions in the Forum, we will also explore solutions, so that we get collectively even closer to our ideal: the fair, impartial, and representative jury. Thank you.

Comments By Panelists

PROFESSOR MARY ROSE

I am so grateful to have the chance to be a commentator on Professor Hans's paper. Anyone who reads her work is able to get a sense of her remarkable skill set, if only because it becomes apparent that Professor Hans is an expert or has done specific research on most of the sections of her own paper.

I'm also grateful to the organizers for determining that the conference should address this particular theme, because if there is one takeaway message from Professor Hans's work, it centers on how important it is to consider participation in civil juries and how much more we still need to know. Hence, I'm centering my remarks on both the need to care about this topic and the need to understand it more. Then I'll close with just a few comments on what I think judges in particular should be considering.

The Impact of Jury Participation

In terms of caring, Professor Hans's opening section makes it clear that in terms of benefits to both the juror and the system, there's ample reason to care about participation in civil trials. And further, there should be little distinction between civil and criminal juries when it comes to asking whether they are open to all.

Diversity improves decision-making. It enhances public perception of verdict legitimacy, and jury service helps citizens learn more, including learning the positive aspects of our courts, and it promotes civic participation. Although we are surely in the middle of a crisis of confidence in the criminal justice system, I believe we never have fully recovered from the efforts in the late 1980s, the 1990s to vilify civil juries.

There should be little distinction between civil and criminal juries when it comes to asking whether they are open to all.

The college students I teach today hold many of the same assumptions about civil juries that fueled politicians to declare decades ago that civil juries are a problem to be solved. We still need to promote confidence in civil jury outcomes, especially as the last few years have brought more attention to the downsides of alternatives to trials and to jury decision-making. There's the illegitimacy many feel when they are forced into binding arbitration agreements just for signing up for a service. And there's the lack of transparency about behavior that arises when information is not presented to a jury or a judge in a trial.

Schooling Citizens

Citizens need to be schooled in what the civil system can do well. And, as Professor Hans makes clear, there is no greater school for this than jury duty, whether that's civil or criminal. Nevertheless, caring about participation in civil cases, and any racialized variations in participation, requires extra commitment and creativity. For instance,

Citizens need to be schooled in what the civil system can do well.

Professor Hans's paper lays out the sources of underrepresentation, including unrepresentative source lists, disqualifications and exemptions, summons nonresponse, and decisions made during voir dire. However, research I and others have done suggests disparities in participation levels for minority groups, at least with respect to

the earliest phases—that is, those who send back a qualification questionnaire or who appear at court—are small enough that, at first glance, some may say, “So what?” and not care sufficiently. Specifically, more often than not, levels of minority underrepresentation do not resemble the jaw-dropping values we saw in the middle part of the 20th century, in which all or nearly all of the minority community might not be in a pool. Instead, for African Americans, it’s common for about a third to 40 percent of the community to be missing from the pool. When a group constitutes a minority of an area, that large disparity translates to an absolute disparity, the measure that courts typically look at, that is usually the 3 to 5 percent range. These typical levels of underrepresentation mean that in a pool of 40 people, perhaps only one or two members of a minority group may be missing. It’s easy to wave that away, but those one to two people do not accrue the benefits of participation. And the likelihood of a diverse jury, with all the benefits that Professor Hans outlines, is lessened.

Many, many states hold fast to the discredited “10 percent” rule, meaning that if the absolute disparity is less than 10 percent, it is not recognized as a legally sufficient disparity to challenge the pool. Courts have to be more committed to remedying the disparities they have, not waving away small differences as not a problem, or constructing laws that will almost never accept a challenge to a jury pool.

Responses to Non-Responses

Courts also need to care enough to be creative about summons non-response. Professor Hans outlines well that our source lists can be more diverse than they are. But nonresponse, together with inactive addresses, tend to be

Courts also need to care enough to be creative about summons non-response.

the leading cause of underrepresentation. Deciding how to get people to respond to a summons without unleashing more law enforcement into an already alienated community constitutes, in my opinion, the key challenge for diversifying our 21st century juries.

My community of scholarly researchers also needs to step up. The research literature is very much in its infancy in understanding the nexus, if any, between race and views about civil litigation. I think scholarship is much clearer about the likely, albeit not inevitable, relationship between race and views of the criminal justice system. The civil justice system presents fewer clear-cut findings, if only because cases themselves are more diverse.

What seems clear from research Professor Hans cites and work done by Professor Shari Diamond, work that a former graduate student of mine replicated, is that attorneys appear to act as if race matters in civil cases. Defendants are more likely to dismiss African Americans through peremptories, and plaintiffs are disproportionately likely to dismiss non-Hispanic whites.

What stereotypes and assumptions undergird these patterns? We know precious little about how attorneys reason about jury selection in this domain, and we likewise know little about whether or not the stereotypes reflect any actual attitudinal differences.

Attitudes

Actual attitudinal differences are plausible. Civil cases reflect important areas of stratification in the world, and as much as some may wish to deny it, our country continues to be stratified structurally along racial lines. Therefore, race patterns, for example, the types of jobs that people occupy, and civil cases may well touch on relationships between employers and employees. Life expectancy is lower and health morbidity is higher among African Americans compared to other racial groups, and cases may center on the effects of living with disabilities or other health conditions. African Americans are less likely than other groups to own property, and are estimated to have about one eighth the amount of wealth of whites. What does that mean when cases center on the responsibility expectations of property owners? And, of course, what does it mean for views of what constitutes enough damages for an injury?

Valerie's paper rightly notes that demographic factors rarely predict verdicts in specific cases. I am by no means suggesting that any attorney stereotypes about race and viewpoints in civil cases render the patterns in peremptory behavior to be justified. Instead, I think we just don't know enough about whether achieving greater racial diversity in civil cases provides greater attitudinal diversity during deliberations. Given that we know we need attitudinal diversity to elevate the quality of deliberation, the absence of information on race and civil justice-relevant viewpoints is problematic. There are so many potential questions that we can ask about achieving more diversity in the civil realm.

Civil cases reflect important areas of stratification in the world, and as much as some may wish to deny it, our country continues to be stratified structurally along racial lines.

Nonetheless, at a conference of judges, I must emphasize that judges have the power to prioritize representation issues. In my opinion, the adversarial system is not well equipped to tackle representativeness issues. Defense attorneys litigate this issue as part of an appeal of a verdict. In the civil realm, plaintiffs' attorneys may do

Judges have the power to prioritize representation issues.

likewise. Conceivably, through this process, problematic practices will get identified and addressed. Yet the remedy is about a particular defendant. To achieve system-wide change, we need judges to take leadership roles in prioritizing and caring about the issue, and to advocate for prospective jurors—people who may not even recognize that they need advocacy. What I have seen is that true changes to a system come about when judges decide that underrepresentation is a

problem to be fixed, and that it can be fixed. What are the bottlenecks in one's own jurisdiction? Where is attrition occurring? It is typically when leaders in courts take a look at this problem and try to address it that you get real change. And the most powerful role that judges can perform is to also advocate for the trial itself—because without trials, there are no juries, and no body to represent *any* community, not just minority communities. Thank you so much.

THE HONORABLE STEVEN C. GONZÁLEZ

It's great to be here, I appreciate the chance to talk about some very important issues.

I'll start with the premise that diverse juries are better. Jury selection and jury diversity are getting long overdue attention lately, due to the pandemic and due to the racial reckoning in the United States, which is also long overdue. And regardless of the debate about the legal underpinnings of the issue for criminal versus civil cases, I believe that having diverse juries is better policy, with better outcomes, in both kinds of cases.

Diverse Juries Are Better

Diverse juries are better, and the papers bear this out, and so does experience, in every objective measure, except perhaps one. And that's efficiency. It may take longer, and that's in part because of how a more diverse jury operates. Others worry that maybe there's going to be a larger likelihood of a hung jury, but the evidence is to the

contrary, that that risk does not increase. The diverse juries are more likely to actually read the instructions from the court. They're more likely to review the evidence carefully, and more likely to discuss the issues with each other before reaching a decision.

Regardless of the debate about the legal underpinnings of the issue for criminal versus civil cases, I believe that having diverse juries is better policy, with better outcomes, in both kinds of cases.

In addition, and importantly, white jurors act differently—they act *better*, when people of color are in the room. And, therefore, it's not just the perspective of people of color that is important, although it is, the effect we have on the others in the room as we deliberate is also important.

I also would recommend that, as we're evaluating jury selection, we should reassess how we do it. I would urge us no longer to allow, from counsel, leading questions, and not use them ourselves as judges. Especially when we're seeking to potentially rehabilitate a juror, we should not be leading them to that rehabilitation. We want to hear the words from the jurors themselves, not have them agree with ours. And as we conduct voir dire as judges, we should be paying close attention to who is questioned and what questions are asked to see any differences in the approach that might be helpful.

Partisan Parties in Litigation

Of course, in jury selection, the goal of the justice system overall in society is to have a fair jury, but the parties are partisans, and their goal may be the opposite. In fact, they may be trying to find the jury that's the most biased in their favor at the outset. It's the judge's job to make sure that we stick to the ultimate purpose of selecting a fair jury, that is a cross section of the public.

Now, part two of my comments has to do with the civil/criminal distinction, and as I alluded to before, I don't find much difference between the two, even if the legal underpinnings may be different. And I agree

The goal of the justice system overall in society is to have a fair jury, but the parties are partisans, and their goal may be the opposite.

with Professor Hans's paper that diversity on the jury matters both in civil and criminal cases. It matters in similar ways in those cases for the cases themselves. For the jurors, it matters in the same way. To me, a potential juror is like an at-will employee who has no right to a job, but has a right not to be terminated for an illegal reason. The citizen called for jury duty has no *right* to serve on the jury, but they have a right not to be removed for a discriminatory reason.

Part three of my comments is that *Batson* itself is a complete failure in preventing discrimination in jury selection. There's been much written on this. I don't think that's really in debate. It's pretty universally acknowledged that, essentially, the test requires the judge to agree with one counsel that the other counsel is intentionally racist. It's a rare thing that that's going to happen. And I think it's incumbent upon us together to find a solution to actually eliminate bias in the selection and retention of juries.

Abolish Peremptories

For part four of my comments, I believe peremptory challenges should be abolished. Here's why I think that's true: Thurgood Marshall observed in the *Batson* case itself that, the history of peremptory challenges itself is a problem. Peremptories originated in England when it was believed that the king was infallible, and therefore was entitled to strike any potential juror without stating a reason. To be fair, the defense was allowed a certain number of challenges without a reason as well. But now in England, since they recognize that the crown is not infallible, they have completely eliminated peremptory challenges, because the underpinnings have been eroded. In this country, we adopted them without much debate as a colony, and then as states were added—again, without much discussion about why we have them. We cling to them now, I think, because of tradition and the belief that we are using them effectively, even though all the studies say that, in fact, we're not—that with the jurors we strike come appreciably the same outcomes as with the jurors that we keep.

Peremptory challenges also make the process unnecessarily complicated, and expensive, and we're not honest with ourselves as litigators about why we strike jurors.

Peremptory challenges also make the process unnecessarily complicated, and expensive, and we're not honest with ourselves as litigators about why we strike jurors. We're either not being honest with ourselves or to those studying us when we give the reasons for why we have struck certain jurors.

Now, I think there are great benefits to having a diverse jury, and very little in favor of actually keeping those peremptories. But that's a hard one to sell. Litigators always believe that they're the exception and they're actually able to use them well even if others do not. And because of that resistance, in our state, I voted to adopt a compromise. It's called General Rule 37 in Washington state. And we recognize that *Batson* has failed, that diverse juries are better, that racial discrimination in jury selection is bad, and that we have an obligation as judges to do something about it.

We adopted this General Rule 37 after much drafting and comment by interested parties and groups. And what it provides is that a peremptory strike will not be allowed if an objective observer who understands implicit bias

could conclude that race was a factor in its use. The test isn't that an objective observer *would* so conclude, or even *would probably* so conclude, just that they *could* so conclude. And if so, you may not strike that juror of color.

Based on some of the comments to this proposed rule, you would have thought that the sky was falling. Some said that jury trials, as we know them, will cease to exist, and that we were discarding the baby with the bathwater.

We're taking a hard look at race and its effects on our system instead of avoiding the subject altogether.

In practice, it's been a bit of a yawn. Juries are selected, strikes are made. Sometimes the rule is invoked and ruled upon, and the cases proceed, and usually with more diverse juries and better outcomes than we would have had otherwise.

And as a consequence of the rule, there is more implicit bias training for judges and for counsel. Jury selection has received greater attention by everyone, and I think we're doing it better than we did before. And one additional significant upside of this

rule, and not just jettisoning peremptory challenges as I've advocated for, is that we're taking a hard look at race and its effects on our system instead of avoiding the subject altogether, which is what we were prone to do before.

Improving the System

Finally, I'll close with some comments about the recommendations that have been made. The process itself can be improved. The source list should be fresh, because we know demographically young people and people of color are more likely to move than are white people or wealthy people or older people. If we actually want to get a good cross section, we need to find a way to get to people quickly before that address that we have might be stale. And letters don't always work. Delivery may not be good, or the mail might not get opened. We need to reach people by email, by text, and other means. And of course, pay needs to be increased.

In my state we pay \$10.00 a day, which is an amount that was set before I was born, back when that would have constituted more than the minimum wage for jury service. And I agree that a felony record shouldn't matter. It matters less even in civil cases than criminal cases and shouldn't bar someone from serving.

I also am in favor of the zip code-replacement approach discussed in the papers for today. Since the process is not random, we're picking more people from the same zip code that's underrepresented. I think it's a good affirmative step in making sure that we have broad representation on our panels.

And as I said before, we shouldn't use leading questions, and lawyers should have the chance to meaningfully participate in voir dire, as long as they use that time responsibly, not leading, not arguing the case, and not doing most of the talking, but rather getting the jurors to talk.

I'm also in favor of questionnaires. Civics education is an important part of the answer. And it's not the baby that we're throwing out here with the metaphor. The baby, if you will, is justice— and sometimes peremptories and the process itself are the bathwater. We can do it better. I urge us to, and I appreciate the chance for further discussion. Thank you.

DOUGLAS K. BURRELL

First, I want to say how much I appreciate having the opportunity to speak at the Pound Civil Justice Institute, especially this year when the focus is on “Juries, Voir Dire, *Batson* and Beyond: Achieving Fairness in Civil Jury Trials.”

As a civil defense attorney who also currently serves as President-Elect of DRI—Lawyers Representing Business, it is very important to me that the jury trial system is fair. I don’t subscribe, especially as an African American man, to the belief that there are certain types of jurors who are more favorable to business and certain types of jurors who are more favorable to plaintiffs.

It Depends on the Juror

I think it all depends on the juror, and on their particular background, and it is important in the jury selection process (which includes the pool that the jury is drawn from), that the entire process is fair so we can get the best juries. And I’ll just give you an example.

Most people, certainly in Georgia where I’m from, make the assumption (in my opinion, misguided) that most African American jurors are going to be liberal. But I know firsthand that regardless of socioeconomic status, there are a lot of very conservative African Americans out there. And it all depends on the issue, and it all depends on the questions that you ask them during the jury selection process to make a determination on whether they are more conservative-leaning or more liberal-leaning. You just can’t make assumptions and stereotypes.

I agree with the paper that was written by Valerie P. Hans, “Challenges to Achieving Fairness in Civil Jury Selection.” I agree that the pool must be protected, that right now there are a lot of efforts underway to reduce voter rolls, and juries tend to be pulled from the voter rolls, and there are efforts to pull juries from those roles of people who drive. But yet there are a lot of people who don’t necessarily drive and have driver’s licenses.

I firmly believe that the efforts to expand the potential pool of jurors is going to ultimately lead to the best possible outcomes in civil jury trials. It is extremely important, then, that we as lawyers—and when I say lawyers, I include the judges—participate in the process to make sure that the pool of available jurors is expanded, and that we get the greatest possibility of a diverse jury pool brought into the courtroom for voir dire.

Better Outcomes

The studies show, as reflected in the paper, that when you have a diverse group of people sitting in a room, viewing evidence, bringing their perspectives and points of views, we get the best possible outcomes. And quite frankly, that’s what you want in a civil jury trial.

I will clearly admit that I have an ego, and when I try a case, I want to win. There’s no question about that. I want to be the best advocate for my client and their position. But at the end of the day, I want a fair outcome. And there have been times when I have tried a civil jury case where I’ve had a verdict go against my client, but the award was a fair outcome based on the situation.

I don't subscribe, especially as an African American man, to the belief that there are certain types of jurors who are more favorable to business and certain types of jurors who are more favorable to plaintiffs.

I want to be the best advocate for my client and their position. But at the end of the day, I want a fair outcome.

In those particular cases, we've tended to have diverse jurors sitting in the box. And I certainly could not complain about the outcome because I thought it was a fair and reasonable outcome based on the evidence that was presented in the case. And that's all, at the end of the day, you can really ask for, is that your client gets a fair hearing in front of a group of impartial jurors. And, from my perspective, that's

why it's extremely important to have a balanced and fair jury pool and a balanced and fair and diverse set of jurors to decide your cases when it comes to civil litigation.

I also agree with the paper, when it talks about the legitimacy effect, when it comes to having diverse juries and diverse jury pools. Your people are going to feel like the process is more fair when it is a diverse group of people making decisions in a case. And by the way, I am a defense lawyer who firmly believes that jurors try to do the right thing, and they try to reach the right result based on the evidence that's presented to them.

I am a defense lawyer who firmly believes that jurors try to do the right thing, and they try to reach the right result based on the evidence that's presented to them.

And I've been fortunate enough that my wife has served on a jury that was a diverse jury, and hearing her experience about how they worked their way through the evidence to try and reach a fair and balanced result in that particular case. And that makes me even more confident that jurors try to do the right thing. And it's up to us as lawyers to be able to get the evidence in so that they can make decisions based on that evidence.

Give Lawyers Time to Ask Questions

It is very important when it comes to selecting juries, and it was mentioned in the paper, that the lawyers have enough time to ask questions of that jury pool in order to conduct a fair selection process and determine whether there are any biases in that jury pool. I think in today's day and age, lawyers do not get enough time to ask questions of the jury panel. I often feel that I'm rushed by the court during jury selection. I know that some of my friends on the plaintiff's side feel rushed as well. And there's nothing scarier to me than having a group of people sitting in the juror box and you know nothing about them. You were not allowed to ask enough questions to really get a feel for whether they would be fair and impartial jurors in the case.

And again, that's what we ultimately strive to do, and the paper talks about that and points that out. And so, I encourage the people who are listening to this Forum to do whatever is possible to make sure that the lawyers who are trying a case have enough time to ask that panel of prospective jurors the questions that need to be asked so that we can try and get as fair and impartial a jury as possible to decide our cases.

Again, at the end of the day, I'm a defense lawyer who knows that sometimes corporations make mistakes. And you go to trial, and they need to pay for the mistakes, but there are times when there is a gray area in there that we need the jury to sort out. We may have an injured plaintiff, but it may not be a case where the corporation should have to necessarily overpay for that injury, and you're looking for a jury to give a fair and balanced approach. And that's very important, and that's why I support having a fair and balanced, diverse jury pool out there.

Thank you very much, and I look forward to further discussion.

ROXANNE BARTON CONLIN

Valerie Hans's excellent paper argues persuasively for expansive voir dire, and provides significant empirical support, and jury questionnaires are an important tool for conducting expansive voir dire expeditiously. But unless the biased jurors, who are identified either in questioning or by the questionnaire, are excused for cause, even the most expansive voir dire will be virtually useless.

Every state has a standard for challenges for cause based on state of mind. In Iowa, a juror might be challenged for cause by a party when it appears that the juror has a state of mind which will prevent the juror from rendering a just verdict. Every one of us has heard or seen or done something like this. The juror says, "I know something about the facts of this case. And even though I'm going to try not to let it interfere with my decision-making, I think that it might."

Unless the biased jurors, who are identified either in questioning or by the questionnaire, are excused for cause, even the most expansive voir dire will be virtually useless.

Rehabilitating the Juror

Then enter the judge, who says, "Well, you understand that if you are selected to sit as a juror in this case, you will take an oath and you are to arrive at your verdict solely upon the evidence that you hear in the courtroom or the exhibits that are introduced." To which the juror of course says, "Yes, sir." The court then goes on to say, "And accordingly apply those facts to the law as the court gives it to you in the instructions. Yes, you understand that?" "Yes." "Notwithstanding any prejudice or opinion that you might now have, can you do that?" "Yes, I can do that." "Will you do it?" "Yes." The court then overrules the challenge for cause. That's really not going to be a way to seat a fair jury.

This concern is not new. Chief Justice Marshall, sitting as a trial judge in the Aaron Burr case said, and I quote,

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him . . . Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.⁸

What the Chief Justice recognized so long ago remains true, and has even been exacerbated by efforts to destroy the public's faith in, and understanding of, the justice system. Any panel member who expresses hesitation about his or her ability to serve fairly must be excused without any questioning designed to persuade or intimidate the panelists into agreeing that he or she would "follow the court's instructions" or similarly worded leading questions.

As Justice Marshall recognized, the panelist may say, and may even believe, that he or she can be governed by the evidence, but that will actually be impossible. The panelist is likely to hear only the evidence that confirms his or her previously held beliefs and opinions. That panelist, and all such panelists, must be excused for cause.

Ingrained Bias

Unfortunately, bias or prejudice are innate characteristics, often deeply ingrained and concealed from our own self-examination. Bias can exist in someone who is quite positive—positive that they have no bias, and would be perfectly able to decide the question wholly uninfluenced by anything but the evidence. Courts have echoed this sentiment, finding unsatisfying the notion that the principal consideration in determining bias is the potentially biased juror’s own assurances that he or she can be impartial.

Prospective jurors often cannot or do not acknowledge their own biases and prejudice when asked general voir dire questions. Even honest panel members fall into this trap. The American Bar Association’s guidelines, dedicated to improving juries and jury trials, has echoed the importance of striking jurors who might be biased among its formal recommendations for voir dire. It advocates the following: “At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, or may be unable or unwilling to hear the subject case fairly and impartially.”

Bias or prejudice are innate characteristics, often deeply ingrained and concealed from our own self-examination.

In other words, if there is any doubt about a juror’s ability to be completely fair, that juror should be thanked and excused. There are also constitutional problems when a juror who should have been removed for cause is not, and a party must then exercise a peremptory challenge, and the party effectively loses that peremptory challenge to which he or she is entitled by law. The failure to excuse jurors for cause may violate the Equal Protection Clause of the United States Constitution and various state constitutions.

Attitudes Predict Behavior

One thing that empirical studies show us is that demographics do not predict behavior, but *attitudes* do. Among the attitudes that are important are attitudes toward the court system. In a recent study, 83 percent of those surveyed believed that too many lawsuits are filed in America; 67 percent agreed that excessive lawsuits are causing good companies to go bankrupt; and 61 percent of Americans feel that lawsuits result in personal injury lawyers getting rich. Voters favor “tort reform” by 45 percent in favor and 6 percent opposed as a means to curb frivolous lawsuits. Some 74 percent of the American public believes that the cost of insurance is in a state of crisis, and 76 percent believe that a large verdict would cause insurance rates to rise. Those are the *attitudes* that influence the outcome of a jury verdict.

There is a case called *Knop v. McCain*.⁹ In that case, two prospective jurors should have been disqualified for cause in a medical malpractice case. Although both prospective jurors responded to defense questions by stating that they could determine the case based on evidence and the law, one prospective juror stated that in her opinion, people were “too quick to sue.” And that, “evidence would have to be overwhelming for the plaintiff” before the prospective juror would be “willing to give her money.” The other prospective juror stated that she “probably” could be fair and impartial, although there was “some” doubt—enough doubt for the appellate court to reverse the verdict.

Implicit biases are outside the control of an individual’s own conscious mind. They can manifest themselves in any form, whether based on race, beliefs about the law, or any other subject of importance to a particular case.

By trying to rehabilitate jurors during voir dire instead of excusing them, a judge can allow prejudiced jurors to be impaneled. Social science teaches that people's belief systems are fixed and virtually immutable. The notion that such beliefs can be set aside is both wrong and dangerous.

A few loaded questions, even from a judge, even from an authority figure, are not sufficient to assure a fair trial from panel members who have already stated in public that they are biased. Rehabilitation should not be permitted because, frankly, it is simply impossible. Jurors do not come equipped with an on/off switch. A juror's own bias toward one side or another or one particular position of law can't be turned off at the command of the judge.

Implicit biases are outside the control of an individual's own conscious mind. They can manifest themselves in any form, whether based on race, beliefs about the law, or any other subject of importance to a particular case.

If a prospective juror states that he or she cannot, will not, or even *might* not follow the law, he or she should not be seated on the jury. If they state, "I can probably be fair," that person cannot sit on the jury. No rehabilitation is even possible, and none should ever be allowed. Seating a jury that is 100 percent fair, that is 100 percent impartial, is everybody's duty. And doing so will help to restore faith in one of our most cherished institutions, the right to a trial by a fair and impartial jury of our peers. Thank you.

Response by Professor Hans

Thanks so much for giving me a chance to respond to this incredibly rich set of comments on the questions that concern us all—questions about the fairness, impartiality, and representativeness of juries. When Mary Collishaw and James Rooks contacted me and Professor Diamond about writing on jury fairness and impartiality for this year's Pound Forum, we welcomed the opportunity. In part, it is because the civil jury, and the civil justice system as well, has been under considerable pressure.

Some of it is the vilification of the civil jury that Professor Mary Rose talked about, starting back in the 1980s and 1990s, combined with procedural and legal changes like mandatory arbitration clauses that require one to waive jury trial. These developments have combined to put pressure on the civil jury. It's only intensified during

The civil justice system as well, has been under considerable pressure.

the last year and a half in the pandemic, when many courts closed down. The question facing many courts was, should we start up again? And should we start up with criminal juries or civil juries?

The chance to write papers gave me and Professor Diamond the opportunity to survey and reflect on the new research on the psychology of bias in decision-making. We could also think about what courts are doing to try to address some of these key challenges. My conclusion is very similar to the comments that were made by all four of these amazing commentators: We have made some progress. We are better than we used to be, but we still have a long way to go.

Let me offer some responses to the commentators' points. Then, I am eager to hear from the audience and give our commentators a chance to weigh in as well.

Representative Juries

Professor Mary Rose—who I think some of you may know has her own incredibly deep and rich body of research on jury selection and jury decision-making—rightly brings our attention to the need to care about representativeness and representative juries. She points to some of the negative consequences of underrepresentation, in particular, non-response to summonses.

I have confronted this in some of my own work, either with the courts or independently. Summons non-response is a really difficult problem. Of course, we could do some things with the post office and more frequent outreach to individuals and contacting them in lots of different ways, including some of the modern techniques of texts and emails and so on, as Justice González was talking about. But the fact of the matter is there are different views about the value of jury service across our community.

The fact of the matter is there are different views about the value of jury service across our community.

At least some of the non-response isn't because we don't get to the target. It's because people are not thinking about jury service as a positive part of their contribution to the society. That's one of the issues where, collectively, we might think about what can be done. What can be done about it by judges, by lawyers, and by the

scholarly community? Here, I applaud Professor Rose's call to our research community to look carefully at what the bottlenecks might be in some communities, and then to enlist the cooperation of the legal community to try to unstop some of those bottlenecks.

Diversity Within Minority Communities

I also applaud Professor Rose's important point that we need to know more about race in civil juries. This connects to some of the comments that Mr. Burrell made about the variability and diversity within African-American communities. I take his point that there is an assumption of uniformity. Perhaps this is driven by political differences and whether people are registered Democrat or Republican. However, diversity within the African-American community is real and quite apparent to him and to many other observers.

I like Professor Rose's point that, nonetheless, even if the research suggests that there is a lot of diversity within subgroups in our communities, still attorneys have theories about what people of different racial and ethnic backgrounds think about, what men and women and people of diverse sexual identities think about, and how they'll approach the case.

One way you can try to dismantle the theories is by giving people who are lawyers and judges a chance to plumb the thinking of prospective jurors. That's why I'm so keen to expand the opportunity for lawyers and judges to question jurors expansively during voir dire.

One way you can try to dismantle the theories is by giving people who are lawyers and judges a chance to plumb the thinking of prospective jurors.

Like Justice González, I think it's a good idea to use pretrial jury questionnaires, where there is an opportunity to ask more expansive questions and learn about the experiences people have had in their past that might bear on this particular case. In that way, we can be more efficient, because

obviously efficiency is a value that we want to aspire to in the courts. Giving people an opportunity, before they are sitting in a courtroom or on a Zoom call, to reflect on the things in their own lives and their attitudes that might bear on a particular case, can be quite helpful.

Listening to the Jurors

I applaud Justice González’s comment that we should reassess jury selection. He and I are very much on the same page about wanting to hear jurors’ own words and trying to avoid leading them to what the “right result” is in a particular answer, the one that will ensure that they are or are not on the jury.

Justice González made a really interesting point about paying attention—that judges should pay attention to who is doing the questioning of prospective jurors and who is being questioned.

Judges should pay attention to who is doing the questioning of prospective jurors and who is being questioned.

For some illustrations about how voir dire questioning can reflect very different approaches to people of different racial and ethnic and gender backgrounds, a substantial body of work on voir dire in death penalty cases examines how prosecutors and defense attorneys approach these kinds of cases. That work has shown different race-based patterns in voir dire questioning.¹⁰ The different approaches may be based on theories that both prosecutors and defense attorneys have about who’s going to be a favorable juror in their death penalty case. This research gives us a model for what we should be paying attention to in voir dire to avoid racial bias in questioning.

I also like Justice González’s many recommendations for potential change. The issue of the objective observer approach in *Batson* is really fascinating. Professor Diamond is going to talk about that later on today, so I’ll leave that for the afternoon session.

Justice González’s comment about eliminating peremptories is quite provocative, and I agree that it would be very, very hard to sell. If peremptories are abolished, the trial judges will be in complete control of who does and does not sit on the jury. That is probably the reason why it is so hard to sell that. It excludes lawyers with their particular knowledge and insights about the case from any role in the selection of who is going to be sitting on the jury and who’s not going to be sitting on the jury. That’s the price we would pay if it comes to that.

Voter Rolls and Jury Lists

On Mr. Burrell’s comments, I was reminded about voter rolls and efforts to remove people from voter rolls. Since the 2020 election, we have seen renewed efforts to remove people from voter rolls. That will have downstream consequences if courts are using voter rolls as one of their primary methods of putting together a representative cross section of the community. We should be mindful of that. It underscores the recommendation that Paula Hannaford-Agor made¹¹ about the necessity of combining lists so as to maximize our chances of identifying people from all subgroups of the population.

If there is time pressure, using pretrial jury questionnaires allows the court to be more efficient.

I also liked Mr. Burrell's point that he can't complain about the outcome of the case if actually it was fairly tried to a fair and impartial and representative jury. That's a great illustration of the general point that, when you have a diverse jury that looks like the community, even if you're not all that enthusiastic about the result (say you're the losing attorney), that at least you have confidence that, "I did as well as I probably could have."

It was interesting to hear from a litigator that he recognizes the importance of having an impartial jury yet often feels rushed in the selection of juries. That is something that we should weigh as we consider how much voir dire is enough. If there is time pressure, using pretrial jury questionnaires allows the court to be more efficient.

Voir Dire and Challenges

Roxanne Conlin made a comment that expansive voir dire is great—however, if the judge takes a traditional approach or a very limited approach to exercising challenges for cause, it's not going to do any good. That was a really interesting point. Ms. Conlin seems to encourage us to go in almost the completely opposite direction. That is, if a juror or prospective juror even expresses a hesitancy about the possibility of being impartial, they should go off the jury.

I worry a bit about that, though, because I wonder if the prospective jurors who recognize the potential that they themselves might have some attitudes and biases that might bear on the case might be some of our more impartial jurors. But that, again, is another question and issue that could be resolved with further judicial and attorney questioning of prospective jurors.

... [E]xpansive voir dire is great—however, if the judge takes a traditional approach or a very limited approach to exercising challenges for cause, it's not going to do any good.

I note Ms. Conlin's final point about the recent survey research on public attitudes toward civil justice, finding beliefs that there are many frivolous lawsuits, and that changes to the tort system are necessary to rein in the overly generous jury that doesn't care about liability, but just wants to plumb the deep pockets of corporations. These survey results add to a long body of research showing very substantial numbers of our population endorse those kinds of attitudes and views.¹² Those views and attitudes about civil justice and tort system changes definitely play a role in decisions in civil cases. And therefore they should be a focus of the jury questionnaire. Questions that ask about views about civil justice generally merit inclusion on jury questionnaires.

Questions From Participants

Question: Chief Justice Gonzáles, what has been your experience with juror summoning? Have you had some of the same issues Professor Hans mentioned in terms of concerns of responsiveness?

Chief Justice González: Well, we've had a very strong response during the pandemic. In fact, in many instances, the juror response rate has been higher than it was before. We've been pleased with that. It certainly

matters whether the court is taking adequate protective measures to make people feel comfortable. We've been very pleased with the turnout.

Question: Professor Hans, is the downside of larger juries that there's a tendency for each juror to take less responsibility for decision-making? With a jury of six, it's tough for a juror to be uninvolved. With a jury of 30, diversity would be maximized, but it would be easy for individual jurors to sit back, relax, and let others do the heavy lifting.

We've had a very strong response during the pandemic. In fact, in many instances, the juror response rate has been higher than it was before.

I think jurors sitting back and relaxing would be rare, especially if jurors are required to be unanimous.

Professor Hans: The research on jury size suggests that the larger juries are better decision-makers all around. Although it's clear that, if you're in a group of 12 people, you can share the responsibility for decision-making with a broader group, the diversity of opinion, perspectives, and backgrounds that are presented is such a positive about the larger jury that I think it would outweigh the issue of sitting back and relaxing.

I also support the comment that Mr. Burrell made about juries trying to do a good job. It can be an overwhelming experience, and jurors have a chance to contribute. I think jurors sitting back and relaxing would be rare, especially if jurors are required to be unanimous.

Civil v. Criminal Cases

Question: Professor Rose, for purposes of today's discussions, is there a significant difference, in your eyes, between a civil case and a criminal case?

Professor Rose: If you're talking about benefits to the juror, then I don't see a distinction. Something we take for granted is the fact that most of us actually don't get to court very often when we are not in trouble or facing some enormous hassle. And jury duty may be a hassle, but it's not about you and your life. With jury duty, people see their role in court, in a way, almost as a peer to a judge—which is what I think the founders intended—and that is a remarkable experience for people. And that can happen in a civil case.

With jury duty, people see their role in court, in a way, almost as a peer to a judge—which is what I think the founders intended—and that is a remarkable experience for people.

In criminal cases, I think the research suggests that, in terms of later civic participation, there may be some differences. But really, it's about deliberation and the opportunity to be empowered to decide. In what other facet of life do you do that? And in what other facet of life are you in contact with people with whom you may not agree on anything else, but you have to find common ground on this?

Question: Douglas Burrell, have you seen differences in effectiveness and fairness between six-person juries and 12-person juries?

Douglas Burrell: Actually, all the juries that I've tried cases to have been 12-person juries. I've never tried a case to a six-person jury, so I don't know the answer to that.

Moderator: Does it make you nervous thinking about doing a six-person jury as opposed to a 12-person jury?

We think we can discern bias in jurors, but we're wrong. The truth is that the bias more likely resides in us, and we project it onto them.

Douglas Burrell: Yes, it does. I prefer a 12-person jury, because I think the bigger the group, the greater chance that you're going to have different perspectives and you're going to get a more accurate and fair result.

Professor Rose: Yes, the research really bears that out, too.

Chief Justice González: I heard the comment about the need to strike jurors and to keep peremptory challenges, and I just want to react to that for a second. We think we can discern

bias in jurors, but we're wrong. The truth is that the bias more likely resides in us, and we project it onto them. It's shown by the research that we don't use peremptory challenges to jurors well. Our ego tells us that we're right. The studies show that we're wrong. We strike the jurors based on myth, generalizations, and something called a "gut feeling," which is really just a euphemism for the prejudice that we all carry with us into the courthouse.

And the reason that judges are stingy with challenges for cause is because peremptory challenges exist. If we adopted something closer to Ms. Conlin's suggestion about true cause challenges, we wouldn't need all of those peremptories, because we'd get rid of the ones who really do have bias.

I don't think I'd go as far as she suggests, though, because the honest jurors, as you heard the professor say, sometimes say, "I have some trouble with it, but I think I can put it aside." We want to keep people who are honest with us, not those who say, "Oh, I have no biases, and I'll be perfectly fair," because sometimes that's not true either.

I think we need to think very carefully about the underpinnings of it. And when we cling to peremptories, even though we don't use them effectively, maybe we should actually follow the science.

Assumptions About Jurors

Douglas Burrell: I just want to add this: there have been times where I thought a prospective juror was leaning in one direction, which was not favorable to me. But at the end of the trial, when I talked to the jurors, I found out that that person was really beating the drum in my favor in the jury room. We make all these assumptions before jurors actually hear the evidence. And that's part of the problem in our system—that we're making these assumptions and they have not heard the evidence.

We make all these assumptions before jurors actually hear the evidence. And that's part of the problem in our system—that we're making these assumptions and they have not heard the evidence.

**Higher pay is important
as a sign of respect.**

Question: How much do you think jurors should be paid? Some states pay only \$10.00 per day, which is not even minimum wage. How likely is it that any state legislatures will appropriate the money and pay jurors fairly?

Professor Rose: I have one remark on that, which is, although I believe symbolically that higher pay is important as a sign of respect, and certainly to cover expenses of parking and lunch and all those things, the research, counterintuitively, suggests that people's behaviors may not change drastically in response to higher juror pay, at least according to some field studies on this topic. But I also think a pay rate can be too low and can look insulting. We probably are never going to get jury pay rates adjusted for inflation as Judge González talked about. If we adjusted for the now, it would be probably unaffordable. But I think it needs to be enough to show respect.

Chief Justice González: And I would add to that. It's not just the summons response rate that matters. And the studies have been partially flawed. My experience, when I was a trial court judge, which I did for 10 years, was that many jurors were lost because it was an undue hardship for them to serve, given that they were only being paid \$10.00 a day. Those were disproportionately low-income jurors, or jurors of color, that we were losing for hardship. And that's directly related to the way that we pay them or don't pay them.

Why 12?

Question: Why is 12 such a magic number? Too few, five or less, certainly has potential issues, but circling back, why 12?

Professor Hans: I can talk a little bit about the scholarly research. As I said in my presentation, there is now a fair amount of research that backs up the mathematical calculation that if you have a larger group, you are better able to represent people, especially people who constitute just a small portion of the population—say a minority group of 10 percent or even 20 percent.

**If you have a larger group, you
are better able to represent people,
especially people who constitute just
a small portion of the population.**

What the research has also suggested is that larger groups are better fact finders. It's not only the diversity of opinions that are reflected in this larger group of individuals. It is also that they seem to be less affected by unusual outlier opinions. So, the eventual judgment seems to represent more of the central tendency of the group. Smaller juries of six people, as is the case with civil juries in a number of states, seem to be more responsive to an unusual outlier judgment, whether it's a very high damage award or a no-damage-award judgment. I think that's one of the reasons the researchers who have typically compared six-person juries and 12-person juries have reached the conclusion that it's better by the dozen.¹³

**Smaller juries of six people, as is the
case with civil juries in a number of
states, seem to be more responsive to
an unusual outlier judgment.**

Question: Chief Justice González, shouldn't the focus be on whether the prospective juror understands the concept of being fair and nonbiased rather than trying to rehabilitate a person who hesitates?

Chief Justice González: Well, I'm not sure that those are the only two choices. I think it's clear that you want all the jurors to understand that concept. And then, if somebody expresses that they don't think they can be fair, they may be able to rehabilitate themselves in their own words. But what I'm opposed to is the lawyers asking them leading questions, or as we heard Ms. Conlin talk about as well, the judge in the Black robe sitting up on the bench saying, "If I tell you this, you would follow the law, wouldn't you, you wouldn't break your oath, would you?" Those kinds of questions don't really discern whether somebody can put aside their bias at all. I think once someone has stated that they have a bias, we have to believe that they actually have it.

Notes

- 1 Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. & SOC. PSYCHOL. 597 (2006).
- 2 JOHN GASTIL, E. PIERRE DEESS, PHIL WEISER & CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010) (jury service in criminal cases); Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697 (2014) (jury service in civil cases).
- 3 Mary R. Rose, Christopher Ellison & Shari Seidman Diamond, *Preferences for Juries Over Judges Across Racial and Ethnic Groups*, 89 SOC. SCI. Q. 372 (2008).
- 4 JAMES BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM 20 (2021).
- 5 Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 JUDICATURE 47 (2020).
- 6 Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 SO. CAL. L. REV. 503, 505 (1965).
- 7 JUDICIAL BRANCH OF ARIZONA, MARICOPA COUNTY, RACIAL AND ETHNIC REPRESENTATION THROUGH THE JURY SELECTION PROCESS: AN ANALYSIS OF 2019 JURY DATA FROM THE SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY (May 2021); Shari Seidman Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 441 (2009).
- 8 *United States v. Burr*, 25 F. Cas. 49, 50 (C.C. Va. 1807).
- 9 *Knop v. McCain*, 561 So.2d 229 (Ala. 1989).
- 10 See, e.g., Barbara O'Brien, Catherine M. Grosso & Abijah P. Taylor, *Examining Jurors: Applying Conversation Analysis to Voir Dire in Capital Cases, a First Look*, 107 J. CRIM. L. & CRIMINOLOGY 687 (2017).
- 11 Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761 (2011).
- 12 VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 50-78 (2000) (summarizing research on litigation-crisis attitudes and documenting their impact on case judgments).
- 13 Higginbotham et al., *supra* n. 5.

Where Do We Go from Here?

Honorable Gregory E. Mize, Judicial Fellow, National Center for State Courts

Many thanks to the Pound Civil Justice Institute for organizing this important gathering to improve fairness in civil jury trials. Our organizers have commissioned Professors Valerie Hans and Shari Diamond, two of the most highly respected members of the legal academy, to present concise, information-rich papers to carry with us after today in the work that we're going to do to improve fairness in our own jurisdictions.

Each paper in its own way charts trial improvements over recent decades. They describe the fruits of new empirical research that has been applied to courtroom procedures and to better understand the dynamics of human decision-making. And importantly, these papers recognize the current era of heightened racial tensions, political divisions, and distrust of government institutions. There is more work for each of us to do.

For me, the Hans and Diamond work products have especially rekindled memories of past jury improvement endeavors. I'm about to suggest what more we can learn from that history. And my ultimate goal in my short time with you is to inspire all of us to act on these cogent writings.

By virtue of this Forum, I hope each of us will better see the barriers to representativeness and the shortcomings of our traditional trial practices in our home jurisdictions. My hope is that we leave this forum with a mission and commitment to act concretely back home. To foster that resolve to go home with renewed commitment to jury trial improvements, I'm now going to skip down memory lane, naming some modern milestones in jury trial innovations.

I hope each of us will better see the barriers to representativeness and the shortcomings of our traditional trial practices in our home jurisdictions.

Efforts at Jury Reform in the United States

Many say that jury reform in the United States began in 1992, when the Brookings Institution and the ABA gathered at the University of Virginia in Charlottesville to develop recommendations to improve civil jury trial procedures. If that wasn't the beginning, then surely what happened in Arizona in 1993 and '94 is the beginning. The Arizona Supreme Court created a committee on the more effective use of juries, and they chose Judge Michael Dann to be the chair of that committee.

They chose him because Judge Dann, a full-time sitting judge and, at one point, the presiding judge of Maricopa County Superior Court in Phoenix, took a sabbatical in the early 1990s. He went to the University of Virginia and got a master's degree in law. And his thesis was the history of trial by jury in the Anglo-American culture and the desire to improve current ways of doing things.

His capstone project was a law review article that eventually was published in the *Indiana Law Review*, entitled “Learning Lessons and Speaking Rights Creating Educated and Democratic Juries.”¹ With that as a theoretical base, the committee did its work. They came up with a document called *The Power of 12*.² And it included a juror Bill of Rights, and a series of recommendations to the Supreme Court of Arizona, which they took so seriously that in less than 12 months, the civil and criminal rules of procedure in Arizona were changed to give jurors the right to take notes during a trial, to ask written questions of witnesses, and other reforms.

Not long thereafter, in 2001, Chief Judge Judith Kaye, presiding over the New York State Court system, held the first ever National Jury Summit. There were 400 persons present at that summit in New York City, representing 45 states. That was another launch, another boost to the endeavors around the country to improve trial by jury.

You’re going to see in your resource materials an article in *Court Review* magazine, the Journal of the American Judges Association.³ That article describes how 30 states undertook some form of jury trial assessment, and

Thirty states undertook some form of jury trial assessment, and in many instances made recommendations to improve trial by jury in those jurisdictions.

in many instances made recommendations to improve trial by jury in those jurisdictions. The article tells us that reform efforts were predominantly a top-down process, as in Arizona, where the Supreme Court took the initiative and created a commission with a mission to do certain things.

Other reform efforts among those 30 states were bottom-up—for example, in Colorado, New Jersey, Hawaii, and other places, where judges and lawyers undertook pilot projects over limited periods of time. Written assessments of the

projects or the pilots were undertaken. They were given to the bench and bar, and to their state supreme courts, and in many instances they led to reforms in those jurisdictions.

Jury Reforms in the District of Columbia

One unique jury reform effort was here in Washington, D.C., where a private, nonprofit corporation, the Council for Court Excellence, received grant funding to undertake a study of how jury trials were conducted in D.C. Superior Court (our state type trial court, where I sat), and how they’re conducted in the U.S. District Court for the District of Columbia. It had a goal of proposing reforms after studying the ongoing standard practices in both federal and state type court. That led to 13 recommendations that were sent to the chief trial judges of our U.S. District Court and the Superior Court.

Those recommendations included a suggestion that jury selection should rely more on for-cause strikes than on peremptory challenges—that there’s the need for judges to allow greater inquiry of potential jurors during jury selection so that for-cause challenges, based on well-developed information about that particular prospective juror, would be the predominant way of winnowing out jurors who would not be fair and impartial. And, maybe, thereafter justifying the reduction in the number of peremptory challenges because of the greater reliance on for-cause.

The NCSC's National Jury Program and the ABA Principles

In 2004, the National Center for State Courts created its National Jury Program, employing business management practices and evidence-based approaches to studying how judges across the country are conducting jury trials. And interestingly, and importantly, half a million dollars was donated by law firms and lawyers from around the country to support that National Jury Program, and it led to the State of the State Survey. Judges and lawyers in every state of the nation were asked to answer a series of questions about what happened in the last jury trial they presided over or participated in. It was trying to find out how many judges allow jurors to ask questions of witnesses. How many judges across the country allow jurors to take notes? Who does most of the questioning during voir dire? Is it the judge, the lawyer, or is it a hybrid of both? What are the discretionary practices?

From that survey, we have reliable information from all 50 states about the practices, and typically how long it takes to select a jury in a civil case in South Carolina, for instance, versus a civil case in Illinois, a criminal case in Connecticut versus a criminal case in California. It's online and available today for each state.⁴

And then, of course, there is the 2005 *ABA Principles for Juries and Jury Trials*. In 2004, Robert Grey, during his year as president of the ABA, made his signature project promoting trial by jury and setting forth principles that, if followed, would make jury trials fairer and more effective.

A point of personal privilege here: I became a judge after being a trial lawyer and chief counsel to the D.C. City Council. I was the general counsel for eight years. And that was a hub of activity, where the citizens of the District of Columbia—the businesses, the silk stocking lawyers, and the bag ladies from the street—would all come into the building and tell council members what was wrong or what was needed in public policy in the District of Columbia. It was a very exciting time in my life.

Implementing Jury Reforms in the Courtroom

When I became a judge, I entered this cloistered role environment, and my only connection to the community was with the jury. And my favorite, most important task as a trial judge was being a rabbi, if you will—a teacher to the jury, helping them do what they need to do and know what they need to know to reach a fair and just verdict.

I took the recommendations of the D.C. Jury Project regarding voir dire, and I tried the practices out in my courtroom. For my colleagues in the past, the tradition in my court was to ask questions in open court. After it was all over, if there was no juror who had a yes answer to any open-court question, a record was made of that and those jurors were never questioned. They were, I guess, assumed to be safe jurors.

There was a problem with that, because people don't like to answer questions in open court. Many people are shy. Many people don't speak English. And so what I did, as an experiment, was to call to the bench, after the open court questions, even those who didn't have a yes answer to any question. I asked them at the bench, in the company of the lawyers, "Did you hear all of my questions? I see you didn't answer any of them. Did you understand them?"

My favorite, most important task as a trial judge was being a rabbi, if you will—a teacher to the jury, helping them do what they need to do and know what they need to know to reach a fair and just verdict.

What I found out—and my article⁵ is cited by Professors Hans and Diamond—is that a huge percentage of the people who didn’t answer the open-court questions had very significant things that they finally told us when I questioned them at the bench. Some people didn’t speak English. Some had mental health issues. Some couldn’t

A huge percentage of the people who didn't answer the open-court questions had very significant things that they finally told us when I questioned them at the bench.

even talk about drugs because of addictions in their family. And the coup d’état, in one case, was a young lady who came up to the bench and she said, after my questions, “Judge, I know I should have answered this question, but the defendant is my fiancée!”

That article was published. My fellow judges changed all of their habits of jury selection to make sure they questioned every single juror, even those who didn’t

have a positive answer to an open-court question. One of my colleagues said it would be judicial malpractice not to question every single potential juror. I cite that as how important it is for judges and lawyers to undertake pilot projects that seek to measure improvements.

Where We Are Now

Now, let’s look at where we’re at right now, thanks to Professors Hans and Diamond. They make it plain that jury representativeness is a constitutional guarantee and a quality that makes jury deliberations more thorough and verdicts more reliable. But they show us that barriers remain: inadequate source lists and all-too-abbreviated voir dire questioning, just to give two examples.

Thanks to the Harvard Implicit Association test,⁶ which has been taken by millions of people around the world, we know about the prevalence of implicit bias. The pandemic has contorted, and in some cases even eliminated, traditional jury trial practices. Voir dire is happening, in some jurisdictions, in hotel ballrooms or rodeo arenas or on video screens. And several state supreme courts, in the face of this, have concluded that the three-prong *Batson* test is inadequate to stem racial discrimination during jury selection. Thank goodness for Washington State, New Jersey, Connecticut, and others, whose supreme courts have taken a lead to get to the bottom of a better selection process to weed out racial discrimination. Importantly, we know from recent studies that in 76 percent of all civil cases in the United States, at least one person is self-represented. And I’m going to come back to that and how that’s relevant to jury selection.

Jury representativeness is a constitutional guarantee and a quality that makes jury deliberations more thorough and verdicts more reliable.

Shari Diamond, in her title, actually, talks about judicial rulemaking as a key component of successful achievement of fairness in trials. Let me add that we judges and lawyers are key players as well. As they have done in the past, lawyers have generously participated in pilot projects, filled out surveys, and lobbied legislatures or supreme courts to amend relevant statutes and rules to gain permission to try pilot projects. And trial judges have courageously adjusted their traditional trial practices to allow greater lawyer participation in voir dire questioning and written juror questions.

How We Can Improve Jury Practices

Now it's our turn, here in 2021, every one of us at this Forum, to make a practical commitment to eradicating practices that keep minorities outside of jury deliberation rooms and to improve the quality of summoning and voir dire. The Hans and Diamond papers spell out the problem for us now.

Here are a few possibilities for you and me:

- I encourage you to think about, and especially you appellate judges or you managers of law firms, being a *top-down* leader. Spark the creation of a new jury innovation commission comprised of judges and lawyers—both plaintiff and defense, prosecution and defense, court administrators, legislators, and academics. Importantly, former jurors should be on such commissions.
- As a top-down leader, propose new rules of procedure and make the public comment period a public education event.
- Create a series of CLE programs focusing on the topics we're discussing today.
- Related to the high percentage of pro se litigants, reconstitute your jury pattern instruction committees to include linguists like Professor Peter Tiersma, to help make communications to juries as comprehensible as they are legally accurate. One of the resources in your materials is Peter Tiersma's booklet, *Communicating with Juries*.⁷ This is a practical, hands-on guide to talking more plainly and clearly and effectively with jurors.
- And be a *bottom-up* leader, too. For those of you who are solo practitioners or trial lawyers, or a single trial judge, initiate a pilot project in your courtroom as I did. Have regular meetings at your law firm or bar organization to develop action plans that address the issues of today.
- Lobby your congressional delegation to amend the Federal Jury Service and Selection Act,⁸ a 1968 relic of a statute that defines to this day for federal courts "representativeness" as proportionality of the registered voters list, and permits courts to retain the same master jury summoning wheel for up to four years rather than updating it frequently.
- Talk to juries as a regular person would. When you look at Peter Tiersma's "Communicating with Juries," you see that it's important to avoid archaic legalisms. Be as concrete as possible, understand your audience, use verbs instead of nouns, avoid compound sentences, and use his other suggestions.

Now it's our turn . . . to make a practical commitment to eradicating practices that keep minorities outside of jury deliberation rooms and to improve the quality of summoning and voir dire.

As a senior judge, I have volunteered to sit on high-volume calendars with many pro se litigants. I'm talking about the landlord tenant court and the daytime emergency judge, where most of the people in front of me are pro se. And I've been doing this since I took senior status for the last several years. And when I have a temporary restraining order hearing, and both sides are unrepresented, or it's a neighbor dispute, or an employer/employee dispute, and the like, I have to tell them what their job is, what the burden of proof is if they want to get a TRO, for example.

Doing that year after year, not in front of a jury anymore, but in presiding over cases with pro se litigants, what I have realized is that we need to speak in plain English to help them know what their burden of proof is, what the rules of evidence are, what's allowed and not allowed. I have to talk like a fellow D.C. resident, not like some highfalutin lawyer or academic, or a judge on a high bench. I have to talk in real terms, and I think that that

is a lesson for all of us to learn as trial lawyers and judges speaking to juries.

I have to talk like a fellow D.C. resident, not like some highfalutin lawyer or academic, or a judge on a high bench.

And here again, I think jury pattern instruction committees can learn a lot from the likes of Peter Tiersma and other linguists to make those instructions better understood by our fellow Americans sitting in the jury box.

That *Court Review* article that I cited earlier in my presentation about the efforts in 30 states after the National Jury Summit, it is entitled “Jury Trial Innovations: Charting a Rising Tide.” Since then, since that article in 2004, the seas have changed a bit. There's some debris and toxicity in the water. Think about implicit bias. Think about our anachronistic voir dire practices and summoning practices. Think about our public health crisis.

Armed with the data and the suggestions provided by Valerie Hans and Shari Diamond, I encourage all of us to be Gideon's little army. Face the new tide. Create a renaissance that deals with implicit bias and other issues that we're discussing today. And maybe, as members of that army, we can even make some good trouble, like Representative John Lewis urged us to do in the civil rights era.

I encourage all of us to be Gideon's little army. Face the new tide. Create a renaissance that deals with implicit bias and other issues that we're discussing today.

Thank you again for this opportunity to be with you and to suggest some forms of action that we can undertake in the near future. Thank you.

Questions From Participants

Question: How about this change? Peremptory challenges may not be used willy-nilly, they may only be used when a well-supported challenge for cause was denied by the court.

Judge Mize: That's a good reason to still have peremptories, but it's not the only one. It's a good start. I have evolved from feeling, like Justice Marshall, that they should be abolished. I know from my own self-reflection and my experience as a trial lawyer that we make mistakes as judges, and peremptories have a role to curb against judicial error in ruling on for-cause challenges.

The Jury System and the Pandemic

Question: How well do you think the jury system will recover from the COVID pandemic? Will it ever make a full recovery? Would a full recovery to its former health be enough?

Judge Mize: I think the jury system is still very healthy. We're talking about moving from incandescent light bulbs to halogen to LED. We're making it brighter and better without throwing that lamp out the window.

Question: Of the innovations you've seen tried by various different courts, what have been the most successful and the least successful?

Judge Mize: I think the most successful was when (in Houston first, and then spread around the country) courts created the one day/one trial system. That meant that professionals and sole proprietor business owners might have a better chance, and be more willing, to serve on a jury. If it's a less of a burden, it's better. And we get more professionals showing up in the jury box.

On the downside, I go back to my remarks about speaking in comprehensible terms to jurors. The Supreme Court has said that you must quote the statute that is the underlying criminal charge or statute at issue in a case. And the judge has to tell the jury just the way the state legislature described the crime and its elements. Oh, my lord, I don't think legislators are thinking of jurors when they write these statutes! And I think that Supreme Courts and appellate judges ought to recognize that, and give some leeway and some accommodation and some focus on comprehensibility, as well as accuracy.

Pro Se Cases

Question: What are the specific challenges in pro se cases in dealing with this issue?

Judge Mize: I think for many, many pro se litigants, the last place they want to be is in a courtroom, a very formal setting, talking in front of a bunch of strangers. I think we need to make the experience as a juror, the courtroom experience, the deliberation room experience, less threatening and more communicative and positive; bring people up to the high calling of administering justice; remind them of the oath at the beginning of a trial, what they're promising to do; throughout the trial administer justice and bring people to appreciate their oath and

all its aspects; and thank them for their service and accommodate their needs during trial. That will bring them to hold the courts in even higher regard than they are already.

We need to make the experience as a juror, the courtroom experience, the deliberation room experience, less threatening and more communicative and positive.

Question: You talked about your experience in questioning each juror that hadn't been very communicative during the ordinary voir dire. How did the lawyers respond to that? Were they appreciative of your additional questioning? Did they that it was unnecessary, or was it well received?

Judge Mize: It was very well received. In every trial, there was at least one silent juror. In one of my articles, I call them UFOs. At least one silent juror said something that the lawyers and I, we all looked at each other. "Okay, no objection, judge, go ahead." And I think it was giving them information that they otherwise wouldn't have,

We make mistakes as judges, and peremptories have a role to curb against judicial error in ruling on for-cause challenges.

by calling those citizens up to the bench. I think this is one area where plaintiff lawyers and defense lawyers are probably both appreciating getting more information. More is probably better than less, no matter which side of the “V” you’re on.

It’s an honor to be with you. Thank you.

Notes

- 1 68 IND. L.J. 1229, 1229-1256 (1993).
- 2 ARIZ. SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1994).
- 3 Gregory E. Mize & Christopher J. Connelly, *Jury Trial Innovations: Charting a Rising Tide*, 41 COURT REVIEW 4 (Spring 2004).
- 4 GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (Nat’l Ctr. for State Cts. 2007), available at https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf
- 5 Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 36 COURT REVIEW 10 (Spring 1999).
- 6 See Project Implicit, <https://implicit.harvard.edu/implicit/aboutus.html>; <https://www.projectimplicit.net/>.
- 7 PETER M. TIERSMA, COMMUNICATING WITH JURIES: HOW TO DRAFT MORE UNDERSTANDABLE JURY INSTRUCTIONS (NCSC Center for Jury Studies 2016), available at https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0024/8772/communicating-with-juries-original-publish-2006.pdf.
- 8 28 U.S.C. 1861 et seq.

Judicial Rulemaking for Jury Trial Fairness

Shari Seidman Diamond,¹ Northwestern Pritzker School of Law

EXECUTIVE SUMMARY

In Professor Diamond's Introduction, she provides the major premise for her examination of the role of judicial rulemaking in assuring fair legal proceedings: "Our ability to produce a fair jury trial depends on an attentive and responsive court system." Her purpose in this article is to describe and evaluate methods that courts are starting to use, or might consider using, to promote fair trials.

In Part II, she identifies three themes that guide her inquiry: (1) achievement of a representative jury pool; (2) the selection of an impartial jury that will actually hear the case; and (3) efforts to control the ways (some overt, some not) in which bias may infect the proceedings.

In Part III, Professor Diamond identifies the key players in rulemaking for fairness: state supreme courts, which have the authority to establish commissions to examine jury operations; individual judges, who can use their opinions to spotlight jury system problems and potential solutions; and legislators, who can respond to judicial guidance by enacting legislative reforms.

In Part IV ("Increasing the Representativeness of Jury Pools"), Diamond describes strategies for achieving jury pools that are more representative of the community the court serves: (a) expanding jury service eligibility through eliminating historic exclusionary rules based on occupation, lack of English proficiency, non-citizenship, and felony convictions; (b) expanding juror source lists beyond the usual voter registration records; (c) updating sources lists annually; (d) using follow-up techniques to contact non-responders; (e) sending replacement summonses to potential jurors in the same ZIP codes or census tracts as those of non-responders; and (f) dealing flexibly with the hardships jury service inevitably imposes on some jurors.

In Part V ("Preserving Representativeness and Fairness in the Courtroom"), Professor Diamond reviews five approaches to the conduct of trials that can improve the fairness quotient: (a) jury selection that includes attorney participation and case-specific juror questionnaires; (b) "giving Batson teeth" by measures like adopting an "objective observer" standard for resolving allegations of bias; (c) requiring involvement of judges during voir dire; (d) reducing the number of peremptory challenges allowed; and (e) returning to the traditional jury of 12 members.

In Part VI ("Instructing Jurors on Bias"), Diamond considers the problem of bias, both conscious and unconscious ("implicit bias") and the prospects for combatting it through the use of "informational interventions" such as orientation videos for jurors and well-crafted jury instructions.

In Part VII, Professor Diamond underscores the four reforms that, in her judgment, offer the "best prospects for optimizing fairness": expansion of eligibility for jury service; the use of comprehensive, up-to-date juror lists

with follow-up and replacement to deal with non-response; adoption of the “objective observer” standard for judging Batson challenges; and limiting peremptory challenges and increasing the size of juries.

I. INTRODUCTION

Our ability to produce a fair jury trial depends on an attentive and responsive court system. The parties and the public turn to the courts for a fair trial. The citizens who appear in court in response to their jury summonses

Our ability to produce a fair jury trial depends on an attentive and responsive court system.

expect that the court will see that they are treated with respect and will ensure that the proceedings are fair. Although our best evidence is that jury trials generally succeed in reaching these goals, courts do encounter obstacles that can undermine the fairness of a trial.

In recognizing these challenges, a number of state courts in recent years have taken a proactive approach to protecting the rights of parties, prospective jurors, and the public at large to a fair jury

trial. The purpose of this article is to describe and evaluate those policies and procedures, as well as to consider some additional measures that might be taken. The ultimate question in the end is whether these efforts are likely to be effective.

II. THREE THEMES

Three key themes guide this inquiry. Although at an abstract level all three may seem to describe uncontroversial goals for a fair jury system, agreement on what steps courts should take to achieve these goals is a different matter. Thus, we will consider both innovations that courts have implemented and suggested reforms they have declined to adopt, as well as procedures that have not yet received attention.

The first theme, discussed in Part IV, focuses on achieving a representative jury pool. A representative jury pool is recognized as the optimal starting point for a fair jury trial. That goal was explicitly recognized in *Taylor v. Louisiana*, when the U.S. Supreme Court considered the make up of the jury pool and specified that “a fair cross section of the community is fundamental to the American system of justice.”² Similarly, this goal was captured in Principle 10 of the 2005 ABA *Principles for Juries and Jury Trials*: “Courts Should Use Open, Fair, and Flexible Procedures to Select a Representative Pool of Prospective Jurors.”³

A representative jury pool is recognized as the optimal starting point for a fair jury trial.

Our second theme, which is the focus of Part V, analyzes the fairness of procedures used to determine which of the prospective jurors who are summoned to serve will actually serve on a jury. The procedures that lead from being a member of the jury pool to serving on a jury require courts to evaluate and rule on a variety of potential reasons why a prospective juror *should not* serve. In addition to ensuring that prospective jurors are legally qualified to serve according to the statutory eligibility requirements, courts must evaluate whether jury service would cause undue hardship that warrants an excuse or delay in service, a concern made particularly prominent during the COVID period of 2020-21. Courts must also determine whether a prospective juror cannot be fair in a particular trial. In addition to these decisions on whether to excuse a juror for cause, courts are charged with monitoring the

peremptory challenges that attorneys propose for removing prospective jurors from a panel during jury selection. The principle enunciated in Principle 11 of the 2005 *ABA Principles* is that “Courts Should Ensure That the Process Used to Empanel Jurors Effectively Serves the Goal of Assembling a Fair and Impartial Jury.”⁴

Our third theme, covered in Part VI, focuses on potential bias that can infect court proceedings. Exclusion of potential jurors based on race, ethnicity, or gender is not the only way that bias can creep into court proceedings and undermine the promise of a fair trial. Another reason is that individuals, including jurors, judges, parties, and court personnel, may harbor biases that they are not even aware they have, so-called implicit biases.⁵ The challenge for courts is how to provide guidance that minimizes the effects of these biases. Since the 2005 ABA Principles were written, courts have become more aware of this challenge and several modern jury commissions and court-appointed working groups have been charged explicitly with addressing it.⁶ In addition to focusing on attorney behavior during jury selection, the primary thrust of this effort has been on educating jurors through jury instructions. The operative principle might be characterized as: Courts Should Attempt to Minimize the Impact of Bias, both Explicit and Implicit, on Jurors and Juries.

So far, so good, but of course the devil is in the details.

III. KEY PLAYERS

Judicial rulemaking authority is substantial and courts are the dominant players in achieving fair jury trials. It is not surprising that the National Center for State Courts (NCSC) State-of-the-States survey found that three-quarters of the states (38) had appointed a statewide commission or task force to examine issues related to jury operations and trial procedures, and that “The vast majority of these commissions were established by the chief justice or under the authority of the court of last resort.”⁷ More recent efforts by states show a similar pattern. For example, in 2019 the New Jersey Supreme Court established an internal Working Group on Juror Impartiality “to focus on practical steps that can be implemented to improve fairness in the jury selection and deliberation process.”⁸

Judicial rulemaking authority is substantial and courts are the dominant players in achieving fair jury trials.

Individual judges can be influential as well. For example, in two opinions in 2019, California Supreme Court Justice Goodwin Liu⁹ and Court of Appeal justice Jim Humes¹⁰ urged the California Supreme Court to rethink its *Batson* framework in order to eliminate racial discrimination in jury selection. Although it is unclear precisely what led California to add Section 231.7 to its statute governing peremptory challenges, the changes included in the bill passed in 2020 track some of the judicially proposed reforms.¹¹

Some steps can be taken by judges and judicial rule changes; others require legislation.

Some steps can be taken by judges and judicial rule changes; others require legislation. As the Arizona Supreme Court Committee on More Effective Use of Juries learned, legislative support may need to be cultivated as part of a move for change.¹² Although the Arizona Committee was able to implement a number of major procedural reforms, several were not implemented because legislative action was not obtained. Judge Michael Dann, chair of the 22-member

committee, suggested that failure to include a state legislator on the committee contributed to a lack of legislative support for increasing juror pay. Although it may be advisable to formally include legislative participation on Judicial Task Forces and Commissions, judges on their own can play an influential role in informing legislative change, so the full range of potential actions—both rule-making and statutory changes—are included here.

IV. INCREASING THE REPRESENTATIVENESS OF JURY POOLS

The pool of potential jurors was historically composed exclusively of white male property owners, but is now drawn from the citizenry at large, including the women and minorities who were not eligible to serve as jurors when the country was founded.¹³ Even in the past century, courts have come a long way from the days when local officials selected citizens for jury service based on their community ties and status.¹⁴ Nonetheless, jury pools today fall short of achieving the coverage and representation of the fair cross section ideal, at times in significant ways that lead to substantial underrepresentation of minorities. Courts (and legislatures) could take a number of steps to fully realize, or at least more closely approach, the fair cross section goal.

Jury pools today fall short of achieving the coverage and representation of the fair cross section ideal, at times in significant ways that lead to substantial underrepresentation of minorities.

A. Expanding Jury Eligibility

1. Removing Occupational Exclusions

Much of the recent push to increase the likelihood that juries will reflect a cross section of the community has focused on removing racial and gender restrictions, albeit with mixed success.¹⁵ Other efforts to expand jury representation have led to the elimination of most occupational exemptions. For example, as of July 2006, Indiana eliminated all automatic exemptions. Previously, licensed dentists and veterinarians were excused, as well as members of the armed forces in active service, elected or appointed governmental officials, honorary military staff officers appointed by the governor, members of the board of school commissioners of the city of Indianapolis, and members of police or fire departments.¹⁶

This move toward eliminating occupational exemptions is likely to have the desired effect of increasing wider participation in the jury system. When occupational exemptions were available in New York, a report indicated that “5 to 10% of New Yorkers who return their qualification questionnaires claim an occupational exemption.”¹⁷ After these exemptions were eliminated, the number of available potential jurors increased, and “the percent of persons reporting who indicated that this was their first time on jury duty increased from 33% to over 50%.”¹⁸

Despite the value of this expansion, almost half of the states still have professional exemptions.¹⁹ While all have tended to reduce the number of occupations covered, some states still maintain exemptions for occupations like law enforcement or clergy.²⁰ It is unclear how much those remaining exemptions undermine the representativeness of the jury pool on race, ethnicity, and gender, but courts may wish to consider whether, for example, a blanket

exclusion of medical personnel is justified, or whether there is a rationale for excluding law enforcement officers from civil juries. In addition, if jury service is viewed as a responsibility and opportunity that all able-bodied citizens should share, it is hard to justify excluding citizens from service based on occupation.²¹

It is unlikely that the elimination of professional exemptions has the effect of increasing representation from minorities. It does, however, increase the diversity of the jury pool on other dimensions.

It is unlikely that the elimination of professional exemptions has the effect of increasing representation from minorities.

2. Removing Other Traditional Qualification Barriers to Jury Eligibility

Three other traditional requirements for serving as a juror affect the racial and ethnic composition of the jury pool. English language proficiency, citizenship, and lack of a felony record are generally prerequisites for jury service, although there have been some efforts to remove those requirements. The state of New Mexico permits non-English speaking citizens to serve as jurors, and its constitution explicitly prohibits the exclusion of citizens who are unable to speak, read, or write English.²² This provision has been interpreted to require reasonable efforts to accommodate the non-English speaking juror by providing an interpreter.²³ With an eye toward maximizing representativeness, the 2005 ABA Principles for Juries and Jury Trials endorsed eligibility of non-English speaking jurors “unless the court is unable to provide a satisfactory interpreter.”²⁴ Although it is unclear how the presence of a non-English speaking juror (and interpreter) in the deliberation room affects the deliberations, Justice Edward Chávez reports that including non-English speaking jurors in New Mexico has not caused difficulties.²⁵ There have been reports of as many as four non-English speaking citizens serving on the same jury panel in recent years,²⁶ but the effect of these jurors on decision-making and how people respond to translation in the jury room has received only nascent empirical attention.²⁷ Thus far, no other state has followed New Mexico’s lead. A sub-committee of the Connecticut Jury Selection Task Force was recently charged with considering whether the statute requiring individuals summoned for jury service to be able to speak and understand English to serve on a jury warranted revision, but decided not to recommend any change in the statute.²⁸ Jurisdictions with a high percentage of non-English speaking potential jurors are the most reasonable candidates for this accommodation, both because this disqualification has a greater impact on the jury pool and because court interpreters are more likely to be available.

Citizenship is a standard requirement for jury service that excludes the estimated 13.1 million lawful permanent residents in the United States.

Citizenship is a standard requirement for jury service that excludes the estimated 13.1 million lawful permanent residents in the United States.²⁹ In 2013, the State Assembly in California, where 3.5 million noncitizens are legal permanent residents, passed a bill that would have allowed those noncitizens to serve as jurors.³⁰ Then Governor Brown vetoed the bill, characterizing jury service as “quintessentially a prerogative and responsibility of

citizenship.”³¹ The result of the citizenry requirement is that a substantial portion of legal permanent residents in the United States are not included in the population from which jury pools are drawn. This limitation differentially excludes ethnic minorities, which some have argued raises the potential for an equal protection or Sixth Amendment claim.³² The idea of including permanent residents on juries is still on the table. At the end of 2020, the Connecticut

Jury Selection Task Force re-visited the issue and its Jury Summoning Sub-Committee has proposed permitting permanent residents to serve on juries.³³

The exclusion of individuals with a felony conviction is the qualification barrier that probably has the largest effect on the representativeness of the jury pool, and in light of the recent history of mass incarceration in the U.S., strongly affects the representation of persons of color. A majority of states exclude convicted felons for life from serving on a jury, which has the effect of disproportionately excluding Black adult males. While people with felony convictions account for 8 percent of all adults, they account for 33 percent of the African American adult male population.³⁴ Wheelock estimated that felony juror exclusion reduces the pool of eligible African Americans in Georgia by nearly one-third, reducing the expected number of African American men on a jury from 1.61 to 1.17 per jury.³⁵ To the extent that felon exclusion is justified by presumed

The exclusion of individuals with a felony conviction is the qualification barrier that probably has the largest effect on the representativeness of the jury pool.

The permanent wholesale exclusion of felons undermines the goal of achieving juries that represent a fair cross section of the larger community.

anti-prosecution bias among felons, that presumption may not be justified. Binnall found that convicted felons and law students did not differ on a measure of pretrial bias.³⁶

The permanent wholesale exclusion of felons undermines the goal of achieving juries that represent a fair cross section of the larger community. A number of courts have recently recognized this cost and eliminated lifetime or long-term ineligibility for jury service. In California, the “Right to a Jury of Your Peers” bill was signed into law in October, 2019.³⁷ It enables felons who have finished their prison or jail time and are no longer under post-release supervision, including parole and probation, to serve as jurors. In June 2020, the D.C. Superior Court announced it would begin permitting individuals with a felony conviction to serve on trial juries, in both criminal and civil cases, one year after they have completed their sentences.³⁸ Previously, persons with felony convictions had to wait ten years after they completed their sentence to serve on a jury. As Chief Judge Robert Morin said in announcing the decision: “This change will make juries more representative, advance due process and allow returning citizens to more fully participate.”³⁹

B. Expanding Source Lists

At the federal court level, the 1968 Jury Service and Selection Act broke ground by requiring the use of voter registration rolls as juror source lists, as well as a plan for summonses to be sent randomly.⁴⁰ The 1970 Uniform Jury Selection and Service Act provided a model statute for states to adopt, and also endorsed random selection, as well as supplementation of voter rolls with other lists.⁴¹

Voter registration and drivers’ licenses are the dominant source lists that states currently use.⁴² The difficulty is that they may still fall short of achieving full coverage of the potential jury population in a number of non-random ways. For example, minorities tend to have lower voter registration rates. While 77 percent of citizens identifying

Voter registration and drivers’ licenses . . . may still fall short of achieving full coverage of the potential jury population in a number of non-random ways.

as white non-Hispanic were registered in 2020, only 69 percent of those identifying as Black and 61 percent of those identifying as Hispanic were registered.⁴³

Supplementing this list with drivers' licenses can help,⁴⁴ but states differ in the extent to which drivers' licenses capture a substantial portion of the population. The number of licensed drivers per 1,000 residents ranges from 627 licensed drivers per 1,000 state residents in New York to 905 licensed drivers per 1,000 residents in Vermont.⁴⁵ Residents of urban areas are underrepresented in the group of drivers. Moreover, drivers do not have to renew their drivers' licenses annually (e.g., every four years in Illinois; every five years in California; every eight years in Michigan), so the addresses available from drivers' licenses may not be up to date. These variations suggest that limiting jury rolls to these two sources may be insufficient in some jurisdictions to provide good coverage of persons otherwise eligible to serve as jurors.

The state income tax roll . . . has the advantage of being updated annually.

The state income tax roll is used as an additional list in 18 states and, unlike voting rolls and drivers' licenses, has the advantage of being updated annually. Nine states do not have a state income tax,⁴⁶ but income tax rolls could be a valuable additional source list in the remaining 23 states that do not yet use them. California is one example. In 2022 California will

add income tax rolls to its master jury list.⁴⁷ This addition is expected to add at least a few million more names to the lists, and the new potential jurors are expected to be largely lower-income and minority.⁴⁸

Supplementary lists can also be obtained from other sources, such as utility rolls. The key follow-up for all jurisdictions is to monitor the effects of the combination of source lists they use on the representativeness of the jury pool.

The NCSC has developed best practices for removing duplicate entries when multiple source lists are combined.⁴⁹ More broadly, the NCSC announced it will be working with court leaders in Missouri, New Jersey, Tennessee, and Maricopa County, Arizona, to create diverse master jury lists for courts there and nationwide. According to the plan, "The project involves determining how courts compile their jury lists and how accurately those lists mirror the demographics of their communities, and then coming up with ways to help courts make their lists better."⁵⁰

C. Updating Source Lists Annually

The state of Massachusetts has required, since colonial times, that each city and town compile a numbered resident list, on an annual basis, of all residents 17 or over. As a result, the Office of the Jury Commissioner in Massachusetts has what is probably the most complete list of potential jurors in any state. Even if a complete resident list is not the starting point, all jurisdictions can increase the representativeness of their jury pool by updating the master jury list at least annually to ensure the accuracy of the addresses. The average annual migration rate in the United States is 15 percent, with higher

Even if a complete resident list is not the starting point, all jurisdictions can increase the representativeness of their jury pool by updating the master jury list at least annually to ensure the accuracy of the addresses.

rates of mobility for minorities, people with lower socioeconomic status, and renters as opposed to homeowners.⁵¹ Updating the master jury list at least annually increases the likelihood that people at all socioeconomic levels and minorities will be included in the jury pool and increases inclusivity because the list will also include people new to the community.

D. Maintaining Diversity Through Follow-up

A comprehensive Master jury list does not automatically produce a representative jury pool. According to the NCSC, “[u]ndeliverable rates are the single largest factor contributing to decreased jury yields.”⁵² The estimate is that the national rate is on average 12 percent.⁵³ The loss is not random because the rate of undeliverable summonses tends to be higher in communities of color. As the NCSC reports, “undeliverable . . . rates tend to disproportionately decrease minority representation,”⁵⁴ noting that “undeliverable rates . . . are strongly correlated with lower socio-economic status and, in turn, correlated with minority status.”⁵⁵ In addition to updating the master jury list frequently, and using the most up-to-date address lists, submitting names to the National Change-of-Address (NCOA) database operated by the United States Postal Service can improve the quality of the address list used to summons jurors.⁵⁶

Potential jurors who receive a qualification questionnaire or a summons do not always respond.

Potential jurors who receive a qualification questionnaire or a summons do not always respond. Nationally, eight percent of all individuals summoned for jury duty fail to appear (FTA), but rates can be much higher. Lower-socioeconomic-status individuals are less likely to appear, which has the effect of reducing appearance rates among minorities. A simple reminder can be surprisingly

effective in reducing FTA rates. Riverside County (California) Superior Court found that sending prospective jurors a reminder postcard one week before the reporting date reduced FTA rates by at least 5 percentage points.⁵⁷ Although postcards that describe penalties that would result from FTA reduced FTA rates by 10 percentage points, courts may be reluctant to threaten such penalties. The NCSC has found that, when courts sent a second summons, nonresponse/FTA rates were 24 percent to 46 percent lower than when no follow-up summons was sent. Actual follow-up Order-to-Show-Cause proceedings or other aggressive approaches (e.g., fines) had only a marginal effect.⁵⁸

The NCSC has found that, when courts sent a second summons, nonresponse/FTA rates were 24 percent to 46 percent lower than when no follow-up summons was sent.

Some courts now use the Internet to qualify and schedule jury service.⁵⁹ This innovation can be remarkably efficient and convenient for users, but it may inadvertently undermine representativeness by reducing non-response rates only among wealthier and better educated prospective jurors who have regular access to and proficiency with the Internet. This potential distortion to the jury pool is likely to be less of an issue in some jurisdictions⁶⁰ and become less of a problem over time, but it is incumbent on courts to monitor the effect of these procedures on the composition of the jury pool.

E. Supporting Diversity Through Replacement Summonses

Both undeliverable summonses and non-responses reduce the diversity of the jury pool. One approach that 18 federal trial courts have taken to address this issue is to send a replacement summons to a new prospective juror in the same zip code as the zip code of the “missing juror.” Twelve courts send a replacement summons when either the original summons is returned as undeliverable or there is no response, and an additional six send a replacement when the original summons is returned as undeliverable. Although more research is needed on the impact of these efforts, one study in the Northern District of Illinois showed a modest increase in the percentage of Blacks in the wheel, that is, the jury pool of qualified jurors, used in the district.⁶¹

Some states are moving in this direction as well. Connecticut, following the recommendation of the Connecticut Jury Task Force, has a bill pending in the legislature that would institute this follow-up procedure in response to undeliverable summonses.⁶²

The effect of these efforts on diversity is tied to the extent to which zip codes are homogeneous, and minority membership varies across zip codes in the jurisdiction. It may be more effective to use census tracts for this procedure, because there are 73,000 census tracts, but less than 43,000 zip codes in the U.S.⁶³ Census tracts are more homogeneous in the number of persons they cover, with census tracts tending to cover 4,000+ individuals, while the population of a single ZIP code can exceed 100,000.⁶⁴

F. Addressing Hardships

Courts attempting to maximize the diversity of the jury pool face a dilemma in dealing with the hardships that fall disproportionately on prospective jurors with financial constraints and family obligations. The strong correlation between socioeconomic status and minority status means that these hardships tend to fall disproportionately on minorities and fuel underrepresentation of minorities in the jury pool. The most direct way to address this problem has long been recognized: greater juror pay. A study in El Paso, Texas, showed that when juror pay was increased from \$6 to \$40 a day, public participation in jury service reportedly climbed from 22 percent to 46 percent within a year.⁶⁵ Although some courts provide reasonable compensation for the expenses associated with jury duty, and increased compensation during service on longer trials, others provide little or no payment to cover even travel costs. Courts with higher-than-average-compensation policies report excusal rates of 7 percent compared to 9 percent for courts with lower-than-average-compensation policies.⁶⁶

Courts attempting to maximize the diversity of the jury pool face a dilemma in dealing with the hardships that fall disproportionately on prospective jurors with financial constraints and family obligations.

Temporary hardships can be addressed by a deferral policy that permits jurors to defer service one time to a future date within six months of the original summons date. Deferral rates and excusal rates are inversely correlated: a 1 percentage point increase in the deferral rate is associated with a decreased excusal rate of 0.7 percent.⁶⁷

The length of jury service also affects the burden imposed on jurors. The extent of that hardship in turn appears to affect excusal rates. In courts with a one-day or one-trial term of service, the average excusal rate is 6 percent, while in courts with longer terms of service the average is 9 percent.⁶⁸

In sum, addressing the hardships potential jurors face when a jury summons appears can increase participation. To the extent that these hardships differentially affect minorities, reducing those burdens may also improve representativeness.

Addressing the hardships potential jurors face when a jury summons appears can increase participation. To the extent that these hardships differentially affect minorities, reducing those burdens may also improve representativeness.

V. PRESERVING REPRESENTATIVENESS AND FAIRNESS IN THE COURTROOM

A. Allowing Attorney Participation and Case-Specific Juror Questionnaires as Part of Jury Selection

Individual questioning of potential jurors by the judge can be revealing,⁶⁹ but attorney questioning may provide a further window into juror thinking. Indeed, Judge Mark Bennett suggests that “[b]ecause lawyers almost always know the case better than the trial judge, lawyers are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome.”⁷⁰ In addition, the normative pressure to give the judge a socially desirable response may be reduced when the attorney is asking the question. One study showed that attorneys were more effective than judges in eliciting candid self-disclosure from potential jurors.⁷¹

Individual questioning of potential jurors by the judge can be revealing.

When attorneys are given only a limited role in conducting voir dire, as they often are in federal courts, they have fewer bases on which to decide how to use their peremptory challenges. Under those circumstances, they may be more likely to rely on readily available cues and apply snapshot racial, ethnic, and gender stereotypes in their judgments about potential jurors.⁷² Further evidence about juror experiences and attitudes that can be gleaned from responses to a case-specific questionnaire or during in-court jury selection should reduce the tendency to turn to demographic characteristics. Thus, to the extent that implicit and explicit biases infect challenge decisions, maximizing other information may act as a countervailing force.

When attorneys are given only a limited role in conducting voir dire, as they often are in federal courts, they have fewer bases on which to decide how to use their peremptory challenges.

B. Bolstering *Batson* (a.k.a. Giving *Batson* Teeth)

When the U.S. Supreme Court decided *Batson v. Kentucky* in 1986, it was a victory of sorts for fair jury trials: the Court recognized that discriminatory behavior could remove potential jurors from sitting on a trial based on the behavior of an attorney during jury selection.⁷³ In the cases that followed, the Court expanded this prohibition to cover attorneys in civil cases.⁷⁴ The Court in *Batson* delineated a three-step procedure for identifying and evaluating a potential *Batson* violation. First, the complaining attorney must establish a prima facie case that “gives rise to an inference of discriminatory purpose” to support the claim that the opposing party has exercised its peremptory challenge in a discriminatory fashion.⁷⁵ Second, if the judge believes a prima facie case has been made, the burden shifts to the accused party, who must offer a race-neutral explanation for the contested challenges.⁷⁶ Finally, the trial court judge must decide whether the offered explanation is sufficient to rebut the claim that the challenge was racially motivated.⁷⁷ If persuaded, the judge will not permit the peremptory challenge to be exercised.

When the U.S. Supreme Court decided *Batson v. Kentucky* in 1986, it was a victory of sorts for fair jury trials.

State courts have been grappling with the deficiencies of *Batson* for 35 years.

Justice Thurgood Marshall was skeptical that the procedure introduced by the *Batson* Court to control the use of racially-based peremptory challenges would be effective.⁷⁸ Time and empirical research have provided evidence that his expectation was correct.⁷⁹ One reason may be that because a challenge need not be reasonable, or even plausible, but must be *pretextual* to warrant a successful rejection of the challenge, the court must essentially call the attorney who wishes to exercise the challenge a liar when the attorney offers an explanation that the court rejects. Even opposing counsel may hesitate to raise a *Batson* challenge that would label their opponent a racist or a liar. It is no wonder the procedures created in *Batson* have not succeeded in removing race from jury selection.

State courts have been grappling with the deficiencies of *Batson* for 35 years. In recent years, however, the research on implicit racism, and the growing awareness that race (and gender) stereotypes can influence all of us unconsciously, have opened the door to consider *Batson* from a new perspective. If implicit bias can be found in all of us, we should not expect trial attorneys to be immune. Indeed, the experiments of Sommers and Norton, discussed below, show precisely that bias.⁸⁰ Courts have used this new lens to motivate and re-evaluate the procedures used to control discriminatory use of peremptory challenges. For example, in *State v. Saintcalle*,⁸¹ the Washington State Supreme Court expressed its concerns that the federal *Batson* test may not provide sufficient protection against biased uses of peremptory challenges, particularly with respect to unconscious prejudice and implicit bias:

Several state courts have explicitly taken on the perceived failure of *Batson* and have instituted, or are considering implementation of, changes that aim at protecting the fair use of peremptory challenges that *Batson* failed to achieve.

Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because *Batson* recognizes only “purposeful discrimination,” whereas racism is often unintentional, institutional, or unconscious. We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination.⁸²

Several state courts have explicitly taken on the perceived failure of *Batson* and have instituted, or are considering implementation of, changes that aim at protecting the fair use of peremptory challenges that *Batson* failed to achieve. The changes have taken four primary forms: 1) finding that a prima facie case has been made if a party strikes the last member of a racially cognizable group; 2) eliminating the first step in the *Batson* procedure; 3) removing the requirement that a successful *Batson* challenge can result only if the attorney has engaged in purposeful discrimination in deciding to excuse the juror; and 4) identifying a series of juror characteristics that presumptively indicate a discriminatory basis for removal of that juror.

1. Peremptory Strike Eliminating the Last Member of a Racially Cognizable Group Establishes a Prima Facie Case of a Discriminatory Purpose.

Although courts often rely on a pattern of strikes to determine that a prima facie case has been made of discriminatory purpose, they also recognize that a single strike can meet the required standard. For example, as the Massachusetts Supreme Court observed:

We have often noted that a single peremptory strike can be sufficient to support a prima facie case, especially where the juror is the only member of the venire of the particular group. [citations omitted]. See *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008), quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (“[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.”). The judge’s reasoning that there was not yet a pattern fails to consider this well-established principle that one peremptory strike can sustain the objecting party’s prima facie case.⁸³

In a modest adjustment to the proof required for the first step of the *Batson* test, the Washington State Supreme Court went further in *City of Seattle v. Erickson*.⁸⁴ The Court announced a bright-line rule that amended the *Batson* framework, holding that “the peremptory strike of a juror who is the only member of a cognizable racial group constitutes a prima facie showing of racial discrimination requiring a full *Batson* analysis by the trial court.”⁸⁵

Courts . . . recognize that a single strike can meet the required standard.

Although this approach has merit, if discriminatory strikes are a serious problem, this remedy probably provides at best a minor and incomplete remedy. It is thus not surprising that Washington’s Supreme Court found the minor adjustment insufficient a year later when it decided *State v. Jefferson*.⁸⁶ In that case, the trial court had applied the bright-line standard articulated in *Erickson*, but after proceeding through the remaining steps of the *Batson* framework, found that the strike was not discriminatory. The Washington Supreme Court disagreed and set out a more demanding framework for evaluating potentially discriminatory peremptory challenges.⁸⁷ The result was that the decision of the trial court was reversed, and the case was remanded for a new trial.

2. The First Step in the *Batson* Procedure Constitutes an Unnecessary Obstacle to Showing that a Peremptory Strike Is Discriminatory.

Some courts have determined that the first step in the *Batson* procedure is an unnecessary obstacle to a claim that a strike has a discriminatory purpose. Thus, once a party makes the claim, the opponent should offer an explanation (step two) and the court should then evaluate whether the explanation is sufficient to rebut the charge that the strike had a discriminatory purpose (step three). California took this position in its new legislation

Some courts have determined that the first step in the *Batson* procedure is an unnecessary obstacle to a claim that a strike has a discriminatory purpose.

governing peremptory challenges, which will go into effect in 2022 for criminal cases and 2026 for civil cases.⁸⁸ The amended statute applies to a broad range of groups that might experience discrimination in jury selection. It prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.⁸⁹ Either a party or

the trial court may raise an objection to the use of a peremptory challenge based on these criteria.⁹⁰ Although “no reason need be given for a peremptory challenge,”⁹¹ a claim that the strike violated this provision is sufficient to move to *Batson*'s second step. Upon “objection to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.”⁹²

Other states too have eliminated or recommended eliminating *Batson*'s first step. In fact, Connecticut adopted this approach in 1989. After following the three-pronged *Batson* approach and finding that the trial court correctly found that the defendant had not passed the first step, so that the state appropriately was not required to provide a neutral explanation for the challenge, the Connecticut Supreme Court eliminated the first prong. Thus, once such a challenge has been made, “in all future cases in which the defendant asserts a *Batson* claim, we deem it appropriate for the state to provide the court with a prima facie case response consistent with the explanatory mandate of *Batson*. Such a response will not only provide an adequate record for appellate review but also aid in expediting any appeal.”⁹³ It is significant that the Connecticut Supreme Court's *Batson* Task Force that issued its report in 2020 determined that further action was required to fulfill the promise of *Batson*.⁹⁴

It is unclear how large a role the first step of the *Batson* procedure plays in defeating a claim that the opponent has exercised a discriminatory strike. Nonetheless, the elimination of the first step requires a party to offer an explanation for what might otherwise be, or be perceived as, a discriminatory strike. An appellate court is therefore in a better position to evaluate the reason for the strike.

3. A Showing of Purposeful Discrimination Should Not Be Required for a Successful *Batson* Challenge.

Our understanding of discrimination has grown exponentially in recent years. At the time of *Batson*, a rough understanding of discrimination viewed conscious intent and even animus as the motivators that lead to discriminatory behavior. Modern research has revealed that people can make judgments that are systematically influenced by race or gender without any awareness that those features affect their judgments. People can even justify those judgments in terms of factors other than race or gender without being aware that it is race and gender

that is actually explaining their choices. Sommers and Norton demonstrated this effect when they gave practicing lawyers two potential juror profiles in a hypothetical case of robbery and assault with a Black defendant.⁹⁵ One juror profile depicted the photo of a journalist who wrote stories about police misconduct, and the other showed the photo of a business executive who was skeptical of forensic evidence. Half of the respondents saw the photo of the

A variety of studies have demonstrated that students, nurses, doctors, police officers, employment recruiters, and many others exhibit implicit biases with respect to race, ethnicity, nationality, gender, social status, and other distinctions.

journalist presented as a Black juror and the photo of the business executive presented as a white juror. For the other half of respondents, the photos were reversed. That is, the journalist was presented as white and the executive was presented as Black. Respondents were asked to act as prosecutors and to choose which of the two potential jurors to strike peremptorily. The lawyer respondents struck the journalist 79% of the time when he was shown as Black

but just 43% of the time when he was presented as white. Yet they generally explained their decisions as based on race-neutral reasons in the juror's background and attitudes. Although it is possible that the participants were dissembling, their behavior is also consistent with a lack of awareness of what actually motivated their choice.

A variety of studies have demonstrated that students, nurses, doctors, police officers, employment recruiters, and many others exhibit implicit biases with respect to race, ethnicity, nationality, gender, social status, and other distinctions.⁹⁶ If we are concerned about bias in the exercise of peremptory challenges, it makes sense to recognize that unconscious bias can infuse choices about whether to exercise a peremptory challenge and not to limit our attention to conscious discriminatory behavior.

California is one of several courts that have recognized a need to expand the criteria for evaluating whether a challenge is discriminatory from purposeful discrimination to whether "there is a substantial likelihood that an objectively reasonable person would view [membership in a protected class] as a factor in the use of the peremptory challenge."⁹⁷ Washington State has similarly set aside the requirement that discrimination be purposeful. General Rule 37 specifies: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge."⁹⁸ Rule 37 further specifies that "an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."⁹⁹ Thus, the standard charges the court with considering the impact of unconscious bias on an attorney's decision to exercise a peremptory challenge.

Connecticut's proposed new rule for jury selection to a large extent mirrors Washington's General Rule 37, using the objective observer as the reference point:

The court shall then evaluate from the perspective of an objective observer, as defined in section (f) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge shall be disallowed and the prospective juror shall be seated.¹⁰⁰

Section (f) of the proposed Connecticut rule further specifies: “For the purpose of this rule, an objective observer (1) is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity.”¹⁰¹

Under the original *Batson* standard, or at least as interpreted in *Purkett v. Elem*, a successful *Batson* challenge requires the court to find that the “neutral reasons” given by the attorney were pretextual, rather than merely implausible.¹⁰² The changes in California’s new statute, Washington State’s new rule, and Connecticut’s proposed new rule offer a potential remedy for this cramped interpretation of bias: to recognize implicit bias

Under the original *Batson* standard, a successful *Batson* challenge requires the court to find that the “neutral reasons” given by the attorney were pretextual, rather than merely implausible.

as a basis for rejecting a peremptory challenge. Reflecting this broader conception of discrimination, the court does not need to determine whether the peremptory challenge was motivated by bias that the attorney was intentionally hiding in offering a pretextual neutral explanation for excusing the juror. Instead, the court is charged with asking a broader, more neutral, question: whether an objective observer would view the explanation for the challenge as plausibly non-discriminatory or, alternatively, the result of implicit or explicit bias. Although this change promises to recognize a broader scope of potential bias, and provides a more neutral way to characterize that bias, it is too soon to know whether it will produce measurably different outcomes for *Batson* claims.

4. Juror Characteristics Historically Associated with Discrimination Are Presumptively Invalid Reasons for a Peremptory Challenge.

The Supreme Court in Washington State identified seven juror characteristics that it determined were associated with improper discrimination in jury selection in the state. To avoid their inappropriate use in jury selection, General Rule 37 listed them as:

presumptively invalid reasons for a peremptory challenge: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.¹⁰³

To the extent that some of these characteristics are correlated with race, the effect of enforcing these presumptions should make it easier to mount a successful *Batson* challenge to a peremptory strike exercised on a Black or Latinx or foreign-born prospective juror.

California’s new statute adopted the approach of identifying presumptively invalid reasons for peremptory challenges used by Washington State. California began with the same seven factors included in Washington State’s General Rule 37, but listed six additional characteristics. And while Washington State’s General Rule 37 does not specify what it takes to overcome the presumed invalidity of one of the listed characteristics when it is offered as a reason for a peremptory challenge, the California law sets a high standard: “To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror’s ability to be fair and impartial in the case.”¹⁰⁴

Finally, Connecticut is proposing a similar approach, adopting the seven Washington State factors with a single addition: having been a victim of a crime.¹⁰⁵ The presumed invalidity of one of the listed reasons can be overcome “if the party exercising the challenge demonstrates to the court’s satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror’s race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror’s ability to be fair and impartial in light of particular facts and circumstances at issue in the case.”¹⁰⁶

The difficulty in implementing these presumptions of invalidity is that some of these characteristics may be quite relevant in a particular case and thus may constitute legitimate bases for concern that a juror may not be unbiased in that case.

The difficulty in implementing these presumptions of invalidity is that some of these characteristics may be quite relevant in a particular case and thus may constitute legitimate bases for concern that a juror may not be unbiased in that case. For example, suppose the case involves a civil suit against a police officer for malicious prosecution involving a wrongly obtained search warrant. Would a prospective juror’s prior contacts with, and attitudes toward, law enforcement be legitimate bases for exercising a peremptory challenge? It may be that the presumption that these are invalid reasons for a peremptory challenge would be overcome in this case, but courts are likely to face some challenges in distinguishing between relevant and irrelevant characteristics in some cases.

The requirement that the judge be put on notice of any objectionable juror conduct, when linked with the requirement that the judge specify the reasons for any Batson ruling, provides an important foundation for appellate review.

Washington State General Rule 37 includes a separate set of presumptively invalid reasons for peremptory challenges that arise from the conduct of the juror in the courtroom.¹⁰⁷ Attorneys may explain a challenge by alleging that “the

prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers.”¹⁰⁸ This list in Washington State’s General Rule 37 was included in the California statute.¹⁰⁹ Connecticut proposes to include all but “provided unintelligent or confused answers” on its list of presumptively invalid behavioral reasons.¹¹⁰ That omission would avoid requiring the more subjective judgments entailed in assessing the nature of those responses. To overcome the invalidity of any of these conduct reasons, notice to the court and the other parties is required so that the behavior may be verified.¹¹¹ California further requires that counsel offering the reason explain why the conduct of the prospective juror matters.¹¹² That addition may act as a useful check on permitting discriminatory peremptory challenges based on innocuous conduct.

The requirement that the judge be put on notice of any objectionable juror conduct, when linked with the requirement that the judge specify the reasons for any *Batson* ruling, provides an important foundation for appellate review. Similarly, the movement from review under a clearly erroneous standard to review of the denial of an objection *de novo* strengthens the monitoring of attorney behavior in exercising peremptory challenges.¹¹³

C. Requiring Judicial Presence During Voir Dire

In most trials, the judge is present from jury selection through the end of the trial. The Connecticut Jury Selection Task Force Peremptory Challenge Working Group, however, was charged with considering whether judges should preside over jury selection in civil trials. The group concluded that the presence of a judge was unnecessary, and unnecessarily costly, and inefficient. In the absence of empirical evidence that the presence of a judge was associated with a reduction in bias (and the observation that 25 years of judicial presence in criminal cases during jury selection had not eliminated bias), the group found that such a rule requiring the presence of a judge

When attorneys conduct voir dire outside the judge's presence, judges are left to rule on challenges without the benefit of direct observation of jurors' initial reactions to the questions asked of them.

was not worth pursuing (and would likely encounter judicial resistance). Yet when attorneys conduct voir dire outside the judge's presence, judges are left to rule on challenges without the benefit of direct observation of jurors' initial reactions to the questions asked of them. If a juror's behavior becomes the basis for a peremptory challenge, the judge cannot verify what objectionable behavior

the proponent of the challenge claims to have observed. The presence of the judge may also set a tone in the courtroom that encourages the attorneys to handle the selection process with greater professionalism. Although the opportunity to waive the presence of the judge is sometimes available, it is unknown how often judicial presence is in fact waived. According to California's Bench Handbook for 2013, in practice, waiver of a judge's presence in civil trials rarely occurs "because of the opportunity for abuse," and most judges allow such waiver only "when they know and trust the integrity of all the attorneys and are engaged in extremely pressing business." While it would be useful to have empirical research that examines how the presence of a judge affects jury selection, until that research is conducted, it seems prudent for the default to include judicial presence.

D. Eliminating or Reducing the Number of Peremptory Challenges

Some observers, beginning with Justice Marshall in *Batson*,¹¹⁴ have proposed an easy way to avoid bias in exercising peremptory challenges: simply eliminate them. No peremptory challenges would mean no race-based exclusions.¹¹⁵ But would that be the classic version of "throwing the baby out with the bathwater"? If peremptory challenges do operate to remove potential jurors who claim they can be fair (and thus discourage judicial removal for cause), even though they have backgrounds, experiences, or attitudes that undermine the credibility of those assurances, the peremptory challenge can act as a safety valve in jury selection. As we have learned, jurors, like all of us, can be unaware of biases that may influence their judgments. Moreover, the fairness of the jury trial in the eyes of the parties may depend in part on their ability to exercise some control over the makeup of the jury.

No peremptory challenges would mean no race-based exclusions. But would that be the classic version of "throwing the baby out with the bathwater"?

The other approach, which would also reduce the potential effect of racial and ethnic bias in jury selection, would be to *reduce* the number of peremptory challenges.

The other approach, which would also reduce the potential effect of racial and ethnic bias in jury selection, would be to *reduce* the number of peremptory challenges to, for instance, three or four per side for a 12-member jury. Currently, eight states with 12-person civil juries allow each side to exercise at least six peremptory challenges.¹¹⁶ A reduction to three or four per side, currently the number in the

majority of states, would treat the peremptory challenge as a safety valve to control non-discriminatory bias rather than an invitation to attorneys to try to mold the composition of the jury along a pathway that facilitates discrimination.

States have periodically considered reducing the number of peremptory challenges they allow, but those proposals have not met with much success.¹¹⁷ It may be that the recent attention to implicit bias will cause a renewed interest in re-examining whether reductions should be pursued. It is interesting that the COVID pandemic led at least one state to reduce, at least temporarily, the number of peremptory challenges provided to each side in both criminal and civil cases (from four to two in civil cases).¹¹⁸ Follow-up research on the effects would be welcome.

A remarkably straightforward structural change to the civil jury trial in many states would directly and dramatically increase diversity on the jury: a return of the civil jury to its original size of 12.

E. Returning to Larger Civil Juries

A remarkably straightforward structural change to the civil jury trial in many states would directly and dramatically increase diversity on the jury: a return of the civil jury to its original size of 12. Although a majority of states use 12-person juries in civil cases, a third have between six and eight-member juries; federal courts have at least six jurors, but may have up to 12. A smaller jury is quite capable of producing a verdict, just as a jury of one would be. But a verdict is not enough. A *fair* jury verdict requires a set of jurors who bring different perspectives and experiences to their consideration of the evidence. And the diversity represented on the jury is predictably greater with a jury of 12 than with a jury of six.

Larger and smaller juries are not functionally equivalent.

Contrary to the U.S. Supreme Court's assumption in 1970,¹¹⁹ larger and smaller juries are not functionally equivalent. In a recent review of the evidence, Judges Patrick Higginbotham and Lee Rosenthal, along with Steven Gensler, called on their federal trial court colleagues to exercise their discretion and seat 12-member juries in civil cases.¹²⁰ They pointed to the accumulated evidence that smaller juries are less predictable, more likely to be influenced by a juror with an extreme view to return an outlier award on both the low and high ends, and less likely to express the voice of the community.¹²¹ They noted that the Supreme Court in *Williams* had acknowledged the value of minority representation on juries, but that the Court had wrongly concluded that reducing the size of juries would have at most a negligible impact.¹²² Citing evidence from both basic statistical models and empirical field studies, they characterized the Court's conclusion as "glaringly wrong" and observed: "In reality, cutting the size of the jury dramatically increases the chance of excluding minorities."¹²³

In collaboration with Destiny Peery, Emily Dolan, and Cook County judge Francis Dolan, I conducted one of the studies cited by Higginbotham, Rosenthal, and Gensler. The impact we found of jury size on Black juror representation was indeed striking.¹²⁴ While only 2.1 percent of the 12-member juries lacked a single Black member, 28.1 percent of the six-member juries were entirely without Black representation.¹²⁵ This pattern mirrored what statistical theory would have predicted: the smaller the jury, the less representative it will be and, in particular, the less likely it will be to include a minority member. This effect cannot be attributed to patterns in the exercise of juror challenges: Black jurors represented 25 percent of the jury pool both before and after attorneys exercised their peremptory challenges.¹²⁶ The difference is attributable entirely to jury size.

The initial move to reducing jury size was justified as a cost-saving measure

The initial move to reducing jury size was justified as a cost-saving measure. Judge Higginbottom and his colleagues cite evidence showing that the time saving is minimal, but also point to another factor that has reduced the cost associated with the 12-member jury. Civil jury trial rates, both federal and state, have declined significantly so that the total budget for jury trials, whether six-member or 12-member, has declined as well. The authors suggest that we can “afford to invest in the few civil jury trials we are fortunate enough to still have.”¹²⁷

VI. INSTRUCTING JURORS ON BIAS

Courts across the country have attempted to ameliorate potential bias on the jury by educating jurors on the effects of bias, both implicit and explicit, on judgments. The efforts have included preparing a specially created video presented to jurors at the beginning of jury service,¹²⁸ as well as writing detailed preliminary instructions

Courts across the country have attempted to ameliorate potential bias on the jury by educating jurors on the effects of bias, both implicit and explicit, on judgments.

and final instructions that remind the jurors that bias can infect all of us, consciously or unconsciously. The legal system depends on jury instructions to provide jurors with guidance on the relevant law they should apply. Although the jury instructions are sometimes challenging for jurors to understand, efforts to create understandable instructions have paid off.¹²⁹ Nonetheless, applying an instruction to control unconscious bias presents a particularly hefty challenge.

In one of the most intensive individual efforts, recently retired Judge Mark W. Bennett of the U.S. District Court in the Northern District of Iowa would spend approximately 25 minutes discussing implicit bias during jury selection.¹³⁰ At the end of jury selection, Judge Bennett would ask each potential juror to take a pledge, which included making a pledge against deciding the case based on bias: “This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.”¹³¹ He also gave a specific jury instruction on implicit biases before opening statements:

Do not decide the case based on ‘implicit biases.’ As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, ‘implicit biases,’ that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence

carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and

Although many informational interventions have been proposed to address implicit bias in the legal system, their effect is uncertain at this point.

commonsense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.¹³²

Other instruction efforts have been less intensive, but instructions offer a relatively low-cost way to address what has been recognized

as a problem that needs attention. Yet although many informational interventions have been proposed to address implicit bias in the legal system (e.g., the American Bar Association’s “Achieving an Impartial Jury” Toolbox),¹³³ their effect is uncertain at this point. In 2013, Jennifer Elek and Paula Hannaford-Agor wrote: “It is not yet known whether a well-crafted jury instruction could help to mitigate the effect of implicit racial bias in juror decision-making.”¹³⁴ That statement is still true. Although we have substantial evidence that bias, conscious and unconscious, is common, identifying ways to dispel that bias presents a challenge. What little evidence we have does not inspire confidence that implicit bias is easily countered. There is clearly more research to be done to determine both the extent of the bias in all trial participants—jurors, attorneys, and judges—and measures that can reduce it.

Although we have substantial evidence that bias, conscious and unconscious, is common, identifying ways to dispel that bias presents a challenge. What little evidence we have does not inspire confidence that implicit bias is easily countered.

VII. BEST PROSPECTS FOR OPTIMIZING FAIRNESS (AND WHAT WE DON’T KNOW)

The trial jury is not composed of a haphazardly selected set of individuals. Rather, it emerges from the operation of a complex set of requirements and interactions between the legal system and the population of prospective jurors, inside and outside of the courthouse. Although the contemporary American jury is far more heterogeneous and representative than it has ever been, systematic underrepresentation of minorities on juries persists, threatening to undermine the fairness of the jury trial. Given research demonstrating that greater diversity of background and experience brings benefits not only of greater legitimacy of the jury system¹³⁵ but of more robust fact-finding and deliberation, courts are wise to take up the challenge of expanding their jury pools. Greater representativeness is a realistic goal in the modern era with its availability of computers that can efficiently gather, organize, combine, sort, and randomly sample large numbers of potential juror names.

Similarly, modern courts are recognizing that unconscious sources of bias can affect the jury selection process and the behavior of the jurors in deciding the case. Fairness demands that steps be taken to cabin those biases.

The trial jury . . . emerges from the operation of a complex set of requirements and interactions between the legal system and the population of prospective jurors, inside and outside of the courthouse.

The variety of procedural modifications discussed here are likely to have different costs and different payoffs, and the payoffs may differ for different jurisdictions. Each of them offers a contribution to the fairness of the jury trial. Some, however, are particularly likely to have a substantial impact. Here are the four I would single out:

1. **Expansion of eligibility to include convicted felons who have completed their sentences.** Of all categories of ineligible individuals, reinstating felon inclusion on jury lists is likely to have the greater effect in increasing racial diversity on the jury. Service on civil trials is particularly likely to be unproblematic.
2. **Use of up-to-date (and comprehensive) juror lists.** A stale jury list disproportionately misses minorities and increases the percentage of summonses that cannot be delivered, making it both unrepresentative and inefficient. To monitor the quality of the list in obtaining a representative pool, it is important that the qualification questionnaire to require the respondent to indicate their race and ethnicity. Follow-up and replacement of undeliverable summonses are key supports to ensuring a representative jury pool.
3. **Adoption of the objective observer standard to judge a *Batson* challenge.** Several jurisdictions have made or are making this change. In principle the change in standard, which drops the need to label the strike as the result of purposeful discrimination, makes it easier to identify it as discriminatory, whether conscious or unconscious. Whether it does in fact enlarge the range of peremptory challenges that are deemed discriminatory will depend on the trial court judges and the appellate court judges who review their decisions. The key will be how judges implement the new standard. It will be important for the jurisdictions making this change to trace its effects. The evaluation needs to track three possible effects: a drop in discriminatory peremptory challenges if the change affects the behavior of the attorneys who exercise them, a change in judicial rulings on challenges to proposed strikes, and a change in the composition of the jury if the new standard reduces discriminatory removals that reduce the extent to which the resulting juries are representative of the community.
4. **Limited availability of peremptory challenges and increased jury size to increase diversity.** In jurisdictions where the parties have more than four peremptory challenges or where the jury is less than 12, diversity on all dimensions, even in the face of bias, will be increased by these changes. Although state courts can support these changes, they will generally require legislative action. They are worth pursuing because they offer a clear path to a more representative jury.

Similarly, modern courts are recognizing that unconscious sources of bias can affect the jury selection process and the behavior of the jurors in deciding the case. Fairness demands that steps be taken to cabin those biases.

The focus to this point has been on the procedures that produce and structure the jury. But if all of us have biases, then members of the jury, even those chosen using optimal procedures, will still harbor conscious and unconscious biases. The jury instructions that attempt to educate jurors about these biases are a step toward addressing this concern. But awareness is only the first step; motivation and ability to control are required as well. Thus far, the evidence on the efficacy of those instructions has not yet emerged. In the end, despite the jury’s remarkable performance, the toolbox of the modern court for producing the ideal jury trial is not yet full.

Despite the jury’s remarkable performance, the toolbox of the modern court for producing the ideal jury trial is not yet full.

Notes

- 1 Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern University Pritzker School of Law; Research Professor, American Bar Foundation. My thanks to Mary R. Rose, Beth Murphy, Stewart Diamond, and James Rooks for insightful comments on earlier drafts of the paper.
- 2 419 U.S. 522, 530 (1975); see also *Duren v. Missouri*, 439 U.S. 357 (1979).
- 3 American Bar Association, *PRINCIPLES FOR JURIES & JURY TRIALS* (2005). The ABA’s Principles are advisory, but were endorsed by the Conference of Chief Justices, a body composed of the chief justices of each state supreme court. The Conference adopted a formal resolution which “[e]ncourages all state courts to implement procedures and practices consistent with the ABA Principles for Juries and Jury Trials.” Conference of Chief Judges, Resolution 14: In Support of the American Bar Association Principles for Juries and Jury Trials, adopted as proposed by the Court Management Committee at the 29th Midyear Meeting on January 18, 2006.
- 4 *Id.*
- 5 Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1196, 1221 (2009) (finding that judges harbor the same kinds of implicit biases as the general American population).
- 6 Examples include California, Connecticut, New Jersey, and Washington State.
- 7 GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS* (National Center for State Courts, 2007), https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf (hereinafter *State-of-the-States Survey*) at 9.
- 8 New Jersey Supreme Court, NOTICE TO THE BAR: SUPPORTING JUROR IMPARTIALITY BY ADDRESSING IMPLICIT BIAS—PROPOSAL FOR (1) NEW MODEL VOIR DIRE QUESTIONS AND (2) UPDATES TO MODEL CIVIL AND CRIMINAL JURY CHARGES—PUBLICATION FOR COMMENT, <https://www.njcourts.gov/notices/2021/n210204a.pdf>.
- 9 *People v. Rhoades*, 8 Cal. 5th 393 (2019) (Liu, J., dissenting).
- 10 *People v. Bryant*, 40 Cal. App. 5th 525 (2019) (Humes, J., with Banke, J., concurring).
- 11 Assembly Bill No 3070 (approved by Governor Sept. 30, 2020) (to add Section 231.7 to the Code of Civil Procedure).
- 12 B. Michael Dann & George Logan III, *Jury reform: the Arizona experience*, 79 JUDICATURE 280 (1996).
- 13 Valerie P. Hans, Challenges to Achieving Fairness in Civil Jury Selection. Paper to be presented at the Pound Civil Justice Institute’s 2021 Forum for State Appellate Court Judges (July 2021); see also Shari Seidman Diamond & Mary R. Rose, *The Contemporary American Jury*, 14 ANN. REV. LAW & SOC. SC. 239 (2018); Neil Guzy, Citizen participation in juries. In Wilbur R. Miller (ed.) *THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA* (2012).
- 14 *Id.*
- 15 Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 915.
- 16 Ind. Pub. L. No. 1-2005 § 216 (2005) (amending IND. CODE § 33-28-4-8).
- 17 OFFICE OF THE CHIEF ADMINISTRATIVE JUDGE, NEW YORK UNITED COURT SYSTEM, *JURY REFORM IN NEW YORK STATE: A SECOND PROGRESS REPORT ON A CONTINUING INITIATIVE*, 33 (March 1998).
- 18 *Id.*
- 19 See National Center for State Courts compendium at <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz>.
- 20 *Id.*
- 21 Shari S. Diamond, Mary R. Rose, & Beth Murphy, *Embedded Experts on Real Juries: A Delicate Balance*, 55 WILLIAM & MARY LAW REV. 885 (2014).
- 22 N.M. Constit. Art. VII, §3 1911.

- 23 State v. Rico, 52 P. 3d 942 (N.M. 2002).
- 24 American Bar Association, PRINCIPLES FOR JURIES & JURY TRIALS (2005) Principle 2.A.4.
- 25 Edward Chávez, New Mexico's Success with Non-English speaking Jurors. J. COURT INNOV. 1:303 .
- 26 Fernanda Santos, As the Demand for Court Interpreters Climbs, State Budget Conflicts Grow as Well, N.Y. TIMES (June 14, 2014), http://www.nytimes.com/2014/06/15/us/as-the-demand-for-court-interpreters-climbs-state-budget-conflicts-grow-as-well.html?_r=1 (2014).
- 27 Hilda Lyssette Chavez, Examining the Effects of the Inclusion of Non-English Speaking Jurors on Jury Verdicts and Juror Experiences, University of Nevada, Reno, 2012, ProQuest Dissertations Publishing 3550209 (2012).
- 28 Connecticut Jury Selection Task Force, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON (December, 2020) 42-43.
- 29 Bryan Baker & Nancy Rytina, Estimates of the Lawful Permanent Resident Population in the United States: January 2013. Population Estimates. Office of Immigration Statistics, Department of Homeland Security (2014), <https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202013.pdf>
- 30 AB-1401, 2013 Leg. (Cal. 2013).
- 31 Edmund Gerald Brown, Letter to the members of the California State Assembly. Lett., Off. Gov., Oct. 7 (2013).
- 32 Amy R. Motomura, *The American jury: Can noncitizens still be excluded?* 64 STANFORD L. REV. 1503 (2012).
- 33 Connecticut Jury Selection Task Force, supra note 28 at 7.
- 34 Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield, & Michael Massoglia, The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948- 2010, 54 DEMOGRAPHY 1795 (2017).
- 35 Darren Wheelock, *A jury of one's "peers": the racial impact of felon jury exclusion in Georgia*, 32 JUSTICE SYS. J. 335 (2011).
- 36 James M. Binnall, *A field study of the presumptively biased: Is there empirical support for excluding convicted felons from jury service?* 36 LAW & POLICY 1 (2014); JAMES B. BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM (2021).
- 37 Amended California Code of Civil Procedure §203.
- 38 COUNCIL FOR COURT EXCELLENCE, D.C.'s JUSTICE SYSTEMS OVERVIEW 2020 at 17.
- 39 DC SUPERIOR COURT CHANGES JURY PLAN TO REDUCE TIME BEFORE RETURNING CITIZENS CAN SERVE AS JURORS, press release issued June 15, 2020, <https://newsroom.dccourts.gov/press-releases/dc-superior-court-changes-jury-plan-to-reduce-time-before-returning-citizens-can-serve-as-jurors>.
- 40 28 U.S. Code §§ 1861-1863.
- 41 Vincent L. McKusick & Daniel E. Boxer, *Uniform Jury Selection and Service Act*, 8 HARV. J. ON LEGIS. 280 (1971).
- 42 NCSC State of the States Dashboard, <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz> (click on the box labeled Juror Selection and Service Terms).
- 43 U.S. Census Bureau, Current Population Survey, November 2020 (Table 4b, which also provides breakdown by state), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>.
- 44 See studies described in Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 U. MICH. J. L. REFORM 1, 36-37 (2018).
- 45 U.S. Dept. of Transportation, Federal Highway Administration, Highway Statistics 2019, Table 6.3.1, <https://www.fhwa.dot.gov/policyinformation/statistics/2019/>.
- 46 AARP, 9 States that don't have an income tax, April 8, 2021, <https://www.aarp.org/money/taxes/info-2020/states-without-an-income-tax.html>.
- 47 Senate Bill No. 592 (Approved by Governor September 28, 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB592.
- 48 Evan Symon, jury Rolls Expanded to Include Taxpayers under Renewed Bill (July 17, 2020), <https://californiaglobe.com/section-2/jury-rolls-expanded-to-include-taxpayers-under-renewed-bill/>.
- 49 Jury Managers' Toolbox, Ctr. for Jury Studies, Best Practices for Duplicate Removal, https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0021/7851/duplicate-removal-techniques-report-mjl.pdf.
- 50 NCSC, Are all of the right people making it into your jury pools? (Jan. 13, 2021), <https://www.ncsc.org/newsroom/at-the-center/2021/are-all-of-the-right-people-making-it-into-your-jury-pools>.
- 51 Judge William Caprathe (ret.), Paula Hannaford-Agor, Stephanie McCoy Loquvam, and Shari Seidman Diamond, *Assessing and Achieving Jury Pool Representativeness*, 55 THE JUDGES' JOURNAL 16, 18; based on U.S. Census Bureau, <http://www.census.gov>, which provides detailed information about state and local migration rates. U.S. Census Bureau, Table B07001 (Geographic Mobility in the Past Year by Age for Current Residents in the United States, 2009–2013 American Community Survey 5-Year Estimates).
- 52 National Center for State Courts, Jury Manager's Toolbox, Center for Jury Studies, Best Practices to Decrease Undeliverable Rates 1 (2010), https://ncfsc-web.squiz.cloud/_data/assets/pdf_file/0020/6806/undeliverable-best-practices.pdf.
- 53 Paula Hannaford-Agor, "Neither Snow, nor Rain, not Heat, nor Gloom of Night Stays These Couriers from the Swift Completion of Their Appointed Rounds" Jury News, 25 CT. MANAGEMENT, No. 3, at 65 (2010).
- 54 National Center for State Courts, Jury Manager's Toolbox, Center for Jury Studies, A Primer on Fair Cross Section JURISPRUDENCE, 1, 3 (2010), https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0026/7478/a-primer-on-fair-cross-section.pdf.
- 55 Id at 5.
- 56 Hannaford-Agor, supra note 53 at 66.
- 57 Shaun Bowler, Kevin Esterling, & Dallas Holmes, *Get Out the Juror*, 36 POLIT. BEHAVIOR 515 (2013).
- 58 Caprathe et al., supra note 51, at 19.
- 59 Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century* (symposium), 66 BROOK. L. REV.1257 (2001).

- 60 Mary R. Rose & Michelle Brinkman, *Crossing the 'Digital Divide': Using the Internet to Impanel Jurors in Travis County, Texas*, 1 J. OF CT. INNOV. 5 (2008).
- 61 Mary R. Rose, Carmen Gutierrez, Jeffrey Abramson, & The Hon. Beth Jantz, What's a Court to Do? The Problem of Summons Non-Response and Jury Representativeness, paper presented at the Law & Society Assoc. Annual Meeting (2021).
- 62 Bill 2021HB-06548-R000577-FC.docx, available at <https://search.cga.state.ct.us/r/basic/>, would add the following text: "On and after July 1, 2022, and until June 30, 2023, for each jury summons the Jury Administrator finds to be undeliverable, the Jury Administrator shall cause an additional randomly generated jury summons to be sent to a juror having a zip code that is the same as to which the undeliverable summons was sent."
- 63 ProximityOne, 10 Reasons to use Census Tract Versus ZIP Code, http://proximityone.com/tracts_zips.htm.
- 64 Id.
- 65 Robert C. Walters, Michael D. Marin, & Mark Curriden, *Jury of our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 350 (2005).
- 66 Caprathe et al., *supra* note 51 at 19.
- 67 Id.
- 68 Id.
- 69 See discussion of voir dire in Hans, *supra* note 13, at 14-16, including the empirical research by Gregory Mize showing how detailed individual juror questioning can be revealing in disclosing potential juror bias).
- 70 Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL. REV. 149, 160 (2010).
- 71 Susan Jones, *Judge versus Attorney Conducted Voir Dire*, 11 LAW & HUM. BEHAV. 131 (1987).
- 72 Shari Seidman Diamond, Leslie Ellis, & Elisabeth Schmidt, *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J. OF LAW & PUB. POLICY 77, 93 (1997).
- 73 476 U.S. 79 (1986).
- 74 Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).
- 75 Id. at 94 (citing Washington v. Davis, 426 U.S. 229, 239-42, (1976)).
- 76 Id. at 97.
- 77 Id. at 96-98.
- 78 Id. at 102-03 (Marshall, J., concurring).
- 79 See, e.g., Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 209 (1989); Kenneth Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 503 (1996); Karen Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 564-66 (1992).
- 80 Sam R. Sommers & Michael I. Norton, *Race-based Judgments, Race-neutral justifications: Experimental Examinations of Peremptory Use and the Batson Challenge Procedure*, 31 LAW AND HUMAN BEHAVIOR 261 (2007).
- 81 178 Wn.2d 34, 309 P.3d 326 (2013).
- 82 Id. at 35-36.
- 83 Commonwealth v. Robertson, 480 Mass. 383, 393, 105 N.E.3d 253, 263 (2018).
- 84 City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017).
- 85 Id. at 724.
- 86 192 Wn. 2d 225, 429 P.3d 467 (2018).
- 87 Id. at 249.
- 88 Assembly Bill No 3070 (approved by Governor Sept. 30, 2020) (to add Section 231.7 to the Code of Civil Procedure).
- 89 Id. at 231.7(a).
- 90 Id. at 231.7(b).
- 91 California Code of Civil Procedure - CCP § 226(b) (2019).
- 92 California Code of Civil Procedure Section 231.7(c) (2020).
- 93 State v. Holloway, 209 Conn. 636, 646 (1989).
- 94 Connecticut Jury Selection Task Force, *supra* note 28 at 16-20.
- 95 Sommers & Norton, *supra* note 80.
- 96 John T. Jost et al., *The existence of implicit bias is beyond reasonable doubt: A refutation of ideological and methodological objections and executive summary of ten studies that no manager should ignore*, 29 RESEARCH IN ORGANIZATIONAL BEHAVIOR 39 (2009).
- 97 Cal. Assembly Bill No. 3070, Sec. 2, 231.7, Code of Civil Procedure.
- 98 Washington State General Rule 37(e) (2018).
- 99 Id. at Section (f).
- 100 Connecticut Jury Selection Task Force, *supra* note 28 at 16.
- 101 Id.
- 102 514 U.S. 765 (1995).
- 103 Washington State General Rule 37(h) (2018).
- 104 California Code of Civil Procedure Section 231.7(f) (2020).

- 105 Connecticut Jury Selection Task Force, *supra* note 28 at 16.
- 106 *Id.* at 17.
- 107 Washington State General Rule 37(i) (2018).
- 108 *Id.*
- 109 California Code of Civil Procedure Section 231.7(g) (2020).
- 110 Connecticut Jury Selection Task Force, *supra* note 28 at 16.
- 111 *Id.* at 17-18.
- 112 California Code of Civil Procedure Section 231.7(g)(2) (2020).
- 113 California Code of Civil Procedure Section 231.7(j) (2020) (“if an objection is denied, it may be given de novo review by an appellate court. The trial court’s factual findings will be reviewed for substantial evidence.”); Connecticut Jury Selection Task Force, *supra* note 28 at 16. (“The denial of an objection to a peremptory challenge made under this rule shall be reviewed by an appellate court de novo, except that the trial court’s express factual findings shall be reviewed under a clearly erroneous standard.”)
- 114 476 U.S. at 105 (Marshall, J., concurring).
- 115 See *Miller-El v. Dretke*, 545 U.S. 231, 273 (Breyer, J. concurring); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075 (2011); Mark W. Bennett, *supra* note 70; Morris B. Hoffman, *Abolish Peremptory Challenges*, 82 *Judicature* 202, 203 (1999); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 *TEX. L. REV.* 1041, 1044 (1995); Melilli, *supra* note 79.
- 116 G. Thomas Munsterman, Paula L. Hannaford-Agor, & G. Marc Whitehead (editors) *JURY TRIAL INNOVATIONS* (Second Edition) (2006), Appendix 1 at 182; updated at <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz>.
- 117 Kathleen Shambaugh, *Reducing Peremptory Challenges in California*, Institute for Court Management Fellows Program, 2013-2014, <https://ncsc.contentdm.oclc.org/digital/collection/juries/id/274> (reviewing failed efforts in New Jersey, Tennessee, and California).
- 118 Supreme Court of Idaho, Order of July 24, 2020, <https://isc.idaho.gov/EO/FINAL-Order-In-Re-Jury-Trials-with-attachments.pdf>.
- 119 *Williams v. Florida* 399 U.S. 78 (1970); see also *Colgrove v. Battin*, 413 U.S. 149, 157-56 (1973).
- 120 Patrick E. Higginbotham, Lee H. Rosenthal, & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 *JUDICATURE* 47, 48 (2020).
- 121 *Id.* at 52 (“Greater unpredictability is the predictable result when courts use shrunken juries.”).
- 122 See *Williams*, at 102; *Colgrove*, 413 U.S. at 159-60 & nn.15-16.
- 123 Higginbotham, *supra* note 120, at 52.
- 124 Shari Seidman Diamond, Destiny Peery, Francis J. Dolan, & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 *J. EMP. LEG. STUD.* 425, (2009).
- 125 *Id.* at 442.
- 126 As in other research, the challenges by the opposing sides varied by race: plaintiffs were more likely to excuse White jurors and defendants were more likely to excuse Black jurors.
- 127 Higginbotham, *supra* note 120, at 54.
- 128 A committee of judges and attorneys in the U.S. District Court for the Western District of Washington created a video and jury instructions that were designed to be “presented to jurors in every case with the intent of highlighting and combating the problems presented by unconscious bias.” <https://www.wawd.uscourts.gov/jury/unconscious-bias>.
- 129 Shari Seidman Diamond, Beth Murphy, & Mary R. Rose, *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures and Next Steps*, 106 *NORTHWESTERN U. L. REV.* 1537 (2012).
- 130 Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1182, n. 250 (2012). The authors, who include Judge Bennett, describe the clip he showed during this discussion from *What Would You Do?*, an ABC show that uses hidden cameras to capture bystanders’ reactions to a variety of staged situations. The episode “opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear. *What Would You Do?* (ABC television broadcast May 7, 2010), available at <http://www.youtube.com/watch?v=ge7i60GuNRg>.”
- 131 *Id.*
- 132 *Id.* at 1182-1183.
- 133 https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf.
- 134 Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 *COURT REVIEW* 190 (2013). In a follow-up article, Elek and Hannaford-Agor published the results of an online experiment in which they attempted to test the impact of an implicit bias instruction; the experiment did not show the usual racial bias in the control condition, making the results ambiguous, but the experiment also did not find an effect of the implicit bias instruction. *Implicit Bias and the American Juror*, 51 *COURT REVIEW* 522 (2015).
- 135 Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 *CHI.-KENT L. REV.* 1033 (2003).

Oral Remarks of Professor Diamond

I'm very happy to be here with you this afternoon. Judges can have a powerful effect on jury trial fairness, so this audience of judges is crucial for a talk about judicial rulemaking for jury trial fairness.

I thought I'd start by talking about a couple of images that we often see of juries. Some commentators claim that the jury is incompetent and biased, that it is naive and easily manipulated. Others view the jury as a unique source of wisdom and common sense. There are grains of truth in these images that are small or large in different situations. But neither captures what real juries actually do. The actual evidence shows that the jury is an impressive decision-maker, a practical group problem solver that copes well with evaluating opposing views in an adversary context. How do we know? Our evidence comes from a variety of studies, but sources include not only experiments,

interviews, and archival studies, but also the picture of the jury we get from research we were able to do watching actual civil jury deliberations in Arizona.¹

The actual evidence shows that the jury is an impressive decision-maker, a practical group problem solver that copes well with evaluating opposing views in an adversary context.

When we look in a jury deliberation room, we see the group of jurors seated around a table, a variety of folks gathered together to reach a decision on a question that the opposing parties could not resolve.

And that's why the diversity of the juror's experience

is a really important feature of the jury. And in the adversary context, which jurors recognize they are in, the judge is a key, important central figure because the jurors see the judge as their one neutral source.

What I'll be talking about is the crucial role that judges play in making sure that a jury trial is fair. I'll be focusing on three aspects of this: one, obtaining jury pools representing a fair cross section of the community; two, preserving representativeness and fairness in the courtroom; and three, ameliorating potential bias on the jury. The judges and the appellate courts play a key role in each of these.

There are several pathways that court actions take in affecting the fairness of the jury trial. One is rulemaking by courts, which will be a central focus of my talk today. But also, there is judicial guidance for legislative action because some things are going to require the legislature to be active in taking steps like affecting juror pay or affecting the size of the jury. And finally, the opinions of individual judges can have an effect, because each of you can influence both your courts and the public, as well as the legislature by what you say—a proactive approach to guiding the best forms of jury trials.

Obtaining jury pools representing a fair cross section of the community

Courts have a variety of ways to increase the representativeness of jury pools, and that's really where the action is—because if you don't get a fair cross section coming into the courthouse, you are not going to be able to get a fair cross section eligible for selection to the jury. You can expand jury eligibility, including allowing for ex-felons to serve on juries and having permanent residents be eligible for juries and providing interpreters for folks who don't speak English, even if they are citizens. There are many people in these groups.

Expanding source lists beyond voter registration lists, beyond driver's license holders is another way. Updating source lists annually, and I'll speak more about that in a minute, is another. Maintaining diversity through follow-up is also crucial—we want to make sure that the initial summons actually results in somebody coming to the courthouse. We can improve diversity through replacement summonses and addressing hardships. Sometimes it's very difficult for jurors to serve, even if they want to, because of the hardships associated with jury service.

If you don't get a fair cross section coming into the courthouse, you are not going to be able to get a fair cross section eligible for selection to the jury.

I'll focus now on some examples of how these approaches can increase representativeness of jury pools:

- **Felony exclusion:** A majority of states exclude ex-felons, even though they have served their sentences. Some estimates say there are 16 million to 19 million felons and ex-felons, 7.8 to 8 percent of the adult population, who are ex-felons. What that does is it eliminates a substantial portion of minority, otherwise eligible, jurors. So, 33.4 percent of African-American adult males have a felony record. As a result, excluding ex-felons reduces the pool of eligible African American jurors.

One study showed that it reduced it from having 1.61 on a jury to 1.17 on a jury. Is such wholesale exclusion warranted? Most people have come to the conclusion that we should reconsider that level of exclusion. For example, the D.C. Superior Court decided in 2021 that the 10-year exclusion would be reduced to a 1-year exclusion, and we will see others, I hope, going in that direction.

- **Updating source lists:** Another example of changes that will increase diversity in the jury pool is to update source lists annually. Why? Because the annual migration rate in the United States is 15 percent. So, you can see what will happen if you only update your source list every four years. Who moves frequently? Renters, lower income people, minorities, younger people. It is not simply random as to who moves.
- **Introducing follow-up measures:** Follow-up methods can make a big difference in terms of what the yield is for the jury pool. A reminder postcard is remarkably efficient in increasing the likelihood that someone will respond. A second summons also increases the likelihood of appearance. An internet option for response or scheduling can make it easier for prospective jurors to communicate, when that, of course, is an alternative to the written version of the response so that prospective jurors with limited internet access are not disadvantaged.

Warnings about penalties for nonresponse—that's a more controversial area. Some studies show that it does increase response rates, but it may not be something that a court would like to do in order to increase the rates.

And finally, replacement summonses—send a second summons to the low-response rate areas. Courts have done this with some success.

Preserving representativeness and fairness in the courtroom.

There are a number of ways to increase representativeness and fairness in the courtroom. Attorney participation and case-specific questionnaires increase the information that jurors provide, and make it possible to ground jury selection in indicators other than superficial characteristics. Bolstering *Batson* has gotten a great deal of attention recently, and I'll talk more about that in a minute. Requiring judicial presence during voir dire just to keep those attorneys in line—sometimes they need that—and eliminating or reducing the number of peremptory challenges, and returning to larger civil juries (more about that in a minute) are all ways to increase diversity and fairness.

There are a number of ways to increase representativeness and fairness in the courtroom.

- **The problem of *Batson*.** *Batson*, you recall, established a three-step procedure for ensuring that a peremptory challenge was not being used for racially discriminatory purposes. In determining a *Batson* violation, the initial step is to establish a prima facie case of purposeful discrimination, and if that is shown, then the burden shifts to the party proposing to strike the juror to come forward with a neutral explanation. Finally, the court then determines if the party raising the objection has established purposeful discrimination. The way this has been interpreted is that it's up to the court at this third step to decide if the reason was pretextual—not whether it was plausible, but whether it was pretextual. Now we've learned a great deal since *Batson* about how people make decisions. And importantly, we've learned that explanations can be consciously non-pretextual, but they can also at the same time be discriminatory.

I'll give you an example of a study that nicely demonstrates how this can happen. Sommers and Norton presented respondents, including attorneys, with a case involving a defendant who allegedly beat a homeowner with a blunt object after being confronted in the middle of a burglary.² Because the victim could not identify his attacker, the prosecution's case relied on DNA, hair, and footprint analysis.

The prosecutor had one peremptory challenge left, and the choice was between two jurors with different profiles. One was a journalist who had written articles about police misconduct, and the other was an

We can't count on determining, based only on somebody's conscious intent, that they are engaging in discriminatory behavior.

executive who said he was skeptical of statistics because they were easily manipulated. You might have a feeling one way or another as to which juror you would prefer. There were reasons to be leery about each of the jurors in light of their profiles. What the researchers did is they produced two versions of the case. For half of the respondents the photograph of the journalist prospective juror was African-American, while the photograph of

the executive prospective juror was white. For the other half of the respondents, the journalist was shown as a white individual and the executive shown as an African-American individual.

What is key here is that the Black juror was more likely to be challenged, whichever profile he had, whether he was depicted as the journalist or as the executive. The point is that discriminatory behavior is sometimes unconscious, and we can't count on determining, based only on somebody's conscious intent,

that they are engaging in discriminatory behavior. They may actually be making decisions systematically based on race without being even conscious of it, while thinking that other reasons were motivating their decisions.

- **Ways to bolster *Batson*.** Courts around the country are beginning to attempt to address this kind of unconscious racism.

*Eliminating *Batson*'s first step:* Eliminating the first step in the *Batson* procedure is a way to go directly to requiring an explanation for a challenge that appears to be race- or class-based. And because the attorney has to supply an explanation at that point, once that charge has been made, there is a better record for appellate review.

The objective observer: There have also been moves to change from focusing on the actual intent of the individual making the challenge to evaluating the challenge from the perspective of an objective observer in judging whether membership in a protected class was a factor in the use of the peremptory challenge. This approach recognizes the role that unconscious bias can play in the exercise of peremptory challenges.

Presumptively invalid reasons: Several courts have taken it further than Washington State, however, has done this, and California and some other states have followed suit in introducing court rules and proposing statutes that make some asserted reasons for challenges “presumptively invalid.” These are characteristics that tend to be correlated with race, such as distrust in law enforcement, having a child outside of wedlock, and, in the case of some explanations that have been given, arguments that the juror was inattentive or sleeping, without actually providing notice to the judge that that behavior was occurring. These new procedures entail letting the judge know and putting it in the record, so that the trial court judge is on notice that this argument is going to be made. And the appellate court is informed of what the judge said she saw in ruling on the challenge.

All of these changes promise to improve the visibility of understanding what is going on in a peremptory challenge. They put a larger burden on both the trial court judge and the appellate court to realize their potential. And these are all new, so we don't know exactly what their effect is going to be, but they are thought-provoking reform efforts that will be worth watching.

There is, oddly, a very simple and straightforward way to increase diversity on civil juries.

- **Finally, increasing diversity by increasing jury size.** There is, oddly, a very simple and straightforward way to increase diversity on civil juries. This was shown in a study we did on civil trials in Cook County³ that compared racial composition on six-member juries versus 12-member juries after jury selection, after peremptory challenges had been exercised. Just as statistical theory would predict, 28 percent of the six-member juries had no Black jurors, while only two percent of the 12-member juries had no Black jurors. This was in a jurisdiction in which the jury pool was 25 percent Black. For Hispanic jurors, 66 percent of the six-member juries had no Hispanic jurors, while only 40 percent of the 12-member juries had no Hispanic jurors.

Instructing Jurors on Bias

This third area is one where we have much less information. We've already said that we acknowledge implicit as well as explicit biases. And so, the approach some courts have been taking is a low-cost approach to this important issue: that is, to instruct jurors about implicit bias, to put them on notice so they will understand and be

The jury is a remarkable institution, but it needs monitoring, it needs nurturing, and it needs support.

alert to, and potentially affected by, the instruction to monitor their own behavior. Now, awareness and motivation are good first steps. What we don't know is how effective they are. Here, as with any of these reforms, it's important to monitor effects.

So, in conclusion, I would say the important things for us to keep in mind are that the jury is a remarkable institution, but it needs monitoring, it needs nurturing, and it needs support. As

we make changes, those things need to be studied and evaluated in order to know whether they are truly effective. Court systems have a variety of tools at their disposal to make a difference in ensuring that jury trials are fair, and it is worth making the effort to protect the system's legitimacy and to maximize the jury's performance. Thanks very much.

Comments by Panelists

PROFESSOR NANCY S. MARDER

I'm very glad to have been given this opportunity to read Shari's paper and to comment on it, because I always learn so much from her work. I also know, from having worked with Shari as a co-editor of a book, how careful and insightful she is in the work she does, whether it's in her own writing or in editing other scholars' writing.

I'd like to begin by saying that I agree with almost everything that Shari says. If state courts acted on her recommendations, their juries would be more diverse, and they would be seen as fairer and more impartial than they are now. The one area where Shari and I take different approaches is with respect to peremptory challenges.

Representativeness

To begin with representativeness, Shari identifies a number of steps that state courts can take to make juries more representative, and she's right to focus on who gets summoned, because courts need to start at the beginning of the process if they want to end up with juries that look like America. One suggestion that New York tried under the leadership of Chief Judge Judith Kaye was to eliminate occupational exemptions, and that did make a difference. More states need to follow New York's example.

Courts need to start at the beginning of the process if they want to end up with juries that look like America.

Also, when celebrities like Oprah Winfrey and Barack Obama show up for jury duty—and Oprah even served as a juror here in Chicago!—this sends a powerful message. It tells everybody that nobody is exempt, including celebrities.

As Shari suggests, we also have to reexamine current disqualifications for being a juror. One disqualification is that convicted felons cannot serve in most states. In other states, they can only serve after a certain number of years have gone by. Only Maine allows convicted felons to serve as jurors without any restrictions. James Binnall's recent book, *Twenty Million Angry Men*, questions the assumption that convicted felons can't serve. He undertakes empirical studies and a survey to challenge these automatic disqualifications. It's a persuasive book, and it made me reexamine my assumptions. By the end of it, I came to share Binnall's view.

Sources of Juror Lists

Shari also points out that it's important for states to draw names not just from voter registration lists or even driver's license lists, but also from other kinds of lists, and I agree. This is a suggestion that has been made since the 1970s, when it was harder to implement because computers were limited to mainframes. This suggestion should be easier now, given advances in computers. One area of study for researchers should be why state courts haven't made this change.

Valerie's paper includes a table at the end that shows just how reticent state courts are to draw from different lists. We need to figure out what state courts are concerned about or what practical difficulties they've encountered. Perhaps members of this audience can help us answer this question, because multiple lists that are not just voter registration lists or driver's license lists would reach a much wider swath of the population.

Another change that Shari suggests, which some courts have also been slow to embrace, is sending out a summons to the same zip code or census tract whenever a summons gets returned from there as undeliverable. When this "stratified" jury selection was tried in the past, some federal appellate courts were reluctant to accept it. For example, when it was tried in the Eastern District of Michigan, the 6th Circuit held that it was a violation of the federal Jury Selection and Service Act of 1968 and the equal protection component of the Fifth Amendment to the U.S. Constitution.

In another case, then-Federal District Court Judge Nancy Gertner wanted to send out additional summonses so that the venire in one of her cases, which involved an African-American defendant, would be a fair cross section and include African-American prospective jurors. The First Circuit reversed, saying that a single district court judge couldn't do this on her own. Such action could only be undertaken as part of a district-wide plan.

Perhaps appellate courts would be more willing to accept this kind of replacement summons without any mention of race.

These past efforts might have failed because they were more explicit about using race. Perhaps appellate courts would be more willing to accept this kind of replacement summons without any mention of race. Some federal courts, such as the U.S. District Court for the Northern District of California, do permit replacement summonses for the same zip code. So, maybe the practice will become more widespread.

Peremptory Challenges

With peremptory challenges, I agree with Shari that there are exciting new developments in several states with respect to the *Batson* test. This is the test first articulated by the U.S. Supreme Court in *Batson v. Kentucky* in 1986, challenging discriminatory peremptory challenges. The State of Washington has taken the lead and

developed its General Rule 37, or “GR37,” which tries to create a more objective *Batson* test, based on what an “objective observer” would conclude.

This “objective observer” is defined as one who “is aware that purposeful discrimination and implicit institutional and unconscious biases have historically resulted in the unfair exclusion of potential jurors on the basis of their race or ethnicity.”

This “objective observer” is defined as one who “is aware that purposeful discrimination and implicit institutional and unconscious biases have historically resulted in the unfair exclusion of potential jurors on the basis of

their race or ethnicity.” Washington made this change through a state Supreme Court rule. California made a similar change through legislation, and Connecticut is considering following Washington’s example.

I agree with Shari that this is a promising development, but that it’s too soon to tell whether this approach will stop the use of discriminatory peremptory challenges. I hope that it will. It might be that, if enough states move in this direction, the U.S. Supreme Court might step in just as it did before deciding *Batson*. Before *Batson*, the U.S. Supreme Court waited until the issue had percolated through the lower courts and the state courts first. But I do have reservations. With just a state effort, we might end up with a patchwork quilt approach to peremptory challenges. Some states would have an objective *Batson* test, whereas others would not.

I also worry that some of the reasons for challenges that Washington and California now have said are presumptively invalid will mean that lawyers will find ways around these reasons. They will learn which reasons are now acceptable and give those reasons. Meanwhile, Washington and California, having codified the reasons that are presumptively invalid, will have a hard time making changes—especially California—because it would require an amendment to the legislation.

Another limitation to Washington’s approach is that GR37 only applies to peremptory challenges that are being challenged based on race or ethnicity. It does not protect against peremptory challenges based on gender. Although I’m prepared to take a wait-and-see approach, I question whether Washington’s and California’s respective approaches to *Batson* are the way to go. Their approaches are complicated, and lawyers may hide behind the complications.

Eliminate Peremptory Challenges

This is one area where Shari and I take different approaches. I recommend eliminating peremptory challenges entirely because I think that Justice Marshall was right—that’s the only way we’ll eliminate discrimination during jury selection. But I realize that this is not a popular approach with American lawyers, even though a number of judges and justices have come to this view.

One way to study this question further is to look at Canada. Their Parliament recently eliminated peremptory challenges, and the Canadian Supreme Court held that this legislation was constitutional.⁴ The Canadian example

would provide a great way for researchers to study how jury selection is working without peremptory challenges. How have judges, lawyers and the public responded? Are juries more diverse now? Canada could provide some answers for us.

Implicit Bias

The final topic that I want to mention is implicit bias. And again, I agree with Shari that it's too soon to tell how best to educate jurors about this subject. The empirical studies are mixed. Courts have generally taken two approaches in trying to educate jurors about implicit bias. One is to show a juror orientation video on implicit bias. The video from the federal district court in the State of Washington is very good.

The other approach is to give an instruction, as we do in Illinois in civil cases. If both instructions and video are used, they can reinforce the message for jurors. Both the video and the instruction need to make clear that everyone has implicit biases; jurors can work together to help each other with their blind spots; and the decision that the jury has to make is so important that jurors cannot take any shortcuts in their decision-making, even though we all take

shortcuts in our daily lives. Although we don't know how effective the video and instruction are, whether separately or together, they probably do more good than harm, and taking no action leaves jurors uninformed about the problem.

In sum, if state courts would follow Shari's suggestions, or even just her top-four list (allowing convicted felons to serve as jurors; using multiple jury lists; adopting the objective observer standard for the *Batson* test; and

Jurors can work together to help each other with their blind spots; and the decision that the jury has to make is so important that jurors cannot take any shortcuts in their decision-making, even though we all take shortcuts in our daily lives.

increasing the size of civil juries to 12 and limiting the number of peremptories (though I would say they should eliminate the peremptories)), then juries would be more representative, and they would be seen as even more impartial and fairer than they are today. Thank you.

THE HONORABLE EDWINA MENDELSON

It is my true privilege to participate in this important program and have the opportunity to comment on the scholarly paper issued by Professor Shari Seidman Diamond, entitled "Judicial Rulemaking for Jury Trial Fairness."

Professor Diamond begins her paper with what I consider to be a call to action, indicating that, and I quote, "Our ability to produce a fair jury trial depends on an attentive and responsive court system." The New York State Unified Court System joins many other courts throughout the country in answering that call as we seek to achieve fairness by squarely addressing racial bias in our court systems at this unique moment in time.

I bring us back to the impetus of our renewed efforts. Midway through 2020, steeped in the hardships of an international pandemic that changed our way of life, our nation faced its most recent reckoning on issues of

I recommend eliminating peremptory challenges entirely because I think that Justice Marshall was right—that's the only way we'll eliminate discrimination during jury selection.

racism, bias, and inequality. These are not new issues for us, but recent events, most notably the death of George Floyd, cast a renewed spotlight on the inequality permeating all of our institutions, including our courts.

New York State's Equal Justice Initiative

As judicial leaders all over the nation considered ways to respond and meet this moment, New York State's Chief Judge Janet DiFiore took a unique path for our state. On the very day of George Floyd's funeral, Chief Judge DiFiore announced the appointment of former Obama administration cabinet member Jeh Johnson, a respected attorney and public servant, to serve as the Special Advisor on Equal Justice for our courts, and to conduct an equal-justice review of our court system's policies and practices as they relate to issues of racial bias and fairness in our courts.

Secretary Johnson and his assembled team performed a rigorous and independent assessment of the New York State Court System. They conducted interviews with nearly 300 people, including current and former judges, court staff, public and private law practitioners, bar leaders, judicial leaders, civic association members and leaders, as well as other community stakeholders. They reviewed numerous submissions from the public, assessed past reports and ongoing work addressing racial bias in the courts, and examined our court system's policies on hiring, promotion, workplace conduct, and bias training.

This work by the Special Advisor on Equal Justice culminated in the issuance of a 100-page report. It opened with welcome news: that many who serve in our courts are working hard to get it right and make it better. But it also describes in painful detail the dehumanizing experience for people who are appearing in our over-burdened, high-volume courts, who are disproportionately people of color and who are experiencing poverty. The report also highlighted that racism and bias remain very present throughout and within our court system.

These words, and the realities made clear in the report, are deeply painful to read, but they reinforce our call to action. I have been appointed by Chief Judge DiFiore and our Chief Administrative Judge, Lawrence Marks, to lead the Equal Justice in Courts Initiative, which is focused on the implementation of the Special Advisor report's 13 recommendations.

After having served as a judge for 18 years, I consider this particular role, and leading this endeavor, to be a defining moment of my life. Our goals for the equal justice work in New York State fully align with the work of the office that I lead—the Office for Justice Initiatives—which is tasked with ensuring meaningful access to justice for all who pass through the doors of every New York state courthouse.

Promoting Fairness

Professor Diamond speaks powerfully to the importance of promoting fairness in our courts for all individuals, regardless of race, ethnicity, gender, or other identifying factors. We fully agree that the court system must take the leadership, the responsibility, and the necessary firm steps to minimize the effect of explicit and unconscious bias in jurors, judges, and court personnel.

Our Equal Justice in Courts Initiative implementation plans neatly aligned with the major themes expressed by Professor Diamond as guiding her inquiry: First, achievement of a representative jury pool; second, the selection

of an impartial jury that will actually hear the case; and third, efforts to control the ways—some overt and some not—in which bias may infect the proceedings.

As recommended by the Special Advisor, we have engaged subject matter experts to assist us as we develop mandatory, comprehensive educational opportunities

for all of our judges and court personnel on racial bias, cultural awareness and humility, and procedural justice. We plan to partner with academia, bar associations, legal practitioners, and other legal interest groups to create and co-sponsor a variety of training opportunities for our court system, and for the public and legal community.

Our equal justice implementation plans will address three specific recommendations related to racial bias in jury selection and deliberation. The first recommendation is that we create and display a video educating jurors about implicit bias. I am happy to report that we've been very hard at work on this particular recommendation, and later this month we will release our brand-new, stand-alone video entitled "Jury Service and Fairness: Understanding the Challenge of Implicit Bias." The video is narrated by our Chief Judge, Janet DiFiore, as well as expert consultants from Perception Institute.⁵

We are deeply proud of this work product and plan to share the transcript and video widely to assist others who are seeking to do similar work in this area. We are grateful to have learned from others who have created jury bias videos before us, and we're hoping to similarly contribute.

Court Rules on Voir Dire and Juror Bias

Professor Diamond speaks to the importance of supreme courts establishing commissions to address jury matters. The Special Advisor's second recommendation is that our court appoint a new committee to investigate and formulate uniform rules to explicitly permit and endorse addressing juror bias during the voir dire process.

Some judges will permit a full exploration of racial bias and implicit bias during voir dire, while others discourage it, and some forbid it.

during voir dire, while others discourage it, and some forbid it. Now, we know that that must impact the fairness of jury selection. This recommendation is meant to address these reported inconsistencies among judges and to promote fairness and uniformity in practice.

The third recommendation from our Special Advisor for addressing racial bias relates to pattern model jury charges in civil and criminal cases addressing implicit bias. We have a State Advisory Committee responsible for drafting criminal jury charges, and one responsible for drafting civil jury charges. Our committee for the criminal

We fully agree that the court system must take the leadership, the responsibility, and the necessary firm steps to minimize the effect of explicit and unconscious bias in jurors, judges, and court personnel.

As recommended, Chief Judge DiFiore has tasked her existing Criminal Justice Advisory Committee, The Justice Task Force, aided by our own counsel's office, to propose court rules in this area. The attorneys who spoke to Secretary Johnson while he was doing his assessment reported that some judges will permit a full exploration of racial bias and implicit bias

jury charges has created and drafted brand-new jury instruction charges that address implicit bias.⁶ We did have some language in our existing jury charges, but we felt that the language was a bit thin in its current form.

So, in addition to enhancing the language that is in our new jury charges, we are doing something new with these bias instructions. The new language will be put out for publication before it's adopted to make sure we're seeking public comment, and we want to receive input before we adopt this new language. I will tell you that our experts have seen this recommended language and they are pleased with it, and they would only tweak a word or two after it's out for public comment to make it consistent with our new jury video that is about to be released. The language that is being proposed would work for our civil juries as well as for our criminal juries.

Jury Pool Expansion

To maximize jury diversity, Professor Diamond highlights the importance of expanding, regularly updating, and maintaining sound and expansive master jury lists. I'm happy to report that we have a very active and robust state-wide Jury Support Office within our court administration, and they are on fire. They've been inspired by Secretary Johnson's report and recommendations, and with the full cooperation of the Commissioners of Jurors throughout the state and our court leaders, our Jury Support Office has established a central community engagement and outreach plan. It contains standards and goals for jury pool expansion, tracking and reporting mechanisms, and is informed by national experts. They have developed a jury college training curriculum for Commissioners of Jurors and their office staff, where they are stressing the importance of juror inclusivity, and they are teaching various methods to engage the public in juror service. They will be reporting regularly on the challenges that they have in increasing their community engagement and their successes, and will be working together collaboratively to improve the systems.

Realizing equal justice in our courts is not simply a goal. It's a necessity. It's our calling.

They've improved and upgraded their technology tools. They're using text-messaging and email alerts and subscriptions, and really, as an access to justice mechanism, they are implementing mandatory follow-up notices and conferences with potential jurors who don't respond prior to imposing fines or penalties on them.

All of these efforts are geared towards ensuring that our jury pools adequately reflect and represent the communities we serve. So, I close now by offering my hearty thanks to Professor Diamond for her many, many helpful insights. It affirms the work that we've been doing and devoting to our strategic planning, but it also provides much new food for thought for us as we move forward.

Realizing equal justice in our courts is not simply a goal. It's a necessity. It's our calling. And I do have deep faith that our different efforts that we are putting into play to combat racial bias and discrimination in our courts will bear great fruit. This is a moment that we must meet. Thank you.

KIM M. BOYLE

Good afternoon. My name is Kim Boyle and I'm an attorney in New Orleans, Louisiana, and I practice in state and federal courts in Louisiana. Professor Diamond discusses methods that are used, or should be used, to promote and ensure fair trials in state and federal courts. The number of jury trials in state and federal courts has dramatically declined over the past 25 years, with a significant increase in the numbers of arbitrations, mediations, court-ordered settlement conferences, and direct settlements between the parties. For those few civil cases that are actually tried before a jury, I believe it is more critical now than ever before that these trials take place in a fair and unbiased manner.

I believe that Professor Diamond has done an excellent job in addressing the issues of bias—direct and implicit—as well as the role of the judge in attempting to address and combat bias and achieve fairness. Therefore, the focus of my discussion concerning Professor Diamond's paper will not be on the portions of the paper, though well-addressed, concerning commissions, legislative enactments, and other external things that may impact the fairness, or lack thereof, of a jury trial.

The Role of the Judge

The proposals made by Professor Diamond are important, in my view. However, a significant portion of the action, what takes place in the courtroom, good or bad, must be controlled by the judge who is presiding over that particular case. Therefore, to ensure that we have fairness, and that we can limit bias as much as possible, we must look at the presiding state court or federal court judge.

To ensure that we have fairness, and that we can limit bias as much as possible, we must look at the presiding state court or federal court judge.

Critically, there is no doubt that the district court judge acts as the gatekeeper for almost everything that takes place in trial concerning motion practice, evidentiary rulings, and obviously what occurs during the trial itself, as well as the conclusion of the trial. And that gatekeeper role becomes even more important as the plaintiff, as well as the defendant, goes through the critical process of jury selection.

So, to start with the meat of the coconut, Professor Diamond is absolutely correct that *Batson* must be given teeth and the trial judge must implement the teeth that *Batson* already has. However, while Professor Diamond focuses on this issue, I think it's important to bring up one aspect that specifically provides teeth to *Batson*, and that relates to the ethical obligations that an attorney has in making representations to a tribunal. And that obligation exists, regardless of whether we're talking about *Batson* or any other aspect of motion practice or trial practice before a judge.

A Role for the Rules of Professional Conduct

Specifically, district court judges can add a lot of teeth to *Batson* simply by ensuring, or attempting to ensure, that attorneys comply with their respective Rules of Professional Conduct, and specifically rules 3.1, 3.3, and 3.4. These rules are implicated because we have an obligation to provide candor to a tribunal and not to make active misrepresentations to the court.

It is important to look at whether or not the attorney is complying with their ethical obligations to the court.

So the bottom line is that, when we talk about whether or not an attorney is properly raising a *Batson* challenge, or more importantly, when we're talking about whether or not the reason for challenging someone is pretextual, but is actually based upon that person's race or ethnicity, it is important to look at whether or not the attorney is complying with their ethical obligations to the court.

Several courts have actually focused upon an attorney's ethical obligations in determining whether or not they have improperly used *Batson*. For example, one judge, Judge Higginbotham, in the case of the *United States v. Clemmons*,⁷ specifically stated, "I've been disturbed by a series of other cases where the *Batson* issue has been raised and where superficial or almost frivolous excuses for peremptory challenges with racial overtones have been proffered and accepted. The relevant jurisprudence makes clear that many of the race-neutral explanations offered to justify the strike of a juror where a *Batson* challenge has been made are frivolous, and therefore in breach of the lawyer's ethical obligations under rule 3.1."

One federal judge in particular used § 1927 to impose monetary sanctions upon an attorney who improperly made peremptory challenges. In the case of *Pueblo v. Supermarkets General*, during voir dire, an attorney exercised her peremptory challenges against the only two African-American jurors on the venire, and when she responded to the district court's request for a nonracial reason for the challenges, the court felt that she was not being truthful. Therefore, the court noted the inconsistent and evasive explanations for the challenges and determined that the challenges were racially motivated. More importantly, the trial court judge fined the attorney the court costs for the 39 jurors on the venire at \$40 a day, for a total of \$1,560.⁸

There are tools already available to a presiding state court or federal court judge related to whether or not someone is properly exercising a *Batson* challenge or, more importantly, whether or not the race-neutral reason for the peremptory challenge is actually true or is pretextual.

Therefore, it is important to know that there are tools already available to a presiding state court or federal court judge related to whether or not someone is properly exercising a *Batson* challenge or, more importantly, whether or not the race-neutral reason for the peremptory challenge is actually true or is pretextual.

Implicit Bias

Now getting past *Batson*, Professor Diamond hits a key point related to issues of implicit or unconscious bias and how this can or should be addressed by the court: Was the reason offered for the challenge plausible, and how does it compare with other challenges by that same side?

I don't necessarily agree with Professor Diamond that an objective observer standard is feasible, because we know that all of us, whether it's the judge, members of the jury, the litigants, the attorneys, or any observers to the process, all of us have some forms of implicit bias. So therefore, it's difficult to understand how this standard would actually be applied in an effective manner.

Size of Civil Juries

However, Professor Diamond makes a critical point about trying to address these issues of implicit bias in other manners. Returning to larger civil juries is absolutely important. A six-person jury really does not allow for sufficient diversity in that jury, and it also allows for extreme views, whether it's on the left or the right, to sometimes take precedence in how the jury deliberates and ends up reaching a conclusion.

It is much harder for one person to control and override the viewpoints of other members of the jury when you are dealing with a larger 12-person jury. It allows for different perspectives. Some of the reasons for using smaller juries are no longer valid, because we no longer have a lot of civil jury trials in the state or federal courts.

It is much harder for one person to control and override the viewpoints of other members of the jury when you are dealing with a larger 12-person jury.

Moreover, I think Professor Diamond makes an excellent point as it relates to the trial judge's ability and willingness to actually, specifically instruct the members of the jury concerning not allowing any forms of implicit bias or unconscious bias to inform their deliberations, and to inform the final decision that they actually make concerning whatever case is pending before them.

I love the instruction that Professor Diamond puts in the paper concerning asking these jurors to affirm that their decision will be totally focused on the evidence as that evidence has been presented to those individual members of the jury and to the collective group. Also, these instructions can specifically address the issue of juror bias.

So I think that Professor Diamond raises a host of critical issues related to what we, as attorneys and members of the bench must actually do to ensure that we have fairness in our trial court system and to try to limit bias in every way possible. That is the only way that the litigants can believe in our jury system, and the only way that the members of the jury can actually believe in the system in which they've been asked to participate. Thank you.

PRESTON TISDALE

A Scene from the Film *Marshall*⁹

Mr. Wright [white venire member]: I'll be honest with you. I don't like the colored. Seems to me they're always getting into some sort of trouble. I don't think much of Hebrews, either.

Sam Friedman [defense attorney]: Excuse me?

Juror: Well, you're one of them, I figured.

Friedman: Thank you for your candor, Mr. Wright. Ah, no further questions.

Judge Carl Foster: Counsellor?

Friedman: Your Honor, we move to have Mr. Wright excused for cause.

Lorin Willis [prosecutor]: On what grounds?

Friedman: He just admitted he's biased.

Judge: Mr. Wright, you're a law-abiding citizen, wouldn't you say?

Wright: That's right, Your Honor.

Judge: If I instructed you that the law requires that you set aside your bias, would you obey my instruction?

Wright: I guess I'd have to.

Judge: The challenge for cause is overruled. You may use a preemptory [sic] challenge.

Friedman: Your Honor, with all due respect . . .

Judge: I have made my ruling.

Friedman: Excused.

[Judge questions next venire member.]

Willis: Mr. Ellis, you agree, do you not, that as a colored man you could not fairly pass judgment on [the defendant] Mr. Spell?

Mr. Ellis [African American venire member]: No, sir.

Willis: You agree you could not be fair?

Ellis: No, what I mean is, yes. If he's guilty, I'd have to convict him.

Willis: We'll use a challenge.

Preston Tisdale: Good afternoon. The video clip that you just saw depicts a scene that is very familiar to virtually all of us. Certainly, you saw the judge attempt to rehabilitate a witness who certainly any of us nowadays would know was not rehabilitatable under those circumstances. But we've seen that scenario play out and we know how ineffective it was. I don't know how many of you thought that that was an effective tactic, but certainly it did not appear to be effective at all.

***Batson* and Implicit Bias**

Batson came into being as an effort to try to keep prosecutors from doing what the movie prosecutor did afterwards, where he knocked out the Black witness, but he had no qualms with the confirmed bigot. I had that experience prior to *Batson* coming into being, where prosecutors would, in fact, knock out every Black juror. It wasn't most prosecutors, but there were some. And the thing is, they did not consider themselves bigoted. They considered themselves engaging in good prosecutorial work.

And of course, over the 30 years since *Batson*, we now have learned that actually implicit biases and unconscious prejudices can have all the same impact of conscious biases and explicit biases.

And so, that's what we're looking to address. I agreed with the vast majority of Professor Diamond's work. I did not have really any major objections there, some minor tweaks. One thing I think that is very important, she talks in terms of the informational intervention, I think that is critical, because most people do not realize at all the implicit biases which they hold. And that goes for the bench and bar as well as jurors, as well as persons who work in the justice

system. And that needs to be actively addressed, and has to be intentional, because so many of the implicit biases have come into play intentionally. They were not accidental. And I'm not going to go into all of the aspects of how they came into play, but I can just tell you this. You don't have to do a lot of research. All of them began their roots during slavery, and they came on through Jim Crow, and they're in existence to this day. And what makes it so tough is that people do not realize that they possess them.

So, I'm fully on board with what Professor Diamond recommends in that regard. I would also point out that, in terms of her recommendations, we have adopted many of those recommendations in Connecticut. We have adopted in Connecticut most of the Washington State General Rule 37 provisions. And there was much discussion and debate that has gone into play. But our legislature has approved of the recommendations from the Jury Task Force on which I served. So, many of those have come into play.

Impact of Economic Changes on the Jury Pool

One of the things she speaks of in terms of increasing the jury pool is incredibly important. We found that there was a period in time, before Connecticut went to the one-day exposure to being selected as a juror, when we had very non-diverse juries. We still had a very strong industrial base in Connecticut, and when it changed, and they extended and made sure that those summonses went out to persons in all parts of the community, we had very diverse jury pools. That began to diminish, and we couldn't figure out what caused that diminution. But one of our working groups realized that because of the change in economics, the change in the industrial base, there was a lot more movement in the communities of color than there was in the past. And therefore, there were a

lot of returned summonses. They would send them once and that was it. Well, they realized that they needed to repeat the summoning process and to make sure that the proportionality of the persons who came from those urban, diverse areas matched the suburban areas, which are very un-diverse in Connecticut.

We know we have a lot of work to do in terms of following up and reporting, but we're confident that we will see a tremendous difference.

And I know that Professor Diamond talked in terms of using census tracts. In Connecticut, actually, we don't have many zip codes which exceed 100,000 people. So therefore, we are able to reach out with this particular initiative and reach a good, diverse population. And obviously, as she indicated in her paper, much will depend on the reporting which takes place afterwards. And so, we know we have a lot of work to do in terms of following up and reporting, but we're confident that we will see a tremendous difference.

Batson is Toothless

In terms of dealing with implicit bias, *Batson* was toothless. It required a showing of purposeful prejudice and discrimination. The fact of the matter is, Connecticut a while back eliminated the first prong of the *Batson* test. The second prong we found really was pretty weak and worthless, and that's one of the reasons we came together.

Throughout my years practicing law, quite frankly, I have never had a *Batson* challenge sustained.

As one of my colleagues said, "Any attorney who could not come up with a race-neutral reason for striking a potential juror deserves to have their law license removed." It is a totally ineffective mechanism.

Throughout my years practicing law, quite frankly, I have never had a *Batson* challenge sustained. I've never seen one sustained. So therefore, over all these years, it's recognized that

something had to be done. And that is what Rule 37 dictates, which we have adopted. It begins to knock out those false reasons that have been used for excluding jurors of color. And those reasons have been the most obvious ones. We put protections in place by putting in those particular prerequisites, and we expect that we will see very good results, because those are the common ones.

Also, in terms of the procedure that has been put together, it has been put together in acknowledgment of the fact that removing those bases for un-diverse jurors will enable us to achieve a judicial process that is truly fair and is perceived as fair.

I can go on at great length about this. But as I said once before, I found Professor Diamond's paper excellent. I have some tweaks at the margin, which I could go on about. But I thank her for preparing such a fine paper, and I thank all of you for looking to address this significant issue. Thank you.

Response by Professor Diamond

I'm very glad to have had the input from all of these wonderful comments. There's almost nothing—aside from my disagreement about eliminating peremptories—that I disagree with that anybody has said. There are just a few things that I want to highlight, and a few new ideas that have come to me based on your comments, which have been terrific, starting with Professor Marder.

Changes Over Time

The changes over time are worth taking note of—that is, the elimination of occupational exemptions, and the use of multiple lists which, as Professor Marder points out, today's computers make possible. For example, we can control for duplications that may arise from use of multiple lists, and the National Center for State Courts is a really good source for making sure that you're using best practices. When Judge Gertner in Massachusetts went out on a limb and said, "You know, if I have a venire for this very major case, which has no African-American members in it, I'm going to do something about that," she got slapped down a bit

We can create a movement where we will get a more widespread effect of the changes that are effective.

by the appellate court. I think it's an interesting example, because ultimately what they said was, she can't do it on her own, but they then adopted her perspective for later cases—a really important influence that an individual trial court judge had.

There is a danger, as Nancy points out, of a patchwork of peremptory challenge standards. But what I would like to see is that, with Washington State's changes and California coming online and Connecticut, there are things going on that we have to document. And to the extent that we do a good job here, and show that these have effects, or that they don't have as much effect as we hoped they would, we can create a movement where we will get a more widespread effect of the changes that are effective.

Judicial Education

Judge Mendelson is fabulous. With her energy and enthusiasm for change, she is a dynamo who I know is going to have a big effect. I read Secretary Johnson's report, and I recommend it to all of you. It's a really thoughtful, intensive analysis of what's going on, with great recommendations, and it's wonderful to see that New York has actually moved along and is implementing the recommendation. One thing Judge Mendelson mentions, which I didn't mention in my paper, but I think is really important, is that judicial education is important here as well. It's tough to change jurors in a short period of time, but judges are the professionals who are in the courts all the time, and their education and training is a really important way of changing the system because judges are, of course, so influential. I look forward to seeing what happens further in New York as these changes are put in place.

It's tough to change jurors in a short period of time, but judges are the professionals who are in the courts all the time, and their education and training is a really important way of changing the system.

The cost issues are not very great when you're talking about a 12-person jury if jury trials are rare.

Ms. Boyle is obviously an expert trial attorney, and she points out something that we haven't mentioned so far, which is really important. That is the drastic drop in the number of jury trials. And one thing about the drop in jury trials is that, when we say, "Maybe it would be good to return to 12-person juries," the cost issues are not very great when you're talking about a 12-person jury if jury trials are rare. Judge Higginbotham and his colleagues, who recommend to their federal colleagues to return to 12-person juries, as some of them are doing for diversity and the other reasons we've talked about, point out that the cost is not going to be very great given the number of jury trials that we have.

Ms. Boyle is obviously an expert trial attorney, and she points out something that we haven't mentioned so far, which is really important. That is the drastic drop in the number of jury trials. And one thing about the drop in jury trials is that, when we say, "Maybe it would be good to return to 12-person juries," the cost issues are not very great when you're talking

Legal Ethics Rules

Ms. Boyle talks about ethics, which I hadn't been thinking about, and I have some doubts about the extent to which that kind of ethical standard is likely to be broadly enforced. Moreover, if we're serious in our understanding of implicit bias, it may very well be that attorneys believe that they're giving legitimate arguments. And the judge, then, is in the position of having to call the attorney a liar who gives her reason for exercising the challenge. So,

I have some doubts about the extent to which that kind of ethical standard is likely to be broadly enforced.

I'm not optimistic about the use of the ethics rules, but I want to think more about it. It's a great idea. We obviously agree on increasing the size of juries.

And finally, Preston showed us that wonderful video. The rehabilitation issue has been a problem for a long time. Jurors see the judge as an authority figure, and, even if they are aware that they will have difficulty following the law,

jurors are reluctant to say that they won't follow the judge's instructions.

The other point that's really important, and maybe not so shocking, is that here is an experienced trial attorney, Preston Tisdale, who says he never had a *Batson* challenge stand. That's stunning, and it tells you how much work we need to do. Again, as they say, all politics is local. It's also true that each jurisdiction may have different needs, and it isn't one-size-fits-all. But with these commissions appearing, and judges moving in the direction of taking greater responsibility, if we recognize that *Batson* was perhaps not too much more than window dressing, and we need to put some teeth in it, I think we have a good future to look forward to. Thank you.

Each jurisdiction may have different needs, and it isn't one-size-fits-all.

Questions From Participants

Question: Professor Marder, aren't the standards for disqualification for cause and the elimination of peremptory challenge inextricably intertwined? Wouldn't it be unwise to eliminate the peremptory challenges in a state where obtaining disqualification for cause is very difficult?

Professor Marder: Well, I think you would see a change in for-cause challenges as well. Right now, judges know that there are peremptory challenges and, so they are very stringent about for-cause challenges. But I think if there were no peremptories, you would see a broadening of for-cause challenges. And the reason it's important that it's a for-cause challenge, though, is that the reason has to be given in open court and become part of the record, unlike a peremptory. So, I don't have the same misgivings about the for-cause challenge as I do with the peremptory challenge.

Restoration of Felons' Eligibility

Question: Judge Mendelson, is restoration of jury eligibility to those convicted of nonviolent felonies, e.g., substance-use felonies, likely to be both politically practical and helpful in increasing jury diversity?

Judge Mendelson: So, that's a lovely question. It really depends on one's perspective. There are many people who wish to have a more expansive jury. I must tell you that the statistics that were provided earlier, about one third of Black men having a felony conviction and the impact that has on the ability to have Black men serving on juries, was so disturbing and impactful. We have had legislation proposed in New York State to change what our current law is. A felony conviction is a permanent bar in New York State. There has been legislation recently moving to try to change that, but it was not successful at this point.

Question: Do you see a significant difference on that issue between civil cases and criminal cases?

Judge Mendelson: I think the argument is easier for a civil case, quite frankly, because the felony conviction has to do with the criminal justice system involvement and perceived biases that may come from being a person who was involved in the criminal justice system. I think the argument is easier to make that one should be permitted to serve on a civil jury.

The felony conviction has to do with the criminal justice system involvement and perceived biases that may come from being a person who was involved in the criminal justice system.

The “Objective” Observer

Question: Professor Diamond, is the objectivity of the “objective observer” for Batson challenge purposes a legal fiction?

Professor Diamond: Well, I recognize the fact that there is a difficulty in asking anybody to put themselves in the position of an objective observer. But we often use reasonable behavior as our legal standard in civil cases, and we ask people to make judgments about what is reasonable. I think this is pretty similar to that.

We often use reasonable behavior as our legal standard in civil cases, and we ask people to make judgments about what is reasonable.

What is a great advance, in my view, of talking about an “objective observer” is that you are not charged then with having to say that you have shown the intent and what motivated the excuse. Basically, a successful Batson challenge under the traditional rule required the court to decide that the attorney

who offered a non-discriminatory reason was lying, that it was really pretextual. So, it changes the bar. Now, what we don’t know is what the effect of the changed standard will be—and I do want to see that research done. Just let me make a pitch for those of us on the faculty here: we’ve all done empirical work, and we are available for doing research in this area. We think it’s really important. And so, the question is, will it have the desired effect? I think it is different from the original Batson standard, so there’s a possibility that it will.

Differences Between State and Federal Courts

Question: Ms. Boyle, you mentioned handling cases both in state and federal court. Have you observed a distinction between the way that federal judges and state court judges approach this issue?

Kim Boyle: Yes, I think that there is a difference, based on the fact that voir dire is obviously much more free-flowing and much more extensive in the Louisiana state court system—particularly in Orleans Parish—whereas federal court voir dire is extremely limited. The federal judges rarely allow the lawyers to ask a lot of questions, and the federal judge basically controls that entire voir dire process.

You also have to look at where the jury venire is being pulled from. If you're in the Orleans Parish court, it's predominantly African American, at least as we sit here today. If I'm in the federal Eastern District Court of Louisiana, we're pulling from some 13 surrounding parishes, where the racial demographics vary. So, yes, I think the procedure differs between state and federal court, certainly in the State of Louisiana.

Question: Mr. Tisdale, during your service on the Connecticut Supreme Court's Jury Selection Task Force, what did you learn that surprised you the most?

Preston Tisdale: That's a good question. Number one, the ineffectiveness of *Batson* rebounded beyond me, so that was a common observation. And we also recommended the objective observer standard. Along with that standard come many, many guidelines, circumstances, which are considered, including presumptively invalid reasons and the reliance on conduct. And that has boxed in a lot of the, if you will, phony "neutral" reasons for the peremptory challenges.

If anything surprised me, it was the unanimity of thought. There were very few issues that we disagreed on. The task force was made up of bench, bar, and academia, and other than on one issue, we were very united in our ultimate report.

Question: Has any study been done since the Elek and Hannaford-Agor 2014 study¹⁰ on the effects of an implicit bias instruction? Sorry to put you on the spot. If we don't know, we don't know.

Professor Diamond: There were plans. Jerry Kang and his colleagues had plans to carry out such studies. But to my knowledge, those studies—if they have been begun—have not been completed yet. And so, I think the Elek and Hannaford-Agor study is the only one we have that is out in public and available. We need to know more.

Reluctant Judges

Question: Is there any formal research showing judges being reluctant to grant challenges for cause? And if so, why were they reluctant?

Professor Hans: In my paper, I talk about the fact that we don't actually have that much research on challenges for cause. Interestingly, as to peremptory challenges, there's now a substantial body of work on the criminal side

On the criminal side that has discovered these disturbing patterns of race-based and gender-based peremptory challenges.

that has discovered these disturbing patterns of race-based and gender-based peremptory challenges. But on the civil side, it's very limited. Professor Diamond or Professor Rose, do any projects come to mind?

Professor Diamond: I think Professor Rose could talk about a study that she and I did.

Professor Rose: Shari and I looked a few years ago at cause challenges by using attorneys as informants about judicial behavior. Then we also asked judges to respond to some hypothetical vignettes. And what we varied is how confidently the juror responded. Did they say, "Yes, yes, I can be fair," or did they say, "I'm pretty sure I could be fair"—something like that type of variation. Everything else about the juror was held constant in terms of the types of conflicts and biases the juror held. It

would be someone who was sitting in a DUI case, but their niece had been killed by a drunk driver, that kind of thing. So, they were pretty severe conflicts.

What we saw clearly was that attorneys thought that judges are affected by those very slight differences in answers to voir dire questions, and that judges themselves believed that those slight changes in how jurors answer questions tended to reflect on whether they saw them as fair and impartial. Interestingly enough, we gave the same vignettes to jurors, prospective jurors, and they don't see a difference between someone saying, "I can be fair" versus "I'm pretty sure I can be fair."

Professor Diamond: There's also another study by Thomas Frampton in the *Michigan Law Review*. He looked at for-cause challenges. He thought that judges displayed their own biases in granting or not granting for-cause challenges. And that led him to the position that we should eliminate for-cause challenges. I disagree. I actually think for-cause challenges are needed. I just wanted to give you a view of where scholars are going here. We're on a continuum. And I would say that eliminating the for-cause challenge is sort of at one end, but that is the direction in which some scholars are moving.

We're on a continuum. And I would say that eliminating the for-cause challenge is sort of at one end, but that is the direction in which some scholars are moving.

More Frequent Trials?

Question: Douglas Burrell, can we make civil jury trials not only fairer, but also more frequent?

Douglas Burrell: I would love for civil jury trials to be more frequent, but with the backlog of cases on most courts' dockets, that's not going to happen, probably at least for another year. We're going to start seeing some jury trials, but most people are settling cases because they're just backlogged.

Question: Judge Mize, I have seen several occasions where two minority jurors have been added to the panel and the state has eliminated the next two. Then there is a *Batson* challenge. Then the state's argument is, "Well, I have two that I'm not eliminating because of race." Then the court accepts that. Have you seen what's alleged implicitly in the question to be a tactic by either prosecutors or practitioners? If so, is there anything that we can do about that?

I would love for civil jury trials to be more frequent, but with the backlog of cases on most courts' dockets, that's not going to happen, probably at least for another year.

Judge Mize: I cannot remember a situation like that. I don't know if a trial judge would know that dynamic that's going on at counsel's table. I do think that it's important that we judges heed the call of the Supreme Court, and not wait for a *Batson* challenge, but monitor what's going on as we see the strikes and their effect on

the panel. We have an important policing role, even though the *Batson* test is faulty, as Chief Justice González mentioned. But we have to be brave and make sure we do what we can.

There is, in the resource materials, an opinion piece I wrote in *The Washington Post* some years ago about a civil case in which I initiated a *Batson* challenge¹¹ and concluded that the answers of the lawyers were sufficient. But after the jury selection was completed and the jury was seated, one of the former venire members came into the courtroom and asked if he could address the court. The lawyers agreed to allow him to address the court, and he said something along these lines: “Judge, you told us why peremptory challenges are limited. They can’t be used for racial or gender discrimination. But I can tell you from what I saw as a juror, it’s happening in this courtroom.” That’s another example of the shortcomings of *Batson*—when believable reasons are given by counsel, but the visual effect remains the same.

Notes

- 1 See, e.g., Shari S. Diamond, Beth Murphy, & Mary R. Rose, *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 Nw. U.L. Rev. 1537 (2012).
- 2 Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Challenges and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007).
- 3 Shari Seidman Diamond, Destiny Peery, Frank J. Dolan, & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUDIES 425 (2009).
- 4 R. v. Chouhan, 2021 SCC 26 (Can.).
- 5 The video and transcript are available at www.nyjuror.gov. The direct link to the video itself is <http://wowza.nycourts.gov/vod/vod.php?source=ucs&video=2021-JuryServiceFairness.mp4>.
- 6 The charges are available at https://www.nycourts.gov/judges/cji/1-General/CJI2d.Implicit_Bias.pdf.
- 7 U.S. v. Clemmons, 892 F.2d 1153 (3rd Cir. 1989).
- 8 Pueblo, et al. v. Supermarkets General, No. 92-CV-01267 (S.D.N.Y. 1992). See Deborah Pines, Lawyer Fined For Improper Jury Practice; Race-Based Challenges Incur Judge’s Sanction, N.Y.L.J., Dec. 24, 1992, at 1 (discussing Pueblo before Judge Louis Freeh); and Andres G. Gordon, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 712, n. 279 (1993) (citing Pueblo).
- 9 At the beginning of his remarks, Mr. Tisdale played a short video clip from *Marshall*, a 2017 biographical film about Thurgood Marshall, written by trial lawyers Michael and Jacob Koskoff and directed by Reginald Hudlin. The clip depicted part of the jury selection proceedings in a 1941 trial in Bridgeport, Connecticut. In the trial, Thurgood Marshall defended Joseph Spell, an African-American man who was accused of the rape of a white woman.
- 10 JENNIFER K. ELEK & PAULA HANNAFORD-AGOR, CAN EXPLICIT INSTRUCTION REDUCE EXPRESSIONS OF IMPLICIT BIAS? NEW QUESTIONS FOLLOWING A TEST OF A SPECIALIZED JURY INSTRUCTION (Nat’l Ctr. for State Cts., Apr. 2014), available at <https://nscs.contentdm.oclc.org/digital/collection/juries/id/273/>. A follow-up article was published later: J.K. Elek & P. Hannaford-Agor, *Implicit Bias and the American Juror*, 51 COURT REVIEW 116-121 (2015).
- 11 Gregory E. Mize, *A Legal Discrimination*, WASHINGTON POST, Oct. 8, 2000, available at <https://www.washingtonpost.com/archive/opinions/2000/10/08/a-legal-discrimination/771e9ddd-00b0-4870-b627-8c7cccd630/>. N.B.: In *Powers v. Ohio*, 499 U.S. 400 (1991), the United States Supreme Court made it clear that judges have a duty to enforce *Batson* even if the litigators don’t bring a motion. This duty stems from potential jurors having a right to serve. A trial court is fit to enforce those rights.

CLOSING SESSION

Professor Hans: It has been a privilege to talk with all of you about the issue of fairness in civil jury selection. Over the course of the day, I found it fascinating to speak with other panelists and with judges in the discussion groups. You gave me a sense of how some of these issues are being decided on the ground. And ideas emerged for more research. That has been very, very helpful.

I think there is a lot of consensus among judges and my fellow panelists about our goals in jury selection. We want juries that represent our community. We want fair and impartial juries. There is a fair amount of agreement on some of the ways that we can move in that direction, but there are also very productive disagreements and debates about specific remedies.

I am optimistic about the prospects for increased fairness in civil jury trials and civil jury selections as a result of all that I've observed today.

I am optimistic about the prospects for increased fairness in civil jury trials and civil jury selections as a result of all that I've observed today. So, thank you very much.

Professor Diamond: I would add that this has been really delightful. Frankly, we were a little nervous about doing this virtually, with the somewhat complicated planning that was required. But the Pound organizers were terrific and it has been remarkably effective. The format gave us a lot of opportunity to get input from many sources, and we saw an impressive level of enthusiasm from participants throughout the day about where things can be moving. Like Valerie, I would be optimistic. I worry that maybe the group here consists of the *most* enthusiastic and supportive people. The question is whether you can spread the word and the feeling to the rest of the judicial community?

How Far We've Come

In looking back when Judge Mize talked at lunch about the history of some of the reforms with respect to juries, it wasn't so long ago that very minor changes were not something that people would accept, like allowing jurors to take notes. We've come a long way. I think that this year, with the things that have happened outside, with the death of George Floyd and the greater consciousness of implicit bias, I think we have had a kind of a wake-up call that may have produced momentum for real and accelerated change.

I'm very enthusiastic, and I was very happy to be a part of this. I'm very interested in what has begun in Washington State and is starting to spread. The more we can learn about that as we move on, I think the better off we will all be.

I think we have had a kind of a wakeup call that may have produced momentum for real and accelerated change.

Judge Mendelson: Thanks for being allowed to participate in this wonderful event. My head is spinning with new ideas to bring back to my Implementation Committee and to our Jury Support Office and our Commissioners of Jurors. We are actively thinking of ways to do things differently,

with the goal of increasing exclusivity in our juror pools, along with the rest of the equal justice work we have before us. So, it's just a deep feeling of gratitude. Thank you.

Chief Justice González: The discussions have been fascinating. I've learned a lot from my co-presenters. It's been a great day for me. We know that heterogeneous juries are better. We have the tools to make sure that we have heterogeneous juries, and we should implement them, and we shouldn't be afraid of that future. Tradition is good, but in this case, it's getting in the way of progress.

Douglas Burrell: I just want to thank you for allowing me to participate today. My feelings on this issue are mixed. As I look around our country, there's a lot of pushback on voting and voting rights, and that can impact the jury panel and who's available to be on a jury panel.

Optimism for the Future

But I will also say that I'm optimistic about the future. I read a Pew Research study about six months ago that talked about the generation after the millennials, which is the generation of my teenage children. They are the most diverse and the most well-educated generation in the history of America. Naturally, as the succeeding generations hit voting age and turn 18, and are able to sit on juries, we're going to have more and more diverse jury pools and have more of an opportunity to have fair and balanced and mixed juries.

Kim Boyle: I think all of the discussions were phenomenal, and I really appreciate the papers that were prepared by the professors. The bottom line is, I still maintain my position that trial court judges have a critical role as gatekeepers as it relates to all of these issues. They do it in every other respect concerning trials. They do it as it relates to procedural rulings. They do it as it relates to evidentiary rulings. There is nothing wrong at all with a trial court judge watching what is transpiring and asking an attorney, "Are you

As the succeeding generations hit voting age and turn 18, and are able to sit on juries, we're going to have more and more diverse jury pools and have more of an opportunity to have fair and balanced and mixed juries.

I do believe the trial court judges have more teeth and more ability to control these issues. Bluntly, I do not believe that they are necessarily exercising everything that is in their arsenal.

certain? Will you affirm to this court the reason why you are attempting to strike this juror when another juror who was not a person of color really falls within that same category?"

So, I do believe the trial court judges have more teeth and more ability to control these issues. Bluntly, I do not believe that they are necessarily exercising everything that is in their arsenal.

Secondly, as it relates to the number of jury trials, I guess as a defense lawyer, I really don't see civil jury trials increasing in substantial numbers regardless of the pandemic. Jury trials are expensive to try for both sides. They're expensive for the plaintiff. They're expensive for the defendant. Most cases in the civil arena probably

should be resolved by the parties being able to reach some type of agreement. We shall see, but I really don't see the number of jury trials substantially increasing as we move forward, even out of COVID. Thank you.

Preston Tisdale: Thanks to all of you. The papers were excellent. Much appreciated. And the offerings of everybody on the panel were so constructive and helpful. I would point out that we were charged with this mission on our task force in Connecticut by our Chief Justice, Richard Robinson. And he, of course, went on to say that implicit bias and unconscious prejudice can be as pernicious as conscious bias. In understanding that, the realization was that we had to deal with the toothlessness of *Batson*. We had to empower the court to make the moves that it had to make in this regard. Most judges did not want to rule our way on *Batson*, because they felt they were besmirching and impugning the character of the attorneys, and labeling them as racist. What happened is, these guidelines are put in place so you can attack those particular acts.

Cautious Judges

I know most of you are familiar with the work of the Rutgers law professor Rachel Godsil. In her study, she points out the fact that the second most pejorative label that whites feel can be placed on them is racist. The only thing worse you can place on them is pedophile. When you realize that, the judges are very unwilling to risk that. I know Chief Justice Gonzáles has been contacted by members of our task force as well as other members of the judiciary in terms of incorporating the Washington Rule 37 guidelines, because they provide a beautiful roadmap.

When I talk about the dangers of implicit bias, I point out that the problem with it is that so many people don't realize they possess it, and yet it's been allowed to metastasize and take root in our society to a tremendous degree.

I use this example: over a decade ago, *The New York Times* reported on its front page on a study of National Basketball Association referees.¹ In that study, the researchers showed that, controlled for every variable, white refs call fouls on Black players at a heavily elevated level. Now, mind you, these are the refs who idolize the players. They know Blacks. But it's so baked in—it's so deeply baked in. So, when you have implicit bias with race, it becomes implicit bias on steroids. Meanwhile, the Black refs called fouls on white players at a *slightly* elevated rate, but it's still implicit bias. So, given the seriousness of all this, with our commission adopting an "objective observer" standard in the criteria that I mentioned, we also recommended an appellate review de novo, because we felt that it was so serious that we wanted to provide a roadmap and guidelines for the judiciary so that this problem wasn't just pushed aside.

We provided the judiciary with guidance so that they would not insert race-neutral reasons that were not offered by an attorney, during the trial and that were not reported and recorded by the trial court. One Task Force member clearly captured the position of a majority of the members and stated that "[p]lainly stating that the reviewing court is bound by the specific reasons presented in the record forces the court to review what was proffered and not look for a race-neutral reason to uphold the challenge."²

When I talk about the dangers of implicit bias, I point out that the problem with it is that so many people don't realize they possess it, and yet it's been allowed to metastasize and take root in our society to a tremendous degree.

Structural Error

On the occasion that the reviewing court concludes that an improper peremptory challenge ruling has been rendered by the trial court, it should be deemed structural error. As stated by the abovementioned Task Force member,

“Structural [error] cases defy analysis by harmless error standards because the entire conduct of the trial, from beginning to end, is obviously affected These cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial

process itself. . . . Such errors infect the entire trial process . . . and necessarily render a trial fundamentally unfair.”³ Quite simply, a decision that deprives a venireman of the ability to serve on a jury as a result of improper bias deserves this treatment.

On the occasion that the reviewing court concludes that an improper peremptory challenge ruling has been rendered by the trial court, it should be deemed structural error.

Finally, we looked at all of this and decided that, yes, we would stay with peremptory challenges. We feel they’re necessary. We put in safeguards for the

attorneys in terms of ways that they can overcome the presumption of invalidity. But we felt strongly that factors that involve impermissible bias must be rooted out. And as I noted, we have implemented safeguards to protect the lawyer’s right to continue to rely on intuition and instinct and using peremptories, but not if that intuition and instinct are grounded in impermissible bias.

Following our Task Force’s work, the Chief Justice of the Connecticut Supreme Court adopted its recommendations, and the Judicial Rules Committee recently approved the Chief Justice’s recommendations. Some Task Force recommendations were deemed more appropriately within the scope of legislation. Recommendations regarding the summoning of jurors were adopted by the legislature. However, some others, such as the payment of minimum wages for jurors, were not supported. Nonetheless, the push for the adoption of such practical measures to ensure the seating of diverse juries will continue.

Believe the Jurors

Roxanne Conlin: I hope judges will *believe* potential jurors when they say they can’t be fair, and let them go home. I know some judges believe that people do not want to serve on juries and will therefore lie about whether or not they can be fair. It’s just not supported by the evidence.

Professor Rose: I just also want to thank everybody for an excellent conference. I learned so much today and have so much to think about. I want to make a plea to everybody from every jurisdiction to take a look at your data collection practices in your court. If you care about reforms and about diversity, the way to get to those is through having data to assess what works and what doesn’t.

I hope judges will *believe* potential jurors when they say they can’t be fair, and let them go home.

I've been assisting the state of New Jersey with their statewide assessment. The results are always more surprising and more complicated than folks going into it might think. That means that the data collection need not be something that's going to shame anybody or lead to terrible headlines necessarily. Instead, it allows you to see what's working and what needs tweaking. I echo what Shari said earlier: We are here, we would analyze any data that you give us. Speaking for myself, it would be a tremendous service. But it needs to be there. Thank you so much.

Professor Marder: I just want to thank the Pound organizers for this amazing online experience. I also want to thank the judges and the lawyers. You help to keep me grounded. I really appreciate hearing your experiences.

Be Prepared to Take Action

I have two takeaways. One is that I hope all the judges leave feeling inspired, ready to take action—any of the actions that Valerie and Shari mentioned in their papers, or any of the actions that Washington, California, and Connecticut have led the way with. As Judge Mize said, whether it's bottom-up or top-down, there's a need for action, and you have the power within you to do this.

As you start to think about Valerie's point about the legitimacy of the jury, think about what everybody in the courtroom is witnessing. It's visible; it's visceral. It's something that really goes to how people think about the jury.

The second plea is, I realize you've been hearing a lot about peremptories, but just to take up Judge Mize's observation, this is what happens in the courtroom. This is what people see. As you start to think about Valerie's point about the legitimacy of the jury, think about what everybody in the courtroom is witnessing. It's visible; it's visceral. It's something that really goes to how people think about the jury. With that, thank you once again.

Notes

- 1 Alan Schwartz, Study of N.B.A. Sees Racial Bias in Calling Fouls, N. Y. TIMES, May 2, 2007, available at <https://www.nytimes.com/2007/05/02/sports/basketball/02refs.html>.
- 2 STATE OF CONNECTICUT, JUDICIAL BRANCH, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON (2020) 25, available at https://jud.ct.gov/Committees/jury_taskforce/default.htm.
- 3 Quoting from *State v. Lopez*, 271 Conn. 724, 733-4 (2004). Citations omitted; internal quotation marks omitted.

THE JUDGES' COMMENTS

In the discussion groups, judges considered the issues raised by the paper presenters and the panels. Judges made individual comments, and the moderators were asked to note areas in which the judges' thinking appeared to converge.

In the discussion groups, the judges were invited to consider prepared questions relating to the Forum papers and oral remarks. The judges devoted more time to some questions than to others, and they raised other interesting topics.

Remarks made by judges during the discussions are excerpted below and arranged according to the discussion questions. These remarks have been edited for clarity only. Conversational exchanges among judges are indicated with dashes (—).

The excerpts are individual remarks, not statements of consensus. For general points of convergence that arose out of the discussion groups, please see page 113 of this report. We have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

How many jurors a civil jury should have, and why

- We have 12 jurors, but we haven't had a civil trial in a while due to the pandemic. If you lose jurors and alternates, which has happened several times because of automobile accidents or illnesses, you can stipulate to a jury of less than 12. I've been a part of a civil trial that went down to eight jurors, but I don't know if you can go below eight. You have to have a majority in civil cases. In criminal cases, it's unanimous. It's always a 12-person jury in criminal cases.
- In our midwestern state we have eight jurors for a civil jury trial; at least three-fourths, or six, have to agree for a verdict.
- I had never really thought about that until today. I guess it makes sense just from a straight number-crunching standpoint that obviously if you have bigger juries, you have a better chance of getting minority groups in the panel or on the jury that actually hears the case. And I think going up to 12 would probably increase the likelihood that you're getting a more diverse mix. And I think with the decline in the number of civil trials, and with the pittance that we pay them, I don't think there's any real downside to bumping up from eight to 12. And why 12 is the magic number, I don't know.
- Eight is certainly a number that I think is necessary, I think even going down to six is too low. I don't know what the magic is about 12. And that's part of my challenge, is why is 12 such a magic number, besides it's an even dozen. Is that just tradition?
- I like the 12-member jury, because it gives a better perspective than the smaller number. You tend to tease out a lot of things.

- I have been fine with eight for years. I know that there's been some discussion periodically of moving to 12. I think if we don't do a better job in diversifying our jury pool, I would, in civil cases go up to 12. But I don't see that happening.
- In our midwestern state's limited jurisdiction court or county courts, the maximum would be a six-person jury. But most of the significant civil cases would be tried in the district court where they are simply entitled to 12 unless both sides agree. Even when I tried to suggest to people, "I'm not going to suggest you go to six, but how about eight or maybe nine?" I could never sell that to the lawyer. I always had 12-person juries in civil cases as well as the criminal cases.
- In our state, the standard number is eight, six out of eight for a verdict. Why this comes up sometimes is, something weird will happen, and you'll end up losing people during the trial. A lot of times the lawyers get along well enough that they'll decide, "I don't want to try the case over again. I kind of like the seven people that I have. Let's run with it." Then they'll stipulate to what percentage, usually five out of seven.
- With respect to the number 12, I agree it provides for a more diverse, robust discussion, and perhaps arguably a more just result. In our mid-Atlantic state we have six, and it does not have to be unanimous. The concern that I have with having 12 for civil trial is that we're already having great difficulty in parts of the state in getting diverse juries. I have a concern that you deplete an already limited pool.
- In our northwest state, you can choose to have a six-person or 12-person jury. You need five on a six-person jury for a verdict, and you need 10 on a 12-person jury.
- Listening to the discussion today, I'm more convinced 12-member juries. We have six in my state. Twelve sounds great. There's always a funding issue, but I was intrigued. I thought, yeah, there are fewer jury trials in civil, so maybe the funding isn't such a big deal, but in our state they'd have 15 counties, with 15 county boards, fighting about the funding.
- I'm a creature of habit. I was a plaintiff's lawyer as well, and I prefer 12. I actually thought that it was better, when I was trying cases as a plaintiff's lawyer, to have a lot more people talking about the case, talking about the damages. And I did think that it skewed higher. That's what I thought.
- I think with six, you're more prone to have one or two individuals dominate the discussion. That could be good or bad for you.
- And I don't know why 12 is the magic number, but I like 12. I think, certainly, the two papers that we've reviewed today show that that gives more diversity.
- There are people who are going to be the "alpha" jurors. They're the ones you have to convince. Then there are those who will just sort of go along because they want to get home for the weekend and be done. They're easily persuaded by the group dynamics.
- Part of our chambers game, when I was a trial judge was, "Who's going to be the foreperson?" And my staff and I would peg it a good half to two thirds of the time. You really could. And the lawyers know that. The lawyers focus on the three to four jurors that are the power center there. But if you had a smaller panel, then you might just have one person who clearly dominates. So I think the more the better.
- Better by the dozen.

- Honestly, I think 12 really works better. Collective wisdom has its place.
- My state's juries have always been 12. The state's evaluation of jury trials during the COVID pandemic has included reducing it to six, primarily to have fewer people having to come to the courthouse, and being able to separate them better in the facilities that we have, some of which are pretty old.
- Strength in numbers—that's my feeling, it does cost more, but I think the result is better with more jurors, and it involves more of the community, and I think that's very important these days.
- I believe that the more jurors we have, the better and fairer results we'll have. In the rural areas, you know exactly what your jury panel is going to look like, and you know exactly what your jury is going to look like. The inherent biases are always present, and you can't avoid them. So, I prefer 12. It gives you a lot better shot in the rural areas. But that's for the size of the jury. When it comes to a verdict, I like nine out of 12, I really do.
- I'm of the view, tentatively, that the gold standard is a 12-person jury with a requirement of unanimity.

How well civil juries in the judges' jurisdictions represent the community

- I don't think we always have diversity in my state. And since I see cases from every county, I have definitely seen that there's no diversity coming from some of our counties.
- Our county is basically one-third white, one-third Hispanic, one-third African American, just to round up. It's very unlikely you're going to end up with an un-diverse jury here.
- I've heard from a lot of litigants that they look out in the jury, and it doesn't represent them. It is not their peers. And I've heard some women say that they looked up and they saw men, or a majority of men, and their lawyer tried to challenge and tried to get more women. It didn't work and they didn't feel that they were treated fairly.
- In our southwestern state, we have a real problem with diversity among our jury panels. It has been a challenge, both in civil and criminal. We're doing a lot in that area to look at how we can draw from different groups.
- In the civil cases, I think there is a fair representation.
- I've not heard concerns about the diversity of juries. Our county in our southern state is a relatively diverse county (probably more minority than not), so we do get participation by all different types of individuals.
- I can tell you from my experience, both on and off the bench, that our juries really don't represent a good cross section of our community, especially the urban areas.
- If you're talking about the venire, then I think the people who show up are fairly representative of the people in the community. I don't think the ultimate jury that's selected is representative.
- Before the pandemic, our juries were fairly representative of the community. Racially and in terms of age distribution, the employed versus unemployed, it's pretty much what you see on the streets. In the civil cases in general, I haven't really heard complaints.

- At least in my experience, we're not very representative.
- In our southern state we tended to get a lot of retirees—postal workers, teachers, government workers, people who basically either had a government job or were retired. It got a little bit different when we started using the voter registration lists. The jury pools that I'm seeing now, I've never seen before. In my last three juries, I had all females, or five females, predominantly either African American or Latin or Indian—all walks of life, all races. It's just interesting to see.

Positive or negative effects of jury diversity observed by judges

- From my vantage point as an appellate judge, I'm having a hard time remembering a civil case where the issue about the jury or striking the jury or juror bias has come up. I'm going to maybe imply that because we don't see it, that there seems to be some satisfaction with how we select juries.
- I never had anyone say it was a negative experience. They said was a positive experience and they seemed to have a camaraderie together. I had a diverse group of individuals, both young and old, races, different professions, and they all seem to have a bond at the end. In fact, I know a lot of them had reunions at some point.
- I personally think that when you have diversity in any subset of a group, it takes it from an abstract idea of what that's like to a legitimate understanding, so it's much harder to stereotype when there's an actual person in front of you that represents that “stereotype.”
- Jury diversity has gotten better, because we're paying such closer attention to it. The attorneys seem to be aware because they know the bench is very serious about it.
- The more diverse the jury is, the greater confidence we have in its verdict, and we see that evolving. I remember making note of the makeup of the jurors in the Derek Chauvin case. The final jury selected included one Black woman, three Black men, two white men, four white women, and two multiracial women. That was fairly diverse, and yet still in a jury of 12, it was majority white. The fact that there were nonwhite members of the jury and the fact that it was almost equally men-to-women, I believe, increased confidence in its decision-making. If this helps to increase the transparency of the courts and what happens inside them, that can be an evolution that hopefully will continue to provide public confidence in the system.
- I have not noticed any difference in how carefully and how thoughtfully the jurors have decided cases, regardless of their makeup.
- I've sat on hundreds of jury trials, mostly criminal, but also some civil. The diversity hasn't changed over those years that I can recall, so it's very hard to compare. I think jurors have traditionally gotten it right anyway. I'm not as concerned about them getting it wrong as I am about trying to increase the diversity on various levels of the panel.
- I can remember on the trial bench having a personal injury case in which a Black child drowned in a swimming pool. The defense attorney had left a Black woman on the jury panel. There was a substantial verdict, and when the jury was interviewed after the fact, this Black juror reported that the jury was unanimous in deciding that

there was liability, but they weren't going to award very substantial damages. This Black juror spoke up and said, “You will not devalue this child's life because he's Black,” and that had a huge impact on that verdict. I think this was reported to me by the defense attorney. He made a tactical error, but in hindsight, it was the correct result.

- One of my colleagues, a trial court judge, told me about a jury panel that was about to vote to convict a young man because they thought he has lied when he said he wasn't in the location of the crime. He said that night he had gone to a Chinese restaurant to purchase french fries and chicken wings. The jurors evidently said, “Well, he had to be lying because you don't get chicken wings and french fries at a Chinese restaurant.” But a Black juror said to them, “Your assessment is incorrect, because last night that was what my son had for dinner. He only had the five dollars I left him and that was what would buy him dinner. If you are in certain neighborhoods and in our city, that's what the Chinese restaurants sell to these kids. These kids leave school and their parents are not home. What they get is chicken wings and french fries.” That just goes to show you how diverse opinions and observations matter. This woman was able to tell this panel that that does not mean he's lying. It changed the result in that case.
- I think you have to be careful in terms of promoting jury camaraderie, which I think is a good thing because it enables discussion, a more free-flowing discussion. But if you are in a jurisdiction where the juries are either all on Zoom, like we are, and they're never together, it's a good idea to give them an opportunity or a Zoom room to just chitchat to develop that kind of camaraderie (obviously with all the admonitions about talking about the case). I think in some areas they're going to have to remain on Zoom or at least partially on Zoom. If we get another COVID surge, we're back to doing everything remotely again.
- You would be surprised how, even with a diverse jury, they do develop a camaraderie that you would think wouldn't happen, but it actually happens pretty quickly when they're all put together. They actually work to do that. That's the positive effect I see. Then they're more apt to listen to the jury discussion and each other's points of view. I think the camaraderie helps to make sure everyone's voice is heard in the jury room.
- What I like that I've seen is, in every case that's before the court, it expands people's perspective and ideas about who people are. It changes the perspectives that they have. For instance, I've had some juries where I've had a person who's 22, and they look like a 22-year-old. Everything they do is like a 22-year-old, including coming to court late a couple of days before they really get it that you need to be on time. I've seen how someone of a different demographic, like age or race, will kind of bond with that person and they kind of grow through the process. I can see that person kind of having a relationship with someone that they never encountered prior to jury service. I'm real big about our communities coming together cohesively for the benefit of our society. That encourages me about the future. That's something I saw and picked up on a lot during my service as a trial judge.

Age disparity in jury pools

- In civil cases, I'm not sure that we're that bad in terms of representing the community from a racial point of view. The problem is age. We have a lot of older people, and we get a lot of older jurors.
- I've seen positive effects. However, I think age continues to be something that you see missing.

- There has been an age change in more recent years toward younger jurors. I think that's made a difference, at least from the perspective of litigants, looking at a panel that's not all full of old white guys. I think it makes a difference in their perspective on fairness, too.
- We have a pretty diverse community. Before I went on the appellate court, we had a pretty diverse group of people. But towards the end, I saw a distinct change in the panels that were coming in as jurors. Now they're distinctly younger. We're having fewer people of color, because there's been, I guess, a shift in population. There's been a lot of gentrification. Now the panels don't seem to be as diverse as they used to be.
- One of the things that's happened with COVID that I've noticed from talking to some trial judges is that when jury summonses are issued, and we have tried to do virtual juries, the number of people that have health excuses tend to be older, and the judges feel like the jury pool is really much younger. And as a result, they feel like, especially in some criminal matters, that there have been some acquittals that in their experience probably wouldn't have happened if you had a larger cross section as far as older folks involved in the jury.
- We get our jurors from the voting records, and we get a lot of older jurors. My county is becoming more diversified, and the younger jurors are underrepresented.

Degrees of diversity in jury pools in urban and rural areas

- I think in the rural part of our southern state, the jury venire is not adequately reflective of the citizens who live in the area. I think the folks who show up for jury duty are largely white citizens who are over the age of 50. And certainly, that's not reflective of everyone who lives in our area.
- Our southwestern state is very diverse in terms of the size of our communities. We have one or two really larger population centers, and the rest is very, very rural, and significantly less diverse. And, in candor, we are not drawing those urban, diverse folks into our panels. What I see is a lot of work to do and something that is a real challenge.
- With our entire state, there's always the opportunity to improve what we're doing, to have people from different experiences, different ways of coming to an issue, and deliberating as part of a jury.

Judicial diversity

- I served as a trial judge at all levels before I became an appellate judge, almost all levels. And I'm also in a jurisdiction where the judiciary isn't diverse. So, in criminal court, where felonies were tried, I was the only judge of color. My presence made a difference to the jurors at the end of the process.
- I am the very first person of color to sit on the bench—appointed or elected—in my county, whether it be a city judge, a district court judge, or a superior court judge. It's making a huge difference, I think.
- It's not that a judge will rule differently because the judge is a woman, a man, a person of color, a gay judge, a straight judge. We're not going to rule differently, we're going to follow the law. But it's the people's perception. Does that bench reflect the community? It's that “equity versus equality” challenge, and the diversity brings equity to the system.

- I've spent years and years and years as the only person of color in the entire courthouse during the week. It's making a difference in how lawyers are conducting voir dire in the types of things that they're raising. The more diversity you have in the courtroom, it just really makes a difference overall. The importance of having that diversity expanded in jury selection just cannot be understated, because these people are making the same decisions that we worry about—major decisions impacting people's lives and families and their children's and their futures.
- These comments about the influence of African American judges on the jury itself should not be lost on us. I come from a very large, very urban county. Yet we only have, amongst some 20 judges at the trial level, one African American woman. And for the whole rest of the state, there are no African American judges. In one of our cities we have a very large African American community, and yet no representation on the bench. In my appellate court we have seven judges, but only through the appointment process do we have one African American judge, and he will be leaving at the next election. So, there will be six white men and one woman, and the other candidates running are, of course, white men. So our bench is very, very pale compared to what our community of jurors is.
- I was the trial judge in our felony division for 22 years. I never had a jury that was not diverse. There wouldn't be as many minorities in the pool as a whole, but they had a Black judge (me) during the selection process, and I made everybody feel welcome and wanted. Even when they tried to get out of jury service, I would talk about myself and my desire to see justice. I'd say, "Everybody is entitled to a fair jury, and we need all of you." I gave those speeches every day for 22 years. I always had jurors.
- Ninety-nine percent of my prosecutors were white, and I was indoctrinated by white prosecutors. You think Black people are ready to vote not guilty on every felony case? That is not the truth. If you have Blacks on a jury who have children, and want them to have wonderful lives, and they are working and trying to keep everything that they have protected, they will listen to the evidence, and they will arrive at a just decision. Whenever a jury was out for a long time, it was a liberal white person who kept them out, not a Black middle-class person.

Jury selection: Expanded voir dire

- Limited voir dire makes it difficult to identify or support an advocate's argument on appeal that bias was somehow not cured, or at least someone exercising a peremptory strike could satisfy their burden in showing that it was not race-based. Expanding voir dire on the record could allow for that a bit, at least for appellate review.
- When I was a very young lawyer, representing indigent criminals in federal court, there was a federal prosecutor who never even bothered to strike a juror. He just said, "Give me the first 12 and we're ready to go." I think when you spend time thinking about the jurors and asking questions, I'm just not so sure that, at the end of the day, you end up with a better quality.
- I think sometimes the more open road we give to the lawyers on jury selection, the more it becomes an attempt to indoctrinate rather than to actually assess who can be a fair and impartial juror. As one of the lawyers in the trial, if you're honest with yourself, I don't think you're probably looking for a fair and impartial juror. You're looking for jurors who are biased in your favor. That's what you're trying to do.

- I think most lawyers are not really trying to find the unbiased juror. They're looking for the one who may have the implicit bias. Where I think the expansive voir dire does fill a gap, though, is to tease out some of the bias: "Wait, Judge. This person does have a bias that you're not seeing."
- I am also very concerned with spoiling the panel. Our jury trials are at an all-time low, and the attorneys do not know how to voir dire. They will ask questions that will create a problem. One of the things I always did was to require them to give me the questions they wanted to ask, just to make sure that they were phrased in a way that wasn't going to spoil a panel. It would still happen on occasion. I want to give them a chance to do all the follow-up I need.
- Attorneys may use it to their advantage, and start presenting their case to the jury. Then you start getting objections from the other side, "They're presenting their case."
- I don't particularly have a problem with expansive voir dire. I think judges should give counsel more time to really assess the jurors that they're dealing with. I think you balance that by keeping it within some parameters, but give them the time to pick the jury that they think is best.
- Having served as a trial judge, and now being an appellate judge, I believe that there is no harm in asking more pointed questions. But when it comes to trying your case during voir dire, the judge has to be careful in reining that in. If you wind up with a biased juror, then you later have to retry the case.
- There is a risk, when you're conducting voir dire, of offending a prospective juror. The more questions you ask, the greater that risk.
- I do agree with expansive inquiry, but there's a risk of tainting the jury pool.
- In our county the lawyers conduct most of the voir dire. There needs to be more in-depth training for some of those folks. But I've seen brand new lawyers do excellent voir dire here. They use creative ways to get at people's thoughts and feelings.
- If voir dire is going in a way that is eliciting useful responses from the jurors and eliciting a productive discussion where the lawyers are actually finding things out about these folks, I don't have a problem with allowing it to go on as long as it needs to.
- Time is certainly the primary concern. The other one is that, the longer you keep on doing it, the more expansive you make it, the more likely you are to end up with more issues to appeal.
- A lot of times I'll give the attorneys ample time, but when they start getting into questions like, "What television stations do you watch? What bumper stickers do you have on your car? What books do you read?" I stop it, because then it doesn't get into whether or not they could be fair and impartial. That gets into their political beliefs and whether or not they think the juror will be on their side. I usually let them go on as long as they're talking about their case, the issues in the case, or, if it's a defense attorney, the defenses that they may bring up, how to prove their case, biases, prejudices. That's where I really cut it off.
- To me, expansive voir dire actually compounds the problem. I know there's theories and work going into it. It actually may expose more bias, but I haven't really seen many lawyers who do that well, nor am I sure what the question would be that would expose implicit bias.

- A more expansive voir dire is really helpful to everyone, especially if the judge does it. Clearly the lawyers have a vested interest in skewing the process their way. But if I did an expansive voir dire it's because I felt that my questions would probably not be as skewed as the lawyers', because I didn't have a dog in the fight. As a consequence, I could really ask questions. The jurors, I think, felt more compelled to be forthright with me than they might be with the lawyers. It didn't take very long, but I certainly didn't want the lawyers preaching to the jury.

Jury selection: Efficiency concerns and other disadvantages of expansive voir dire

- It may be different in a civil trial. You have these other concerns. You have jurors who are anti-tort actions or anti-large awards for fear it means increasing insurance rates. Or they're human. There's something in their background. They just don't like these parties. They just don't like one side. Something struck them the wrong way. And you're trying to figure that out on the questioning. If we are going to stay with this kind of framework (and I'm very dubious of the current framework) we're trying to address the concerns that more questions is a good thing. Less questions cannot possibly be a good thing, because we have cases on appeal where you see the bias in the answers, and they're not being removed for cause and sometimes they're not being removed on these peremptories. So, I do think that more questions cannot be a bad thing, except for the expense. It's about number-crunching and getting the cases done. As long as we have a justice system that's driven by that, we're not going to have justice in the courtroom. We have got to find our way past the pressures of efficiency, or we're at the altar of efficiency instead of the altar of democracy.
- I think expansive voir dire could pose a problem. How long does it extend the trial? Time is crucial. On the district court, we have had hundreds and hundreds of cases. They keep coming. They never stop. Time is a big deal, and part of being a district court judge and preparing and conducting a jury trial is asking yourself, "How much time am I going to allow for voir dire so that we can get the jurors in and out?" It's really not about us, although we might think it's about us. It's about, "How long do we want to keep those jurors there who don't want to be there in the beginning anyway?"

Jury selection: Rehabilitation

- Judges have to be willing to say, "You said you were biased. We're going to let you go." You can't really rehabilitate a bias. That's the challenge, and I think that's an education thing we need to do for judges.
- I always found that when the judge is up there, and is basically telling a person, "Can't you really follow the law and be fair?" That's just a loaded question, and it really is somewhat ineffectual. I think judges just need to err on the side of caution. If there is any indication that somebody won't be impartial, it's just safer to get rid of that particular juror.
- If you wind up in a courtroom where you have a judge who rehabilitates anyone who says they can't be fair, those lawyers should have a right to strike and peremptory them.

- It all depends on the jury pool that you have, whether people are going to admit that they have biases or not and whether the trial judge can rehabilitate them.
- Are you okay with the judge doing a little bit of leading questioning of the juror, to say, “The way you said you’ve had a bad experience, can I be clear, you’re not saying that you can’t be unbiased?”—and, in essence, perhaps rehabilitate that juror?
- As judges, we’re always concerned that we may end up with too few jurors, we’re going to need another venire panel, we’re going to delay the start of the trial. We’ve already told one set of jurors how long the trial would go. Now we’re at least another day longer. I think one of the concerns judges always have is striking too many.

Impact of the COVID-19 pandemic on court proceedings

- In our city we have a very diverse population. People in the jury pool are concerned about whether others are vaccinated. They were just really, really concerned. But as I went through the address to the entire pool, when I explained to them what I was doing and how I wanted to not only make sure that they were safe, but me and my staff as well, it allayed a lot of concerns that people had. Instead of putting the 12 people in the box, as I would normally do, we had them in the gallery, and they were spaced out. And it was just a matter of, I think, putting their minds at ease. And once they felt, okay, well, this is going to be a safe process, then they were more apt to serve. And not only did they serve, they were very engaged. And the jury was actually very diverse. We’re adapting during some unprecedented times. We’re doing what we can.
- My courtroom is partitioned. It’s one of the largest courtrooms on the civil bench, and I found that juries have been very comfortable coming into the courtroom, and with my opening statements and everything, they’re very comfortable.
- It seems horrifying to me that we would go to Zoom jury selection if we didn’t absolutely have to. That human interaction to me is a huge part of the trial process and the jury selection process. It’d be mortifying to me to pick a jury by Zoom if you didn’t have to. Desperate times call for desperate measures, so if you have to, you have to.
- I think it’s fascinating that the turnout for Zoom jury selection has been higher.
- Of all of the feedback that I’ve gotten about online voir dire and those type of things, especially from criminal court judges, monitoring people’s behavior during voir dire is their major concern. You cannot tell whether your voir dire member is looking at their phone or looking at the computer screen where the voir dire is taking place. You don’t know if they’re paying attention and what’s happening. You don’t know if there’s someone in the room off-camera, telling them what to say.
- The accessibility of Zoom hearings is outstanding. I had people appear who would never come to court otherwise. I would almost want to do a two-tier system if that’s possible. You’ll get more people to come versus driving to the courthouse, and then maybe from there, once you’ve made your selection, bring them in. People are very, very forthright on Zoom.

- One of the alternatives might be to allow a hybrid, to allow prospective jurors to choose to appear for jury selection remotely and to allow others to come in to the courthouse. That would be a different sort of procedure and there are some technical challenges of doing it that way. Once you've selected the jury, I think it's very important that they be in the same place and in the court and under control.
 - I think you've got to be able to get technology out to prospective jurors so that they can respond, and they won't have to sit for potentially a week waiting to sit on a jury. They can sit at home and Zoom in. But if they don't have an iPad or they have a very old phone, they're not going to be able to do that.
 - In our county, in our northwestern state, we've done maybe three or four virtual trials where jurors were selected and served from their homes, on their computers. We are considering going forward doing our cause challenges with our panel virtually and remotely, so that people don't have to come downtown if they're stuck at home.
 - I believe there have been statistical studies done so far that show that there was a much higher response rate for potential jurors to show up virtually as opposed to showing up in person at the courthouse. It makes perfect sense. It's less trouble, they can pop on their phone or whatever.
 - When the potential jurors are questioned virtually in voir dire, the lawyers are looking at the backgrounds to see what kind of home they live in. Do they have a big bookcase behind them, children's toys, that kind of thing? It gave them a little bit more insight into who that potential juror is.
 - We've had a better juror turnout for criminal through the pandemic, and also civil, since it started up. Part of that is people are so darned bored that they'd be happy to do anything, just to see people and participate, even online. I'd be very curious to see if we get the same response as people go back to their more normal lives.
- It's also been very popular with the presiding judges who we meet every couple of weeks during the pandemic to discuss what's going on. I suspect that, yes, it will go on. We have one county that's been doing virtual grand juries, and they're definitely going to keep up with that. It's a huge county, bigger than some states. For them, it's the logistics of getting people back and forth. The grand jurors have loved it.
- I've picked seven juries now over Zoom. I think I've done 35 Zoom voir dire panels since last year. I see folks in their break rooms at work. I see folks when they're tending to their children in the background. They probably either wouldn't have responded or would have come in and said, "I can't even participate in this process because I can't get childcare," or "I can't afford to come to downtown." I would like to see remote continue, at least as an option, in some cases.
 - Certainly, I think I have a preference for most jury trials, at least, taking place in person when we can safely do that. But I like voir dire over Zoom. I think it works well on Zoom. We've been doing panels of 19. I think we've had a better response rate to the summonses. Part of it is unique to the courthouse I work in, which is in a part of town where it's expensive to get childcare, to get parking. It works so well. It's just more efficient.
 - I do get the sense that jurors are a lot more comfortable when they're being questioned at home. They seem much more relaxed.
 - In our southern state there has been, I think, a common shared interest in continuing remote proceedings to reduce the morning cattle call in each court, with the pre-trial proceedings that don't require live testimony to preserve right of confrontations.

Number of peremptory challenges appropriate for juries of six or 12

- If you are talking about maybe eliminating or reducing peremptories, I think it's incumbent upon the trial judges to really use the for-cause challenges. Sometimes you hear, "Judge, this person can't be fair." The judge is inclined to do what he or she can to keep that juror.
- I think trial judges would be reluctant to rule on challenges for cause in front of the rest of the venire. Someone who wanted to get off, just didn't want to be there, would suddenly discover that "get out of jail free" card.
- In our state we have, for civil trials, three peremptory strikes per side. I never had a Batson challenge, except in the area of gender.
- In our midwestern state we have eight jurors for civil, 12 for criminal. On the civil side, basically three peremptories per side. If there are multiple parties, especially on the defense side, you can ask the court and usually you will get more. If the interests are aligned, they're not going to give you more. If you've got crossclaims, then there's going to be more peremptory challenges. My experience has been pretty good with it. I felt that it's been sufficient.
- Most of our trial judges now are asking for what they call "struck" juries, that are put together either in chambers or at sidebar. You can get one juror who says, for instance in a civil tort case, "I can't be on this case because I don't believe in awarding money damages for pain and suffering." One person says that out loud, and they're excused, and then you get this whole line of other people who say, "Yeah, me too. Me too." I have experienced that as a plaintiff trial attorney.
- There should be unlimited peremptory challenges. Here's why: in all the years that I've tried cases, very few times have there been jurors that have been struck for cause. As a matter of fact, it happened more for me when I was a prosecutor than in the civil litigation context. So, I don't think this issue comes up that often, or should come up that often. I think if you truly are going to try and get a fair and balanced jury, how many times you have to strike them for cause depends on the pool.
- If peremptories were unlimited, you could literally run out of the number of people that are called in for service.
- In my state, for a civil jury of 12, each side gets three. I find that to be about appropriate. In criminal cases, it's a sliding scale depending on the severity of the felony.
- As a lawyer, I always thought I wanted more than three. I thought three was sort of skimpy. Then, as a trial judge wanting to move things along a lot quicker, I thought three was fine. But I absolutely disagree that peremptory challenges should be eliminated.
- Let's say you get two challenges. A lawyer then strikes the only two Black people in the jury box. Well, you've got a Batson challenge coming. It may actually look a heck of a lot stronger than if they had five or six challenges.
- I happen to agree with peremptory challenges. So, I have no difficulty, and never did when I was a trial judge, with the number of peremptory challenges our legislature has given us. I think trial attorneys have a right to excuse a juror that they believe will not be fair, even if they cannot make the argument for a challenge for cause.

- I would say expand the pools from which you draw potential jurors. If you get a greatly increased, diverse panel, then I think peremptory challenges become less important. You've got a very diverse pool and you're not going to be able to use all your peremptories to get rid of all the people that you think are objectionable.
- The attorneys are allowed to ask for an extra peremptory, and I've always granted it. There's no reason not to grant it, especially if it's not based on race. Maybe there's a question whether they should be excused for cause, but a lot of times I let the attorneys agree themselves. After one side does their voir dire on certain jurors, I'll mark it on my sheet. I'll have red X's and a question mark, and I'll say, these people definitely are going off the jury, and these people are a question marked depending on what happens when the other side gets up. But I also throw it out to the attorneys. I say, "If you all want to get together and figure out which ones you agree to already, I'll excuse them all for cause." That part isn't an issue at all.
- A more expansive voir dire is really helpful to everyone, especially if the judge does it. Clearly the lawyers have a vested interest in skewing the process their way. But if I did an expansive voir dire it's because I felt that my questions would probably not be as skewed as the lawyers', because I didn't have a dog in the fight. As a consequence, I could really ask questions. The jurors, I think, felt more compelled to be forthright with me than they might be with the lawyers. It didn't take very long, but I certainly didn't want the lawyers preaching to the jury. I'd say 75 to 80 percent of the cause challenges are agreed to by both sides. And then it's not usually a matter of great debate, as long as we have enough jurors.
- In our southern state, in order for them to preserve the issue they have to not accept the jury. I've had one attorney in 12 years probably do that. And every single time they'll yell and scream and stomp their feet about how they want this juror excused for cause, and then I deny it. And then they'll use a peremptory. And then they'll either ask for an additional peremptory, or they'll approve the panel. Maybe that's why we don't see them appeal.

Abolish peremptory challenges?

- We should have no peremptories. All of the studies show that we're inept at deciding who is or isn't going to be good for us, and that the people we deselect come to appreciably the same decision as the ones we select.
- If we get rid of peremptories, we have to make it easier to have a cause challenge.
- I don't see how you can eliminate peremptory challenges without lengthening voir dire significantly. Because you sit there thinking, "I got to get this jury picked. I got to get it picked today or I got to get it picked by tomorrow. I've only got 30 more people in the pool, and I'm concerned. Can I give this guy an exemption? If I do that, then I got to give her an exemption?" All of those very pragmatic things that are going through your mind.
- Appeals would be a lot easier if we didn't have peremptories. It would make the job a lot easier. So, it wouldn't hurt my feelings if it went away.
- I do think we should start getting rid of peremptories for a lot of reasons. One is that, I think, it's the only sanctioned process in our entire legal system which allows people to act without reason. Nobody has to give a reason, and we sanction that. So, one or two peremptories for me, perhaps, so that that can be done. But other than that, I would say, no.

- I've been a general jurisdiction trial court judge in the most remote, rural parts of our state. Whenever I hear someone talk about doing away with peremptory challenges, it suggests to me that they come from an urban jurisdiction, where the reality is that most people don't know anyone else involved in the case, and most people have no preexisting knowledge of the circumstances that led to the case. In the extreme rural areas where I served as a trial judge, that premise is simply false. People come to the courtroom knowing everyone involved. Picking a fair and impartial jury is a tremendous challenge in that area. Ultimately, the peremptory challenge in the rural area serves as the ultimate safety valve of getting rid of someone who says, "I know so-and-so, but I can be fair."
- In our state, we had a lawyer/legislator, on his own, issue a bill to eradicate peremptory challenges, and it got pushback from everyone.
- Does the idea of abolishing peremptories mortify anybody else who ever tried cases? You usually had that crackpot on the panel that you couldn't get rid of with a challenge for cause, but nobody wanted him on the jury. You almost wanted to have a joint peremptory challenge by both sides. If those people have to stay on because we're out of peremptories, it's like, "Yikes!"
- I can't ever imagine letting the judge pick the jury that I wanted to have judge my client. I can't imagine getting rid of peremptories.
- "No peremptory challenges" is a brave new world. Sometimes, it's just something about a person that causes the lawyer or the client to not want that person on their jury. There were a number of trials that I've presided over where I would have, as the judge, not put that person on the jury, and that person wound up hanging the jury. Sometimes it's difficult to quantify it within the standards that one would normally apply.
- I think maybe the better balance is to give more direction with respect to for-cause challenges. Be more willing to consider excusing people for cause, and then you may reduce the number of peremptory challenges. But to totally get rid of them, I would have great concerns about that.
- Peremptory challenges serve a purpose. There are good reasons to exclude some people.
- I would reduce the number of peremptories, at least for civil trials. You're trying to eliminate people sometimes not because they have a bias, like a racial or gender bias, but you're trying to eliminate the people who aren't going to go your way. So, if you're a defense attorney, it's like, "I want to get rid of the plaintiff's jurors." If you're a plaintiff, you want to get rid of defense-oriented jurors. So, I suppose if you eliminated some of that and allowed it just to have an ordinary mix, maybe that would be a fairer result.
- I've been an appellate judge for 21 years, and it's really rare to reverse a trial court judge, at least as Batson is applied in my state. And it's frustrating, because sometimes you read the transcripts and you think it looks like there was bias, but you have to give due regard to the discretion of the trial court judge. So, there's some superficial "appeal" (no pun intended) to just eliminating peremptories, and then we eliminate the whole Batson problem.

Batson challenges in general

- In our midwestern state, when I was a trial judge, I raised the Batson issue myself more than once. It didn't require a lawyer. Maybe I'd have a venire with 40 people, and I had three Black people who were stricken who were not convicted felons, were not anybody who lied about their background, or were otherwise homogenous to everybody else in my venire. I would tell the prosecutor, "You've stricken two Black men. They both have jobs. They both are married. They have children. None of their children are in trouble. And we have selected five white people with a similar background. I think if you strike another Black person, you're going to have to tell me why you're striking, and then we'll have to go back to the other two Black people, because I'm thinking that you are creating for me a prima facie case of racial discrimination." And they're like, "Oh, no, no, no Judge." Of course, they didn't strike any more Black members, because they didn't want to go back and make a record and have me say that I thought their other reasons for striking people were pretextual. It takes an act of the judge, I think, to do that kind of thing. I still do like peremptory challenges, but I am almost convinced after listening to today's program that Batson's teeth need to be sharpened.
- Next year will be my 40th year practicing law and about the 25th on the bench. As an attorney, I have never, when I made a Batson challenge, had it sustained. As a judge, I've never sustained a Batson challenge. Perhaps there's never been one that should have been sustained, but that seems a bit unlikely to me.
- We have a problem. If, systemically, you have juries that are not representative, we need to revisit that and think about whether or not we're really doing the right thing by taking this case by case, because that's what Batson does. What does it say about our system that, in the most blatant case, you've got to get all the way to the Supreme Court for them to say, "Well, if the same prosecutor, six times, keeps prosecuting the same individual, and every time he keeps all of the Black people off the jury, we have a problem"? I mean, how often do you need to say that before you say, "We cannot continue to only look at process and not at the outcome"? I'm certainly open to something new. But the more we try and solve the heart of the problem—which is either express or implicit bias—by trying to come up with ways to kind of clean it up, rather than saying, "We're just not going to let you do it at all. We're just not going to allow it. Period. You don't get peremptories. If there's a problem with that jury, you tell me what it is. It's got to fit the standard for a challenge for cause."

Batson challenges: The “objective observer” standard

- We have some recent information coming out of our southwestern area showing that the reality of peremptory strikes is that the prosecutors tend to strike people of color at a significantly higher rate. Criminal defense lawyers and civil plaintiff lawyers tend to strike white people at significantly higher rates.
- In our midwestern state, if it looks like the party is exercising all of their peremptories to achieve an impermissible result, like taking all members of one religious denomination off the jury, then we can review it.
- Although I find the question of interest and significant, it is only really about the continued efforts—some latent, some not conscious—that seek to ensure that a jury looks a particular way, because that's what the purpose of the challenge is. What's the point of the peremptory challenge? You're trying to keep off someone who you think is not going to be a good juror for you.

- The standard is so stringent under Batson that it's toothless. I think the better move is changing the standard. And it'll be interesting to see how that "reasonable person" approach will work, or whether we need to come up with some third version to address the problem. But I think just being aware of explicit as well as implicit bias probably won't help get around the Batson standard, because it's just too high a bar.
- It has to be done on a group basis. Individual judges can't do it.
- In the environment in our county, the bigger problem would be that the lawyers work together all the time. The prosecutors and public defenders work together all the time; the private defense bar and the prosecutors work together all the time. It would be a very difficult thing to do this on a consistent basis, to accuse another lawyer of discriminatory intent. I think it's hard for lawyers to do that. And, since the judges see the same lawyers all the time, I think it's probably very difficult for the judges to do that as well.
- Perhaps this is just further proof that trial judges have the most important and most difficult job in the whole system.
 - Oh, they do. No doubt about that.
 - Absolutely.
 - They get thirty seconds to make a decision that we appellate judges can mull over for three months.
 - And we have law clerks to help us make the decision, where a lot of times the trial judges, especially in the rural areas, do not have a law clerk, because of budget concerns.
- It's incumbent upon the trial judge to ensure fairness in the jury selection process.
- It's not just the words, it's actions. Look at the case of *Flowers v. Mississippi* [139 S.Ct. 2228 (2019)] and the prosecutor's repeated actions of striking jurors, in case after case after case. It's not just words. It's looking at objective action. You shouldn't just sua sponte assume necessarily that there's evil intent. As an attorney for our state, in a civil case, I was accused of a Batson violation. There was truly an objective reason for my challenge. It was a case involving the state being accused of theft inside of a prison and the potential juror was regularly visiting someone incarcerated. That's objective, but anyone can be accused of a violation. We all have some sort of biases. It's a question of whether we are acting upon them.
- If the judge doesn't recognize in himself or herself that he or she has bias, then I just don't understand how there can be an "objective standard." I think this relationship between the judge and the potential jurors and the lawyer during questioning becomes a symbiotic relationship. I just don't understand how we're going to get an objective standard out of that.
- I don't believe there is an objective standard. I have concerns about that.
- With respect to the objective observer standard, I understand why it's suggested, and it is utilized in other jurisdictions. Judges are reluctant to declare that a lawyer's conduct is racist or perceived as racist, or motivated by something less than a desire to see that justice is served. How do you stop it from becoming subjective? I think that is a valid concern.
- In our southwestern state we have endorsed the objective standard. I do think that's probably the best choice that we have.

- You don't have to look at a lawyer and say, "I think you're lying to me, I think you're racially motivated." You can say, "Look, as an objective observer, it doesn't pass muster." And it's not the same thing, and I think it will allow judges to exercise greater discretion. I just think it's critical. If we got rid of peremptories entirely, then we would have to be even tougher on challenges for cause.

Challenges based on implicit bias

- In our southern state, I'm a coordinator for the judge training throughout the state, and we've been incorporating implicit bias training for the judges. Because obviously, whether it's a bench or a jury trial, we have innate biases that we bring with us, whether it's conscious or subconscious. So, it's something crucial.
- The evidence is pretty compelling, but it seems to me that Washington State's Rule 37, as I understand it, goes too far in the opposite direction. As I understand it, it says if any decision to strike is infected by implicit bias, then it's due to be prohibited. But the defining characteristic of implicit bias is that it is insidious.
- People are going to be racist. If they're racist, they don't hide it. People have biases. We all do. And the funny thing about it, coming from the criminal bench (where I've served for seven years now, four and a half on the civil bench), people were more inclined to tell you the truth coming in as criminal jurors. "I can't stand police officers." I found prosecutors were knocking off Black jurors. I said, "Do you think Black folk have the plague? You guys are knocking off Black jurors as if they have the plague."
- I think both bench and bar also might suffer a bias, namely that there is a distinction between criminal and civil proceedings and juries in particular. We have data that shows that, even in the civil trial courts, there is a bias in evictions, family, property divisions, personal injury verdicts. There are disparities in judgments and jury verdicts and awards when there is a Black plaintiff, a woman plaintiff. It's not just predominantly in the criminal courtroom.
- On the civil bench they do have biases towards big verdicts. A lawyer gets up and says, "Look, this is a big case, we're going to ask for millions." You see eyes roll. In that situation, obviously you have a problem.
- In our midwestern state we elect our judges, from the supreme court down to our municipal and county courts. If enough judges started enforcing Batson as I believe they should, based on looking at transcripts and my experience as a trial attorney, it will be an issue for them at election time. If you talk about implicit bias, a little voice in your head will tell you, "This is going to be a problem for me in certain areas of the state." It's not appropriate, but it's a fact of life and I see it a lot.
- Before you can find a judge who is willing to enforce it, you have to find a judge who believes that there is an implicit bias. I'm the chair of our statewide jury instructions committee. It took us a very long time to convince our colleagues to adopt an implicit bias instruction, and it is still not mandatory.
- I do grant a lot of cause challenges, for all sorts of reasons. But when we're in the area of implicit bias, that's a whole different game. That's why I think that Washington State's Rule 37 is really helpful, because it takes us out of our own view that somebody is intentionally trying to engage in prejudicial and biased behavior. I think that's really helpful.
- I think that for a long time, in the courts, we have kind of avoided taking the positions that we should take, and I think because of what is evolving now, that we are going to have to take more responsibility.

Better jury management to enhance the fairness of civil jury trials

- Fewer people are actually showing up, and then the ones that show up don't want to serve. Quite frankly, many citizens, majority and minority, are educated, by watching Law and Order on TV, on the magic words to say to get out of jury service. Like "I cannot be fair and impartial." Some do not view jury service as a civic responsibility.
- When we've engaged in campaigns about the importance of jury service, it has increased the number who serve. After their service, when they're given that opportunity to say something, they indicate that they're happy that they did so.
- One of the regular patterns we see is that people will not be enthusiastic about participating in the jury system, and then once they have, they are very enthusiastic about it. Maybe it's time to get into the public relations business again.
- When I was running voir dire, every time people did not want to serve. I promised them that, if they served, it would be one of the best experiences that they ever had. At the end of jury service, when I talked to them, they all said the same thing: "You were right, Judge. This is really wonderful. I had so much responsibility. It was a grave responsibility, sitting on a murder or rape case, or even a drug case. But I would serve again." I have never had anyone who said they would not serve again.
- You need people to encourage you to feel that your life, and your voice, matters, and that it is not only a privilege, but a duty and an obligation to participate, and that this is what citizens do in our country. It is, in my view, impossible to succeed without community advocates who will, themselves, narrate this message. Yes, there is hardship. I agree that there is. But you have to have a sense of unity, empowerment, that this is part of what we do because we are part of this society.
- We have made efforts to use more than just voting lists, the phone directories, driver's license records, state ID cards that are available to people for each of our jury summonses.
- In our southern state we were using the voter registration rolls to get our jurors. And of course, with the volatility of what we see nationwide, you never know when folks are going to be excised off that roll. We're successfully now going to driver's licenses. So, we have more people of color, more women, more diversity on our juries. And it is absolutely great.
- We draw from several different sources, and we already do the things like the text messaging and the email and the follow-up and that kind of thing. I think we're doing fairly well, but I don't want to oversell it because I think that there are improvements that can be made.
- I had a jury very recently where there was a motion to strike the venire for not being representative of the community. Our standard is very high. You have to demonstrate an irregularity with the jury summoning process. But there was no irregularity with the summoning process. I think the problem is not the process. The problem is that the system works as designed—which is that it disenfranchises, for example, Black jurors. That's been my experience. I've only been a trial judge for four and a half years, so I've only had, I think, 40 jury trials so far, but in my experience, it's the same pretty much every time.

- Our large mid-Atlantic city has a comprehensive list beyond just driver's licenses. In the city, for instance, most people don't drive because of the expense of having a car and there's no place to park. Having more expansive lists gets more people an opportunity to serve as jurors.
- In our state, forever, it was just that if you were registered to vote, that's how you ended up on a jury list. So people were intentionally not registering to vote. They were giving up a right in order to avoid what they saw as a burden. I go out to register people to vote and they'll say, well, I don't want to have to serve jury duty. Is this going to make me serve jury duty? One local judge has decided to expand the lists to include people who have a driver's license.
- In our state we use not only driver's license and the voting rolls, but taxpayer lists. That does provide a larger pool. Everybody who's filing taxes in our state is on one of the lists and could be a prospective juror.
- We use driver's license lists, and we used to use voter registration, which you could see would be a completely different jury pool. I've had 16-year-olds or 17-year-olds show up for jury duty. I tell them what a great experience it would be for them. They're in high school. It's crazy to think that they're showing up for jury duty. It's a much younger, much more diverse jury pool with the driver's license lists.
- Using not only driver's licenses, but also voter rolls and any other lists that would give a larger number for the jury pool, that would enhance the fairness of the jury system.
- We started off with lists of property owners. That excluded a whole lot of people. Then, they went to voter registration, and that still exclude a lot of people. Then we went to driver's licenses.
- We have vehicle registration and driver's license and property records to create what we call the "joint list." They're working on accessing a number of other lists: state tax lists, welfare lists, all of those kinds of things where you can mix them, so you can't identify who was who. The technology is there. There are some confidentiality provisions they would run through. But I would think that would really cover the universe, mostly, of probably eligible jurors. Updating yearly seems a lot easier these days, with our technology, than it would have been a long time ago. Once you create that joint list, I would think it wouldn't be that difficult to update.
- Our response rate is about 38 percent for the people who are summoned and who actually show up. I think the people who do not respond are those who either don't get the summons or are not inclined to appear anyway. Or it's more of a hardship on them, and that might be because they're a caretaker for a sick or disabled person. It may be because they can't afford to miss work, even to show up and say, "I can't afford to miss work."
- My anecdotal experience has been that Zoom increases the response rate. We had a pretty good response rate, but it wasn't any more diverse than before. It might have been more diverse in terms of youth, and also people who couldn't necessarily take a whole day off of work to come downtown to the courthouse and pay for parking and procure childcare, but it wasn't any more racially diverse.
- One of the things we do, in order to respect people's time, we have calling systems with computerized updates so that they don't waste the whole day. You're giving a juror number, for instance, and you call to see if your number is needed the next day. Oftentimes you're told not to come today, but to come later, so you're able to go to work, engage in your activities, etc.

- Technology access is something that we try to address pretty early on. We send out this email questionnaire. When I get the list—because we have a juror portal that jurors respond to after their initial snail mail or their actual hard copy that they receive in the mail, where they enter their email address—almost everybody in our pools has had an email address. That's a good sign. For the folks that don't, we call them and send them letters. We do everything we can to engage them with the process. We tell them, “You can come in. You don't have to do this remotely. You can come down to the courthouse. We want you to participate in this process.” What we find is that, even the jurors who don't initially provide email addresses through our portal, when we phone them, they'll say, “Oh, yeah, I have an email address. I just didn't provide it.”

We have had jurors come down to the courthouse. We've made tablets available to them. During the height of the pandemic, we would say, “You can come to our law library offsite and sit in a room, socially distanced from everybody else. We'll give you the equipment to participate in the process to make sure you're not disenfranchised.” I agree it's a challenge, but at the same time, I think there was a lot of angst about technology access issues.

- The culture of the courtroom has changed significantly. The courtroom environment, the jury sitting in a room to deliberate and collaborate towards the ends of justice, that culture, that environment is at risk to be lost if any part of it, whether in hybrid proceedings or totally remotely, is removed. That engagement, that sense of civic duty, the participation in the exercise for justice, people coming to the courtroom seeking relief, that is going to be changed significantly. And that's something that we need to keep, first and foremost, as a top priority when we're making any decisions about how we proceed going forward.
- The overwhelming consensus of our trial judges in our jurisdiction is to favor the questionnaire. I'm not aware of any judges who pooh-pooh that idea and say, “No, we're going to do it in court, and I, and I alone, am going to do the questioning.” The questionnaires have really caught on, at least in my state, and are kind of all the rage. And most trial judges are quite proud of their standard questionnaire, and the carte blanche that they give the attorneys to supplement and add follow-up questions, as necessary.

Jury service for convicted felons

- I was a trial court judge for 22 years, and now I'm an appellate judge. I have never thought that a felony conviction should prevent someone forever from being able to serve on a jury. I would go further than that. I think felons who have completed their sentence ought to be able to vote, but some places don't allow them to do so.
- There are re-enfranchisement clinics, and even the judges have been included in setting up these clinics. In some states 10 percent of the population is disenfranchised, and that's concerning.
- I do believe that felons should have the right to sit on the jury, because we always say we want individuals to be productive citizens. To me, part of being a productive citizen is voting, paying your taxes, and being able to serve on the jury. There's a lot of individuals who have served their time and learned their lesson from that first incident. They've gone on 20, 30 years without any interaction with the court. So, I do believe that individuals should be able to serve.

- I think most judges wouldn't mind felons to come and serve on juries if they're not violent criminals. The question is whether or not we should take an active role and lobby for it. I don't think we should.
- In at least one state, convicts can run for Congress. They can go to law school. They can own conglomerates. Yet they can't vote, and they can't serve on the jury.
- Our legislature is perceived to be reducing participation, not just in jury trials, but even in voting. It really does take a willful commitment by lawmakers to pursue this and preserve the spirit of full engagement under the general umbrella of civic duty.
- I think if we pare down which felonies count as disqualifying felonies and put a time limit on it, then I'd be all in favor of it. But I'm not in favor of just saying that once felons are done with their sentence, the day they get out of the prison, they're eligible to sit on a jury. That causes me some concern.
- I thought the suggestion about differentiating between nonviolent felonies and violent felonies might have a chance. That one might be sellable, but I'm not sure about that.
- I would advocate that you should just go to the legislature, explain, "We need more jury pool. Bring them on."
- Our southwestern state has a restoration-of-civil-rights statute. It is a process, and it can be initiated two years after discharge from all the encumbrances of the criminal conviction. Two years after discharge, the state gets to say whether they object. The state rarely, rarely objects. It's very, very rare that it happens. The restoration of civil rights, of course, would also bring with it the ability to vote. So the vehicle already exists.
- As judges, I think we have an obligation to let our legislators know that what we're learning about, by attending this Pound forum, is so significant. That's why you have us here, to learn about all of these new ideas and learn about the science that's actually been conducted. I do think that we have an obligation to report this kind of thing to the legislature. I, for one, now that I'm more educated on it, am going to make sure that happens.
- Our supreme court chief judge does provide an annual report to the legislature, and in the course of events, does make suggestions to the legislature on these kinds of matters. I would work within the structure of our court system to do that.
- The guy's done 20 years, he's now out. You want to let them serve on a criminal jury? I don't.
 - What about the whole concept of rehabilitation? Then you don't think it exists?
 - I'm not suggesting it doesn't exist. I don't want to take the chance. We have a large enough jury pool. We don't need them. They could be replaced with the same demographic. Now, I have no objection to them serving on civil juries. My objection is to allow a violent felon to serve on a criminal jury.
- I highly doubt that the prosecution would ever accept one if we still have peremptory challenges.
- I'm reluctant to have the courts get involved. I think that's something that needs to come from the bar. I don't think the courts should be advocating for statutes on the propriety of that, one way or the other.
- If the judicial branch is a separate branch, why do they need the permission of the legislature to say who should be a juror, if it's a separate branch of the government?

Jury service for non-citizens who are legal permanent residents

- I think opening jury service to the legal immigrant, the legal permanent resident, is an idea that's intellectually pretty easy to justify. But the political problem is that many people will portray that as just the first step towards opening it to all immigrants, legal or illegal. So, I think it's going to be really hard. I think it would be very difficult to get that through our legislature, because it would be portrayed in a in a partisan way, even though we're supposedly nonpartisan.
- I go back and forth on this issue, but I don't see that getting much traction in a border state like mine. I think a lot of it is related not so much to juries as to other civil rights. But once you grant what would be viewed as a civil right, you're not far from granting voting rights. That would be what people would be concerned about.
- I think in our midwestern state it would be a very difficult sell. It took us a long time to make some inroads into restoration of rights via expungement or sealing the process. We've just recently been able to expand the universe of folks that can have something sealed and some restoration of rights.
- I have always thought of jury service like voting: it's a privilege and responsibility of citizenship. I suppose somebody might be able to persuade me otherwise, but I just haven't thought about it in any other way.
- I can't imagine our legislature doing that.
- Under our statute, one of the qualifications is that you have to read, speak, and understand the English language. Maybe some statutes would have to be modified to allow that. But practically, I think it's difficult.
- The issue of being able to speak, read and understand English adds a layer of complexity onto it, because a lot of people can speak, read, and understand English, but they don't understand it well enough, or not in such a sophisticated way to be on certain kinds of cases. If you speak, read, and understand English, can you be on a car wreck case? Maybe. Can you be on an intellectual property case? I don't know.
- On the language issue, I think technology will get us there at some point. Look at the UN, where they're able to have a meeting in many languages. But it will take technology, infrastructure, and money to get to that one.

ADDITIONAL TOPICS DISCUSSED

Juror pay and hardship

- In our southwestern state, one of the things we did a while back, that's been very effective in being able to get people to serve, was to create what's called the "lengthy jury trial fund." And it pays up to \$300 a day if the trial goes beyond a week. So I can look at somebody who says, "I'm not going to get paid," or whatever their situation is, and know that that's a fairly significant salary. We can get folks who otherwise wouldn't be able to serve at \$12 a day, as long as it's a longer trial.
- Twelve dollars a day. That has been something that we've been talking about. The court doesn't control it—it's the legislature for funding. But we have long-term jury service pay that I think goes up to \$24, \$25 or maybe even more than that. Unfortunately, long term doesn't kick in until after day three of a trial. Most people, if

they're going to have economic problems being away from work, they need that immediately in the first few days. There's some talk about trying to get this before the legislature to explore ways to identify people who need more of that elevated rate up front in the first few days rather than waiting until day three or four, or when they're gone.

- We just have to always remember that for some people, that in-person presence for jury selection is an incredible hardship. Whether they're chosen or not, it's a hardship. And so, although I very much like anything that increases the pool and ensures that everyone has an ability and an opportunity to serve, we have to recognize how difficult that can be for some people over others. In the city, we all think. "Just hop on a subway. What's the big deal?" For some people, it is a very big deal, especially in the pandemic. You know, we're very nervous.
- In terms of having more diversity and more people available, even in longer trials, doing half-day trials might help. I tried a case once where we did that. It was just half-days, with only one break, but no breaks for lawyers to argue and such. All of that would be done outside the jury in the afternoon. It still allowed for four or five hours. You work through lunch, and they're done by 1:00, and the jurors can go back to work. It allowed for many more people to be on the jury. The jurors liked it, and employers liked it. Is that part of the national discussion?
- I'm in a rural state, and socioeconomic challenges among jurors are really the dividing point. A lot of jurors just can't do it. It's a real financial hardship. They tend to get excused.

Trial practice

- As an attorney, I think you have to adjust according to who your jury is. You have your case. You can't change your facts, but certainly, I think, as an attorney, you can change your approach. You can speak to the jurors, like speak their language, so to speak. Know your audience, no matter who your juror is.
- Know your audience and be culturally aware. You're trying to persuade these people.
- Ten years ago, when the attorney would get up and look at the jury and say, "This is going to be a low-tech presentation, I don't know how to use all this technology," the jurors would chuckle and it's okay. These days, they don't chuckle. The reaction is, "Why don't you know how to use this? We do. You should be able to do that." It has an impact.
- When dealing with jury selection, there is such a broad range of experience in handling voir dire among the attorneys. That impacts greatly what information they get from the jurors, to know what biases those jurors may have. If you just ask someone, "Do you have any biases or feelings about this kind of case that may prevent you from listening openly and fairly?" and the juror says, "Yes," oftentimes there's little to no follow-up on that. I've seen some lawyers do it very, very well. I've seen some lawyers completely miss things, and then heard discussions from jurors later where I saw that those lawyers messed up with this person.
- The attorneys who are trying the cases are not reading the jurors—what might be called the new jury pool, the younger, more diverse population. They're not changing the way they try cases or the way they do jury selection. I think they need to be more aware of the jurors. Read the room, know who your audience is. I think that's the biggest change I've seen, that they're not adjusting to the new jury pool.

Special juries

- If special juries exist in our state, I'm not aware of it, I've never heard of it. I don't think we have it. I watched an asbestos trial one time and I've heard horror stories about trademark infringement cases where it's so technical that you question whether a representative person from the community would be able to understand what's going on. I think the danger is then, if you were going to start doing that, where do you draw the line? Is medical malpractice too complicated? Is a products liability case too complicated? I don't know where you start drawing that line, but I think there are cases that are complicated enough that your average layperson isn't going to be able to understand it. But that's where good lawyers come in. It's part of your job as a good lawyer trying one of those cases, just to make sure you're educating the jury along the way. I'd still be a fan of the representative jury.
- We don't have the blue-ribbon juries in our southwestern state that I'm aware of. We've never allowed parties, that I'm aware of, to stipulate to them, though it's been discussed. I think that's a matter for the parties to say, "We're going to go outside the court system and we're going to pick some experts to do this." That's what arbitration certainly has led to. I think it's fraught with problems otherwise.
- My fear is, if you take a case out of the jury trial, then they're going to try it to me, and I don't have any specialized knowledge. I'm going to be just as lost as the average juror would be, and I don't have any help. So, that's always kind of mortifying too.
- I've never heard of special juries, and my gut reaction is that I'd be surprised if the lawyers would like it, because I know if I were trying the case, I'd want to be the one to educate the jury through my witnesses. I don't want them pre-educated. I can just imagine the lawyers fighting over what type of information they should be given beforehand to get educated.
- Unless a special jury was stipulated and agreed to, I think you would certainly run into parties complaining that, "I don't have a jury of my peers, I don't have a jury that's representative of the community," etc., etc.

POINTS OF CONVERGENCE

In the discussion groups, the moderators were asked to note areas in which judges' thinking on issues raised in the Forum appeared to converge.

How many jurors a civil jury should have, and why

- Many judges favored 12 jurors, in the interest of more diversity and better decision-making.
- Few judges thought there should be smaller juries for civil cases.
- The larger the jury, the harder it may be to fill it from a venire.
- Several judges noted how few civil jury trials there are. That may offset concerns about the cost of larger juries.
- Some states require unanimity in civil jury verdicts, others do not.

Effects of jury diversity

- The perception of diversity increases the likelihood of the perception of a fair result.
- Diversity helps bring legitimate understanding, and it diminishes stereotyping.
- Diversity in general is important for a full and fair discussion. It brings out different viewpoints.
- Judges gave specific examples of diverse juries having a broader frame of reference to evaluate testimony. The effect is positive.
- Diverse juries seem to develop bonds quickly. That tends to make it easier for the jurors to listen to each other and make sure every voice is heard.
- Some judges believe there is good diversity of representation in their communities, but other judges felt the juries were not representative of race/ethnicity.

Age disparity in jury pools

- Judges expressed concern about differences in age. Older jurors tend to be overrepresented, and younger jurors tend to be underrepresented.
- Virtual participation in jury selection increases broader participation and access, and works toward evening the age disparity in venire panels.

- Understanding the importance of jury service continues to be a struggle for young people.
-

Degrees of diversity in jury pools in urban and rural areas

- In rural areas, there is typically less diversity in the communities, and hence in jury venires. Urban areas are more diverse, and thus they produce more diverse venires.
 - Some judges have seen obvious racial discrimination in rural areas, with peremptory challenges being used to eliminate diversity.
 - In some areas, selection of a jury that represents the community is not as difficult because either (1) the majority of the community is minority or (2) the community as a whole is white, with little racial diversity.
-

Judicial diversity

- “We cannot overstate the importance of having a bench that is diverse.”
 - The presence of a judge of color can make a difference in how the lawyers and the venire act go about the selection process.
 - There is less judicial diversity in jurisdictions where judges are appointed than there is in areas where they are elected.
-

Jury selection: Expanded voir dire

- Some judges do not take enough time to explore and address potential bias.
 - Expansive voir dire is helpful to provide an opportunity to investigate potential bias.
 - Expanding voir dire might facilitate resolution of issues on appeal, but some judges expressed doubts that expansion would provide a better quality record and better analysis, and would make a real difference.
-

Jury selection: Efficiency concerns and other disadvantages of expansive voir dire

- The major disadvantage to expanded voir dire is that it takes longer, and therefore drains court resources.
- Expansive voir dire may expose additional issues for appellate purposes—the more questions the judge allows, the more likely it is that an error will be made.
- Expanded voir dire adds pressure on trial courts and on jurors. There are hundreds of cases coming through the pipeline all the time, and the jurors don’t want to be present any longer than they have to be.

- Some judges believed that lawyers were not trying to get fair juries, and should not be given more latitude.
- If attorneys have more time to conduct voir dire, they may start presenting their case to the jury, so there should be some parameters to keep attorneys from going too far afield.
- So long as the voir dire is productive, there's no reason to have very rigid time limits on it.
- We should find a way past concerns for efficiency.

Jury selection: Judges conducting voir dire

- Some judges believe only judges should conduct voir dire.
- There are potential issues with having a judge lead the voir dire or be involved in rehabilitating witnesses.

Impact of the COVID-19 pandemic on court proceedings

- The pandemic has complicated jury management because of potential jurors moving, living in temporary housing, etc.
- Many judges attending the Forum had had experience with virtual jury selection during the pandemic, and considered it a positive step.
- Virtual jury selection involves less drain on resources, leads to better response rates, and is more manageable for venire members.
- There was opinion that virtual jury selection makes juries more economically representative.
- There are benefits to in-person jury selection that cannot be precisely duplicated with virtual jury selection.
- Concern was expressed that, in virtual jury selection, the judge could lose control and awareness of influences and activities that could impact potential jurors.
- Some judges favored virtual proceedings for some limited uses, but not for actual jury deliberations.
- There is some sentiment for continuing remote proceedings for jury selection after the pandemic ends.
- Some judges favor returning to in-person proceedings, with some use of the technology courts have, of necessity, learned about.
- Some potential jurors do not have good internet access, and the lack of access should not limit participation in a jury.
- Some judges would prefer socially distanced, in-person juries, not remote.
- Virtual jury selection can give attorneys more insight into the jurors, because they are able to observe them in their home environments.

- When a challenge for cause arises, it may be better to resolve it in person.
 - There are reservations about the idea of fully virtual trials.
-

Number of peremptory challenges appropriate for juries of six or 12

- The judges generally seemed happy with the number of preemptory challenges that are presently available in their jurisdictions.
 - Most judges supported a fairly small number of peremptory challenges, perhaps two or three total. There were varying opinions on what to do about cases with multiple defendants.
 - Even a single preemptory challenge can be sufficient to strike all minority jurors or jurors of color from a jury.
 - Some judges agreed with suggestions that peremptory challenges should be abolished.
 - Most judges were resistant to the idea of eliminating preemptory challenges entirely. There was opinion that eliminating peremptories would take all power over challenges from the parties, and give it to the court.
 - There was some opinion that appeals would be simplified if peremptory challenges were eliminated.
-

Batson challenges in general

- Some judges think courts should be more activist in raising bias issues sua sponte.
- Some judges believe there is a need for a new standard for bias challenges, because the *Batson* standard is so stringent that it is effectively toothless.
- It is harder to make *Batson* challenges in civil cases.
- Some trial judges who have served in trial courts for more than 20 years reported that they have never sustained a *Batson* challenge. Other judges have seen *Batson* challenges sustained or overturned.
- Some judges believe that, in light of the evidence for implicit as well as explicit bias, courts should be more willing to find discriminatory exclusion in the exercise of peremptory challenges.
- Other judges believed that, while there should not necessarily be a greater willingness to find discriminatory exclusion, there should be more questioning of, and discussion with, the challenging attorney.

Batson challenges: The “objective observer” standard

- Some judges felt that the objective observer standard could get traction, because it is similar to other tests used in civil litigation, and appellate judges might find it easier to apply.
- Some judges felt that the objective observer standard would be easier for attorneys to use, because it would be less offensive to opposing counsel. It could also be less difficult for judges to entertain *Batson* challenges against attorneys who appear before them frequently.
- Some judges felt that the objective observer standard could make a greater difference if *Batson* challenges are reviewed by appellate courts de novo.
- Some judges thought there should be more information on how well the objective observer standard works before they decide to use it.
- Other judges strongly opposed the objective observer standard, and thought the existing “reasonable person” standard suffices.

Challenges based on implicit bias

- The existence of implicit bias is not yet widely accepted.
- The first step in implementing challenges based on implicit bias must be to persuade judges that it is a problem.
- Enforcing challenges based on implicit bias in areas where judges are elected could be a problem at election time.
- Recognition of implicit bias would have to be done by judges as a group, which would have greater impact and offer more protection from political forces.

Better jury management to enhance the fairness of civil jury trials

- The achievement of a diverse jury hinges on minority representation in jury pools.
- It is important to have larger and more diverse jury pools.
- It is extremely important to use up-to-date and comprehensive juror lists, which should be expanded beyond driver’s license lists.
- There should be greater efforts to increase the summons response rate.
- Extended pre-voir dire questionnaires for those who are summoned could help in obtaining information without consuming court time. Court personnel may be resistant to this practice.
- Courts might also utilize *post*-service questionnaires to identify better methods of jury management.

Jury service for convicted felons

- A felony conviction should not prevent jury service.
- The bar on felons for jury service disproportionately affects the broadness of the potential jury venire. Allowing felons who have completed their sentences to serve would improve the representativeness of the jury pool.
- In considering this issue, policymakers might distinguish between violent and nonviolent felonies.
- Some jurisdictions have statutes governing restoration of civil rights to restore the right to vote at some point after release, and those could provide guidance for policymakers.
- Some judges feel strongly that convicted felons should not serve on juries in criminal cases.

Jury service for non-citizens who are legal permanent residents

- Judges felt that including non-citizens, even those who are legal permanent residents, would not pass legislatures.
- Such a proposal would be susceptible to misinformation campaigns and politicization.
- Non-citizen legal permanent residents and undocumented immigrants are lumped together in the minds of many people.
- Jury service is similar to voting: it is a duty, an obligation, and a privilege. There is concern that allowing non-citizens to serve as jurors could be seen as granting a civil right, and could be a step toward voting rights.

FACULTY BIOGRAPHIES

Paper Writers and Speakers

Stephen J. Herman practices with Herman, Herman & Katz, in New Orleans, Louisiana, and is the 2020-21 President of the Pound Civil Justice Institute. The author of *AMERICA AND THE LAW: CHALLENGES FOR THE 21ST CENTURY* (Austin & Winfield, 1998), Herman teaches an advanced torts seminar on class actions at Loyola Law School and an advanced civil procedure course on complex litigation at Tulane. He is a past president of the Louisiana Association for Justice, a past president of the Civil Justice Foundation, and a fellow of both the International Academy of Trial Lawyers and the Litigation Counsel of America. He served for six years as a Lawyer Chair for one of the Louisiana Attorney Discipline Board Hearing Committees, and he currently serves on the Louisiana State Bar Association's Committee on the Rules of Professional Conduct. Since its inception in 2010, Herman has served as Co-Liaison/Co-Lead Class Counsel for the plaintiffs in the Deepwater Horizon Oil Spill Litigation.

Professor Valerie P. Hans is the Charles F. Rechlin Professor of Law at Cornell Law School. She conducts empirical studies of law and the courts, and is one of the nation's leading authorities on the jury system. Trained as a social scientist, she has carried out extensive research and lectured around the globe on juries and jury reforms as well as on the uses of social science in law. She is the author or editor of nine books and more than 150 research articles. Her current projects on the American jury include developing a new theory of damage awards, analyzing how jury service promotes civic engagement, and examining the impact of race in tort decisions. Professor Hans is also studying the diverse forms of citizen participation in legal decision-making in other countries. Books she has written, or to which she has contributed, include *JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE* (forthcoming); *THE PSYCHOLOGY OF TORT LAW* (2016); *AMERICAN JURIES: THE VERDICT* (2007); *THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP* (2006); *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* (2000); and *JUDGING THE JURY* (1986). The Supreme Court's 2020 decision on jury unanimity, *Ramos v. Louisiana*, cited her work. Professor Hans is coeditor of the *Journal of Empirical Legal Studies*, Editor of the *Annual Review of Law and Social Science*, and a past president of the Law and Society Association. She is an Academic Fellow of the Pound Civil Justice Institute.

Professor Shari Seidman Diamond is the Howard J. Trienens Professor of Law at Northwestern Pritzker School of Law, and a research professor at the American Bar Foundation. Both an attorney and a social psychologist, she is one of the foremost empirical researchers on jury process and legal decision-making, including the use of science by the courts. She has authored or co-authored more than a hundred publications in law reviews and behavioral science journals and is currently completing a book on juries based on a unique field experiment in which cameras recorded real jury deliberations. Professor Diamond practiced law at Sidley Austin in the areas of litigation and intellectual property. She has taught at the University of Chicago, Harvard, and the University of Illinois at Chicago. She served as editor of the *Law & Society Review* and was president of the American Psychology-Law Society. She has served as an expert witness in American and Canadian courts on matters concerning juries, trademarks, and deceptive advertising. Her publications on juries and surveys have been cited

by the U.S. Supreme Court as well as other federal and state courts. As a member of the ABA's American Jury Project, Professor Diamond helped draft the Principles for Juries and Jury Trials that the ABA adopted in 2005. She currently serves on the Seventh Circuit Committee on Pattern Criminal Jury Instructions. She was elected to the American Academy of Arts and Sciences in 2012.

Tobias Millrood is the immediate past president of the American Association for Justice. He practices in Conshohocken, Pennsylvania, and has had leading roles in numerous pharmaceutical and medical device litigations. He is a member of the Pennsylvania Association for Justice (PAJ) Board of Governors, as well as the Philadelphia Trial Lawyers (PTLA) Board of Directors.

The Honorable Gregory E. Mize is a judicial fellow at the National Center for State Courts (NCSC). In that capacity, he guides several projects for the Conference of Chief Justices (CCJ). He is the principal monitor of Congressional proposals that implicate federalism principles, and serves as Reporter to the CCJ Committee on Civil Justice Improvements. As part of NCSC's Center for Jury Studies, he is editor of the weekly Jur-E Bulletin, and works to help state courts around the country improve their jury trial systems. He was project director of "Jury Trial Management for the 21st Century" which provides a set of judicial education curricula focusing on jury selection and jury deliberations. His writings include *Building a Better Voir Dire Process* (ABA Judges' Journal, 2008) and *TOUGH CASES: JUDGES TELL THE STORIES OF SOME OF THE HARDEST DECISIONS THEY'VE EVER MADE* (co-editor and co-author, New Press, 2018). In 1990, President George H.W. Bush appointed Judge Mize to the D.C. Superior Court, where he presided over hundreds of civil and criminal jury trials. He is now a senior judge, and an adjunct professor at the Georgetown University Law Center. Before joining the bench, Judge Mize was first a trial lawyer, and later General Counsel to the District of Columbia City Council.

Panelists

Professor Mary R. Rose is an associate professor of sociology at the University of Texas at Austin. Her academic interests include juries and jury decision-making, empirical analysis of the law, and social psychology. Her research examines lay participation in the legal system and perceptions of justice, and she has written on a variety of topics, including the effects of jury selection practices on jury representativeness and citizens' views of justice, jury trial innovations, civil damage awards, and public views of court practices. She is also an investigator on the landmark study of decision-making among 50 deliberating juries in Pima County, Arizona. She has served on the editorial boards of *Law & Social Inquiry*, *Law & Society Review*, *Criminology*, *Social Psychology Quarterly*, and *Law & Human Behavior*, and is a former trustee of the Law & Society Association. Her research has been cited by numerous courts, including three U.S. Supreme Court cases: *Miller-el v. Dretke* (Breyer, J., concurring); *Exxon Shipping Co. v. Baker*; and *Ramos v. Louisiana*.

The Honorable Steven C. González has been a Justice of the Supreme Court of Washington since 2012, and the Chief Justice since January 2021. He was previously a trial judge on the King County Superior Court for 10 years. For a period of seven years, he served on the Washington State Access to Justice Board, which was established in response to a growing need to coordinate access to justice efforts across the state. He chaired the Board during his last two years. He has also served as Chair of the Supreme Court's Interpreter Commission, supporting efforts to enhance language access, including amendments to general rules that address remote interpreting as courts respond to the COVID-19 pandemic. Chief Justice González's work has earned him numerous awards and honors on both the state and national level.

Douglas K. Burrell has been a practicing trial lawyer for more than 26 years. He is the current president-elect of DRI—The Voice of the Defense Bar, and has served as chair of its Diversity Steering Committee and in other roles. He holds B.A., M.B.A., and J.D. degrees from the University of Iowa (where he was a two-time football letter-winner and played in the 1986 Rose Bowl). He began his civil litigation career with a firm in Cedar Rapids, and also has substantial experience as a prosecutor and city attorney. Mr. Burrell's present practice includes wrongful death and catastrophic injury litigation, including construction, premises liability, transportation and trucking, and products liability matters. He has particular experience with national retailers, manufacturers, companies in the food and beverage industry, commercial trucking and transportation companies, and furniture and construction companies. He serves as the general counsel of the Georgia Minority Supplier Development Council, and represents its members in litigation matters. He has been active in the education programs of the National Institute for Trial Advocacy (NITA), and is a member of the Association of Defense Trial Attorneys, the International Association of Defense Counsel, and the Federation of Defense and Corporate Counsel.

Roxanne Barton Conlin has her own firm in Des Moines, where she carries on a general practice representing plaintiffs. She was the first woman president of the American Association for Justice, and founded its Minority Caucus and the Civil Justice Foundation. She is a member of the International Academy of Trial Lawyers and a Past President of the Pound Civil Justice Institute. She has also had a long career in Iowa government and politics. She served as an Iowa Assistant Attorney General from 1969-1976. President Jimmy Carter appointed her the United States Attorney for the Southern District of Iowa. She was the second woman ever to be confirmed by the United States Senate to that post, where she served from 1977 to 1981. In 1982 she was the Democratic candidate for Governor, and was the Democratic nominee for the U.S. Senate in 2010. She is the subject of a biography written by William Fredericks titled *Unstoppable: The Nine Lives of Roxanne Barton Conlin*.

Professor Nancy S. Marder is a professor of law at Chicago-Kent College of Law and is the Director of the Justice John Paul Stevens Jury Center. She is a graduate of Yale College, Cambridge University, and Yale Law School, where she was an articles editor of the Yale Law Journal. She clerked at every level of the U.S. federal court system, including a two-year clerkship with Justice John Paul Stevens at the U.S. Supreme Court. She is completing a book, *The Power of the Jury: Transforming Citizens into Jurors*, and has published *The Jury Process* (2005), as well as numerous law review articles, book chapters, and essays on juries, judges, and courts. She has edited or coedited six symposia on lay participation and the courts, organized two conferences on the jury, and presented her work in the United States and abroad. In 2016, she became an elected member of the American Law Institute and an Academic Fellow of the Pound Civil Justice Institute. In 2017 she received Chicago-Kent's inaugural Freehling Award for exemplary scholarship, and in 2019 she was named Senior Fellow of the University of Buffalo's Baldy Center for Law & Social Policy. Most recently, she co-edited *JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE* (forthcoming 2021) with Sanja Kutnjak Ivković, Valerie P. Hans, and Shari Seidman Diamond.

The Honorable Edwina G. Mendelson is a Deputy Chief Administrative Judge and heads the New York State Unified Court System's Office for Justice Initiatives. That office is tasked with ensuring meaningful access to justice for all New Yorkers in civil, criminal and family courts, regardless of income, background, or special needs. Judge Mendelson also leads the Equal Justice in Courts Initiative, tasked with implementing the recommendations made by Secretary Jeh Johnson, the court system's Special Adviser on Equal Justice, in his October 2020 report examining racial bias in the state court system. Additionally, she is leading the implementation of the November 2020 recommendations of the Judicial Committee on Women in the Courts to address gender bias in the court system. Judge Mendelson also directs several juvenile and family justice initiatives. As of January 2021, she also oversees the Unified Court System's Office of Policy & Planning, which is responsible for administering the

state's more than 300 problem-solving and accountability courts. Judge Mendelson remains active on the bench, conducting pro se trials in state correctional facilities and serving in Supreme Court Criminal Term, New York County.

Kim M. Boyle practices with Phelps Dunbar LLP in New Orleans, specializing in the areas of labor and employment, civil rights, constitutional law, commercial, tort and general litigation, as well as representation of a number of governmental entities on an array of legal issues. Earlier in her career she served as Judge Pro Tempore in the Civil District Court for Orleans Parish. She is also a former assistant professor of law at Loyola University School of Law. Ms. Phelps is active in local, state, and national bar activities, as well as community organizations and initiatives. She served as the first female African-American President of the Louisiana State Bar Association (LSBA) in 2009-2010, and was also the first African-American President of the New Orleans Bar Association (NOBA). She has served as a trustee of Princeton University. She was a member of the Louisiana Recovery Authority (LRA), serving as Chair of its Healthcare Committee, on the Bring New Orleans Back Commission, which focused upon rebuilding the city post-Katrina, and as Chair of the Commission's Health/Social Services Committee. She currently serves on the boards of trustees of the Touro Infirmary, Tulane University, Dillard University, and on the Board of Directors of the Lawyers Committee for Civil Rights Under the Law.

Preston Tisdale is a partner with the Connecticut law firm of Koskoff, Koskoff & Bieder, PC. His practice includes personal injury and civil rights litigation. In 2020 he served as a member of the Connecticut Supreme Court's Jury Selection Task Force, and worked with its subcommittee on Implicit Bias in the Jury Selection Process and *Batson* Challenges. At an earlier stage of his career, he headed the Fairfield Judicial District Public Defender's Office, and later served as the Director of Special Public Defenders for the entire State of Connecticut, administering all Special Public Defender operations and functions. He engages in numerous legal pro bono activities with the Public Justice Foundation, the Connecticut Trial Lawyers Association (CTLA), the American Association for Justice (AAJ), the Connecticut Bar Association, and the Connecticut Commission on Racial and Ethnic Disparity in the Criminal Justice System. Outside the legal sphere, Mr. Tisdale serves on the Boards of Directors for Fairfield County's Community Foundation and the Bridgeport Public Education Fund, Inc., and on the Advisory Board for the Center for Children's Advocacy. He is a Past President of the Brown University Alumni Association, and a Trustee Emeritus of the Brown University Corporation.

Discussion Group Moderators

Janet Gilligan Abaray practices in Cincinnati. She received her B.A. degree from the University of Cincinnati, and her J.D. degree from the University of Cincinnati School of Law, where she was Business Manager of the Law Review. She has litigated extensively in the area of pharmaceutical products liability, beginning her career as defense counsel for Merrell Dow Pharmaceuticals, Inc. Since 1987 she has represented plaintiffs in numerous over-the-counter and prescription drug cases, and also represents plaintiffs in insurance and contract disputes. In 2012-2018 she served as a member of the Ohio Constitutional Modernization Commission, established by the Ohio legislature to review and recommend changes to the Ohio Constitution, and chaired the committee on the Judicial Branch and Administration of Justice. She is an active member of the American Association of Justice, and is a member of its Legal Affairs Committee. Ms. Abaray has served as a faculty member of the National Institute of Trial Advocacy. She lectures frequently in the areas of products liability litigation, trial techniques, and epidemiology, and has published articles in numerous legal journals. The University of Cincinnati College of Arts and Sciences recognized Ms. Abaray as its Distinguished Alumni for the 2018-2019 academic year.

David M. Arbogast practices law in San Diego, concentrating on appellate, complex and class action litigation involving a number of disciplines, including consumer protection, defective products, and access to justice related matters. He has been honored by the American Association for Justice (AAJ) as a Champion-Master of Trials, and sits on the amicus and legal affairs committees of the AAJ. He also is a member and active volunteer brief writer for the amicus committee of Consumer Attorneys of California. He is a Fellow of the Pound Civil Justice Institute.

Linda Miller Atkinson is of counsel to the firm of Atkinson, Petruska, Kozma & Hart, with offices in Gaylord and Channing, Michigan. She is licensed in Michigan and is an emeritus member of the Wisconsin and Georgia bars. She is a 1963 graduate of Oberlin College and a 1973 graduate of Wayne State University Law School in Detroit, Michigan. Ms. Atkinson is an author and editor of *TORTS: MICHIGAN LAW AND PRACTICE*, published by the Institute of Continuing Education since 1994, of *LAWYERS DESK REFERENCE* (8th edition, Thomson-West), and of the “Depositions” chapter of *LITIGATING TORT CASES* (AAJ Press, published by Thomson-West). She is a past president of the Michigan Association for Justice, a member of the American Association for Justice President’s Club, and a Fellow and former Trustee of the Pound Civil Justice Institute. In her life outside the courtroom she teaches firearm and hunter safety for the Michigan Department of Natural Resources and has been with the National Ski Patrol for more than 25 years.

Kathryn H. Clarke is a sole practitioner in Portland, Oregon, who specializes in appellate practice and consultation on legal issues in complex tort litigation. She served as President of the Pound Civil Justice Institute from 2011 to 2013. She is a member of the Oregon Trial Lawyers Association, and has been a member of its Board of Governors for more than 25 years, served as President from 1995 to 1996, and received that organization’s Distinguished Trial Lawyer award in 2006. She is also a member of the Board of Governors of the American Association for Justice. She was a member of the adjunct faculty at Lewis and Clark Law School, and taught a seminar in advanced torts for several years. In 2008 she served as a member of a work group on Tort Conflicts of Law for the Oregon Law Commission, which resulted in a bill passed by the 2009 legislature. She has served as member and Chair of Oregon’s Council on Court Procedures, and has been a member of the Oregon State Bar’s Uniform Civil Jury Instructions Committee. In 2016 she was honored by the Pound Institute for her lifetime achievement as an appellate advocate.

Michael Patrick Doyle practices in Houston, representing plaintiffs in maritime personal injury, international and trans-national personal injury, including work injury claims, and insurance bad faith. He is board-certified in personal injury trial law by the Texas Board of Legal Specialization. He holds a B.A. from the University of Virginia and a J.D. from the University Of Texas School of Law, and also studied marine insurance, international law, and maritime law at the University of London, St. Mary’s College of Law. He was admitted to the Texas Bar in 1990.

Deborah Elman is a principal at Grant & Eisenhofer in New York City, where she represents both plaintiffs and defendants in antitrust and securities litigation, specializing in the pharmaceutical and financial services industries. She has represented institutional clients and individuals in complex civil litigation, including class actions, opt-outs, derivative actions, and arbitrations. Ms. Elman has also represented clients before the Securities and Exchange Commission, the U.S. Department of Justice, and state regulators. She is Vice Chair of the Pricing Conduct Committee of the American Bar Association Antitrust Law Section, and a member of the Coordinated Conduct Committee of the New York State Bar Association Antitrust Section and the Board of Directors of the Public Justice Foundation.

Misty A. Farris is senior counsel and an appellate attorney with Dean Omar Branham & Shirley in Dallas. She has spent more than 25 years litigating asbestos, pharmaceutical, and medical device cases for plaintiffs. She has also worked as a teacher, as a minister, and at a home for the developmentally and physically disabled. Ms. Farris received her B.A. from the University of Houston and her J.D. from the University of Texas School of Law. She also holds an M.Div. degree, summa cum laude, from the Southern Methodist University Perkins School of Theology. She is a Fellow of the Pound Civil Justice Institute, and a member of the American Association for Justice, the Texas Trial Lawyers Association, and Public Justice (of which she was a Trial Lawyer of the Year in 2006).

Raymond R. Jones is in private practice in Washington, DC. focusing on criminal defense, personal injury and employment law matters. He has extensive experience litigating matters in state and federal courts. Mr. Jones serves on the Metropolitan Washington Employment Lawyers Association (MWELA) Board of Governors and the American Association of Justice Board of Governors. He received his Bachelor's degree in criminal justice from Temple University, his J.D. from The American University-Washington College of Law, and an LL.M in Trial Advocacy from Temple University's Beasley School of Law.

Justin S. Kahn is a civil litigator. He is triple board-certified in medical malpractice, civil trial, and civil pretrial practice. His practice focuses on catastrophic personal injury matters and other litigation in South Carolina and other states. He is admitted to the South Carolina and District of Columbia bars. Mr. Kahn is an adjunct professor at the Charleston School of Law, teaching deposition skills and civil pre-trial practice. For almost 30 years, he has annotated the South Carolina Rules of Civil Procedure and the South Carolina Rules of Evidence, both published by the South Carolina Bar's CLE Division. He writes and speaks nationally on evidence, persuasion, and litigation. He graduated from the University of South Carolina School of Law and received a B.S. from Tulane University, where he double majored in Psychology and Communication.

Roger Mandel practices with the Jeeves Mandel Law Group in Dallas-Ft. Worth, specializing in business litigation and class actions. He received his law degree with honors from the University of Texas School of Law. In addition to the Texas State Bar, he is a past president of the Dallas Trial Lawyers Association, and continues to serve on its board of directors. He is also a member of the board of the Public Justice Foundation, a Pound Fellow, a fellow of both the Texas Bar Foundation and the Dallas Bar Foundation, and a former board member of the Texas Trial Lawyers Association. In his non-legal life, he has worked with the Dallas-based Vogel Alcove, an organization whose mission is to provide free quality childcare development and social services to young homeless children, with the Susan G. Komen Foundation for breast cancer research, and with a number of United Way charities and social service agencies.

Florence J. Murray is a partner with the firm of Murray and Murray in Sandusky, Ohio. Her practice centers on civil rights, traumatic brain injury, trucking collisions, class actions, insurance law, admiralty and maritime law, and railroad law. She holds a B.A. degree from Saint Ignatius of Loyola University, Baltimore, Maryland, an M.Ed. degree from Ashland University, Ashland, Ohio, an M.B.A. from Case Western Reserve University, and a J.D. degree from The Ohio State University. She is a member of the Ohio Association for Justice, the Leadership Academy of the American Association for Justice (AAJ), and a Fellow of the Pound Civil Justice Institute. In her non-legal life, she assists with Habitat for Humanity projects and is a board member of the Erie County Court Appointed Special Advocates (CASA) for children.

Christopher T. Nace is an attorney with Paulson & Nace PLLC, where his practice includes medical malpractice, wrongful death, legal malpractice, and other serious personal injury matters. Chris is a past president of the Trial Lawyers Association of Metropolitan Washington, D.C. He is a member of the American Association for

Justice Executive Committee, and sits on the boards of the Public Justice Foundation and the Living Classrooms Foundation of the National Capital Region. He is the current Treasurer of the Pound Institute for Civil Justice and the Secretary of the National College of Advocacy. Mr. Nace was the 2019 Recipient of the American Association for Justice's Joe Tonahill Award, which is given in recognition of "outstanding and dedicated service to and support of consumers and the trial bar." While in law school, Christopher served as Editor-in-Chief of the Emory Law Journal.

Kathleen Nastri practices with the firm of Koskoff, Koskoff and Bieder in Bridgeport, Connecticut. She specializes in medical malpractice, personal injury, and complex litigation. She served as President of the American Association of Justice in 2017-18, and continues to serve on the Association's Board of Governors. She has also held numerous leadership positions with the Connecticut Trial Lawyers Association (CTLA), including becoming its first woman president, and is on the editorial board of CTLA's Forum Magazine.

Amber M. Pang Parra represents people nationwide who have been injured by pharmaceutical drugs, medical devices, and dangerous and defective products. She is accredited by the VA to represent disabled veterans challenging disability appeals. Ms. Pang Parra also has extensive experience working with state and federal courts, having worked with the Hawaii State Judiciary, and the Federal Judiciary in the District of New Mexico, and the Northern District of Texas. Ms. Pang Parra is a member of the American Association for Justice (AAJ), as well as a member of AAJ's Committee on the Judiciary, is an alumna AAJ's Leadership Academy, and currently serves as the chair of the Minority Caucus of AAJ. She holds memberships with the State Bar of Texas, Texas Trial Lawyers Association, Hawaii State Bar Association, American Immigration Lawyers Association and the National Organization of Veterans' Advocates. Ms. Pang Parra currently leads the Mass Torts, Veterans Law, and Immigration Law divisions at Justinian & Associates PLLC, working primarily out of their San Antonio, TX office. She is a Trustee of the Pound Civil Justice Institute.

Gale Pearson is Senior Counsel with the law firm of Fears Nachawati in Minneapolis. Her practice concentrates on complex litigation, ranging from environmental law to pharmaceutical and medical device litigation to Qui Tam prosecution. She received her bachelor's degree from California State University at Northridge with a major in Laboratory Medicine, Physics and Chemistry, and her law degree from Loyola Law School in Los Angeles. She is a nationally recognized clinical laboratory scientist. She has played pivotal roles in MDL litigations, serving on science committees, or, in the case of a class action against a tobacco company, as lead counsel. In 2003, U.S. Supreme Court Justice Stephen Breyer presented her the Outstanding Pro Bono Service Award for her work with Trial Lawyers Care, which provided free legal assistance for applicants to the September 11th Victim Compensation Fund. Gale is a member of the Minnesota and American Associations for Justice and the American Bar Association, and is a board member for Public Justice. She has served as a speaker for Minnesota's "We the Jury" project, and is a frequent lecturer on topics in science and law.

Peggy Wedgworth is a partner with Milberg Coleman Bryson Phillips Grossman, PLLC, in New York. She is a managing partner and chair of the Antitrust Practice Group. She has handled numerous securities, commodities, antitrust and whistleblower matters, representing defrauded investors and consumers. She currently represents a nationwide class of plaintiff car dealerships alleging antitrust violations in the data management systems, consumers in the Google Play antitrust litigation, and consumers in contact lens and Hard Disk Drive antitrust litigation. She has also successfully tried numerous cases including a tobacco case in the Engle litigation. She is a member of the New York State Bar Association's Antitrust Committee, the Pound Institute and the American Association for Justice. She holds a B.A. degree from Auburn University and a J.D. degree from the University of Alabama Law School.

2021 Judicial Participants

ALABAMA

Hon. William B. Sellers, Supreme Court

ARIZONA

Hon. B. Michael Dann, Maricopa County Superior Court

Hon. Philip Espinosa, Court of Appeals

Hon. David Gass, Court of Appeals

Hon. Christopher Staring, Court of Appeals

Hon. Ann Timmer, Supreme Court

CALIFORNIA

Hon. Ron Robie, Court of Appeal

DISTRICT OF COLUMBIA

Hon. Gregory Mize (ret.), District of Columbia Superior Court

Hon. Ebony Scott, District of Columbia Superior Court

FLORIDA

Hon. Sandra Perlman, Seventeenth Judicial Circuit

Hon. Michael Robinson, Civil Court

GEORGIA

Hon. Anne Elizabeth Barnes, Court of Appeals

Hon. Verda Michelle Colvin, Court of Appeals

Hon. Christopher J. McFadden, Court of Appeals

HAWAII

Hon. Todd Weldon Eddins, Supreme Court

Hon. Paula Aiko Nakayama, Supreme Court

ILLINOIS

Hon. Robert L. Carter, Appellate Court

Hon. Judy Cates, 5th District Appellate Court

Hon. Mathias W. Delort, Appellate Court

Hon. Thomas E. Hoffman, Appellate Court

Hon. Bertina Lampkin, Illinois Appellate Court

IOWA

Hon. Paul B. Ahlers, Court of Appeals

Hon. Roger Lewis Sailer, Third Judicial District Court

KANSAS

Hon. Linda Kirby, 18th Judicial District Court

Hon. Bill L. Klapper, 29th District Court

Hon. Rachel L. Pickering, Shawnee County District Court

KENTUCKY

Hon. Jacqueline M. Caldwell, Court of Appeals

Hon. John Graves, Supreme Court

LOUISIANA

Hon. Paula A. Brown, Fourth Circuit Court of Appeal

Hon. Nakisha Ervin-Knott, Civil District Court for the Parish of Orleans

Hon. Marc Errol Johnson, Fifth Circuit Court of Appeal

Hon. Edwin Lombard, Fourth Circuit Court of Appeal

MICHIGAN

Hon. Cynthia Stevens, Court of Appeals

MISSISSIPPI

Hon. Leslie King, Supreme Court

Hon. Deborah McDonald, Court of Appeals

MISSOURI

Hon. Anthony Rex Gabbert, Court of Appeals
Hon. Lisa Hardwick, Court of Appeals

MONTANA

Hon. Leslie Halligan, Fourth Judicial District Court

NEBRASKA

Hon. William B. Cassel, Supreme Court

NEW YORK

Hon. Sylvia Hinds-Radix, Supreme Court, Appellate Division
Hon. Edwina Mendelson, New York State Unified Court System
Hon. Jenny Rivera, Court of Appeals
Hon. Shirley Troutman, Supreme Court, Appellate Division

NORTH CAROLINA

Hon. John M. Tyson, Court of Appeals

OHIO

Hon. Mary Eileen Kilbane, Eighth District Court of Appeals
Hon. Anita Laster Mays, Eighth District Court of Appeals
Hon. Mary Jane Trapp, Eleventh District Court of Appeals

OKLAHOMA

Hon. Jane P. Wiseman, Court of Civil Appeals

OREGON

Hon. Adrienne Nelson, Supreme Court
Hon. Shelley Russell, Multnomah County Circuit Court
Hon. Theodore Sims, Washington County Circuit Court
Hon. Ulanda Watkins, Clackamas County Circuit Court

SOUTH CAROLINA

Hon. Clifton Newman, Circuit Court

TEXAS

Hon. Larry Doss, Seventh District Court of Appeals
Hon. Lyda Ness Garcia, 383rd District Court
Hon. Rebeca Martinez, Fourth District Court of Appeals
Hon. Erin Nowell, Fifth District Court of Appeals
Hon. Leslie Osborne, Fifth District Court of Appeals
Hon. Maria Salas Mendoza, 120th District Court
Hon. Jaime Tijerina, Thirteenth District Court of Appeals

UTAH

Hon. Gregory K. Orme, Court of Appeals
Hon. John A. Pearce, Supreme Court

VERMONT

Hon. David Suntag, Superior Court

WASHINGTON

Hon. Sharonda Amamilo, Superior Court
Hon. Steven González, Supreme Court
Hon. David Keenan, King County Superior Court

WYOMING

Hon. James Radda, Teton County Circuit Court

2021 Forum Underwriters

The Pound Civil Justice Institute's innovative judicial education program is possible only with the financial support of lawyers, law firms, and other organizations. The Institute gratefully acknowledges the support of the following contributors, whose generosity helps to assure that Pound will enrich the understanding of the law in courtrooms throughout the United States.

Counselor (\$5,000 and up)

Stephen J. Herman, Herman Herman & Katz, L.L.C

Barrister (\$3,000-\$4,999)

Lieff Cabraser Heimann & Bernstein, LLP

Defender (\$2,000-\$2,999)

Arkansas Trial Lawyers Association
Roxanne Conlin & Associates, PC
D.C. Trial Lawyers Foundation
Delaware Trial Lawyers Association
Florida Justice Association
Indiana Trial Lawyers Association
Kansas Legacy of Justice Foundation
Michelle Kranz, Zoll & Kranz, LLC

Legacy of Justice Foundation (of Kansas)
Louisiana Association for Justice
(through its sister non-profit Bayou
Research Institute)
Maryland Association for Justice
Michigan Association for Justice
Montana Trial Lawyers Association
Florence J. Murray, Murray & Murray
Nebraska Association of Trial Attorneys

New Jersey Association for Justice
North Dakota Association for Justice
Gale D. Pearson, Fears Nachawati, PLLP
Jim Reeves, Reeves & Mestayer, PLLC
Shamberg, Johnson & Bergman, Chartered
South Carolina Association for Justice
Tennessee Trial Lawyers Association
Washington State Association for Justice

Sentinel (\$1,000-\$1,999)

Andrus Anderson LLP
Ciresi Conlin LLP
Kathryn H. Clarke
Robert A. Clifford
William A. Gaylord
Robert L. Habush
Kentucky Justice Association

Kline & Specter, P.C.
Koskoff, Koskoff & Bieder, P.C.
Patrick Malone & Associates, P.C.
Milberg Coleman Bryson Phillips
Grossman, PLLC
George H. Moyer, Jr.
James Parkerson Roy
Russomanno & Borrello, PA

Searcy Denney Scarola Barnhart & Shipley, P.A.
Todd A. Smith, Smith LaCien LLP
Smoger & Associates
Walkup, Melodia, Kelly & Schoenberger
Waters & Kraus
David G. Wirtes, Jr.
Genevieve Zimmerman, Meshbeshier
& Spence

Advocate (\$500-\$999)

David M. Arbogast
Douglas R. Beam
Kazan, McClain, Satterley & Greenwood
Anne M. Kearse

Daniel B. Linebaugh
Richard P. Myers
Dianne M. Nast
J. Randolph Pickett

Tadler Law LLP
Tad Thomas
Leila Watson
West Virginia Association for Justice

Other Supporters (\$25-\$499)

Lawrence A. Anderson
Marvin A. Brustin

Curtis & Co. Attorneys
Sean C. Domnick
Brian Franciskato

James G. O'Brien
Judith A. Pavey

The Forum for State Appellate Court Judges was endowed by the Law Firm of Habush, Habush & Rottier. The Pound Civil Justice Institute also gratefully acknowledges the generous support of the AAJ-Robert L. Habush Endowment. None of the donors has any control over the content of the Forum, the makeup of faculty or attendees, nor the placement of information in Forum materials.

About the Pound Civil Justice Institute

The Pound Institute is dedicated to the cause of promoting access to civil justice through its programs and publications, which give a balanced view of issues affecting the U.S. civil justice system. Since 1956, the Institute has promoted open, ongoing dialogue among the academic, judicial, and legal communities on issues critical to protecting the right to trial by jury. To bring positive changes to American jurisprudence, Pound promotes and organizes:

Annual Forum for State Appellate Court Judges—Since 1992, the Forum has brought together state appellate judges, legal scholars, attorneys, and policymakers to discuss major issues affecting the U.S. civil justice system. Lauded by attending judges as “one of the best seminars available to jurists in the country,” the Forum is unique in its mission to educate state judiciaries on the role of the U.S. civil justice system in protecting citizens’ rights. Our 2022 Forum, *Civil Justice in America: Responsibility to the Public*, will take place on July 16, 2022, in Seattle, WA.

Academic Symposia—The Institute holds periodic Academic Symposia in conjunction with law schools to produce new empirical research supportive of the civil justice system. The academic papers prepared for the symposia are published in the cosponsoring law schools’ Law Reviews. Recent symposia include *The “War” on the Civil Justice System* (Emory Law 2015); *The Demise of the Grand Bargain* (Rutgers and Northeastern 2016); *The Jury Trial and Remedy Guarantees* (Oregon Law Review, Oregon Jury Project 2017); *Class Actions, Mass Torts and MDLs: The Next 50 Years* (Lewis & Clark 2019); and *The Internet and the Law: Legal Challenges in the New Digital Age* (Hastings 2021).

Appellate Advocacy Award—This award recognizes excellence in appellate advocacy in America, and is given to legal practitioners who have been instrumental in securing a final appellate court decision with significant impact on the right to trial by jury, public health and safety, consumer rights, civil rights, and access to civil justice.

Civil Justice Scholarship Award—This award for legal academics recognizes current scholarly research and writing focused on the U.S. civil justice system, including access to and the benefits of the civil justice system, and the right to trial by jury in civil cases.

Howard Twigg Memorial Lecture on Legal Professionalism—Founded in 2010 to honor former Pound President Howard Twigg, this annual lecture series educates attorneys on ethics and professionalism. These lectures are delivered by prominent attorneys, law professors, and jurists and qualify for ethics and professionalism CLE credit.

Papers of the Pound Institute—Pound has an expansive library of research resulting from its Judges Forums, Warren Conferences, research grants, Academic Symposia, Roundtable discussions, and other sources. This research is available via Pound’s website. Pound Fellows receive complimentary copies of Pound’s publications.

Alliance with Academics—The Institute has developed strong relationships within the legal academic community. Currently, 80 Academic Fellows keep Pound abreast of emerging legal trends.

Pound Fellows—Attorneys who care about preserving the civil justice system are invited to join Pound’s important dialogue with judges and legal academics by becoming a Pound Fellow. We offer several affordable, tax-deductible membership levels, with monthly options available.

Officers & Trustees of the Pound Civil Justice Institute, 2020-21

OFFICERS

Stephen J. Herman, President
Gerson H. Smoger, Vice President
Christopher T. Nace, Treasurer
Gale D. Pearson, Secretary
Jennie Lee Anderson, Immediate Past President

TRUSTEES

Jennie Lee Anderson	Patrick A. Malone
N. John Bey	Andre Mura
Jan Conlin	Ellen A. Presby
Caragh Fay	Todd A. Smith
Brandi Gatewood	Alinor Sterling
Raymond Jones	Peggy Wedgworth
Michelle L. Kranz	David G. Wirtes, Jr.
Adam Langino	Zachary L. Wool

EX-OFFICIO TRUSTEES

Eli Fuchsberg	Miranda Soucie
Tobias Millrood	Bruce Stern
Amber Pang Parra	Navan Ward
Shenoa Payne	

PAST PRESIDENTS ADVISORY COMMITTEE

Mary E. Alexander	Mark S. Mandell
Kathryn H. Clarke	Patrick A. Malone
Roxanne Barton Conlin	Richard H. Middleton, Jr.
Kathleen Flynn Peterson	Ellen Relkin
William A. Gaylord	Herman J. Russomanno
Robert L. Habush	Larry S. Stewart
Russ M. Herman	

EXECUTIVE DIRECTOR

Mary P. Collishaw

CONSULTANT AND FORUM REPORTER

James E. Rooks, Jr.

Papers of the Pound Civil Justice Institute

Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for download at www.poundinstitute.org.)

2021 • JURIES, VOIR DIRE, BATSON, AND BEYOND: ACHIEVING FAIRNESS IN CIVIL JURY TRIALS

Valerie P. Hans, Cornell Law School, *Challenges to Achieving Fairness in Civil Jury Selection*

Shari Seidman Diamond, Northwestern Pritzker School of Law, *Judicial Rulemaking for Jury Trial Fairness*

2020 • DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS

Dustin B. Benham, Texas Tech University School of Law, *Foundational and Contemporary Court Secrecy Issues*

Sergio J. Campos, University of Miami School of Law, *Confidentiality in the Courts: Privacy Protection or Prior Restraint?*

2019 • AGGREGATE LITIGATION IN STATE COURTS: PRESERVING VITAL MECHANISMS

D. Theodore Rave, University of Houston Law Center, *Federal Trends Affecting Aggregate Litigation in the State Courts*

Myriam Gilles, Cardozo Law School, Yeshiva University, *Rethinking Multijurisdictional Coordination of Complex Mass Torts*

2018 • STATE COURT PROTECTION OF INDIVIDUAL CONSTITUTIONAL RIGHTS

Robert F. Williams, Rutgers Law School, *State Constitutional Protection of Civil Litigation*

Justin L. Long, Wayne State University School of Law, *State Constitutional Structures Affect Access to Civil Justice*

2017 • JURISDICTION: DEFINING STATE COURTS' AUTHORITY

Simona Grossi, Loyola Law School, Los Angeles, *Personal Jurisdiction: Origins, Principles, and Practice*

Adam Steinman, The University of Alabama School of Law, *State Court Jurisdiction in the 21st Century*

2016 • WHO WILL WRITE YOUR RULES—YOUR STATE COURT OR THE FEDERAL JUDICIARY?

Stephen B. Burbank, University of Pennsylvania Law School and Sean Farhang, University of California, Berkeley, School of Law, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery*

Stephen Subrin, Northeastern University School of Law and Thomas Main, University of Nevada, Las Vegas, Boyd College of Law, *Should State Courts Follow the Federal System in Court Rulemaking and Procedural Practice?*

2015 • JUDICIAL TRANSPARENCY AND THE RULE OF LAW

Judith Resnik, Yale Law School, *Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices*

Nancy Marder, IIT Chicago-Kent College of Law, *Judicial Transparency in the Twenty-First Century*.

2014 • FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*

Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After Concepcion*

2013 • THE WAR ON THE JUDICIARY: CAN INDEPENDENT JUDGING SURVIVE?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*

Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

2012 • JUSTICE ISN'T FREE: THE COURT FUNDING CRISIS AND ITS REMEDIES

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, New England School of Law, *State Courts and Public Justice: New Challenges, New Choices*

J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

2011 • THE JURY TRIAL IMPLOSION: THE DECLINE OF TRIAL BY JURY AND ITS SIGNIFICANCE FOR APPELLATE COURTS

Marc Galanter, University of Wisconsin Law School, and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*

Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*

Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

2010 • BACK TO THE FUTURE: PLEADING AGAIN IN THE AGE OF DICKENS?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*

Stephen B. Burbank, University of Pennsylvania Law School, *Pleading, Access to Justice, and the Distribution of Power*

2009 • PREEMPTION: WILL TRADITIONAL STATE AUTHORITY SURVIVE?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*

Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

2008 • SUMMARY JUDGMENT ON THE RISE: IS JUSTICE FALLING?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*
Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*

2007 • THE LEAST DANGEROUS BUT MOST VULNERABLE BRANCH: JUDICIAL INDEPENDENCE AND THE RIGHTS OF CITIZENS

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of Republican Party of Minnesota v. White*
Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

2006 • THE WHOLE TRUTH? EXPERTS, EVIDENCE, AND THE BLINDFOLDING OF THE JURY

Joseph Sanders, University of Houston Law Center, *Daubert, Frye, and the States: Thoughts on the Choice of a Standard*
Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate: Daubert's Impact on the State Courts*

2005 • THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS

Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

2004 • STILL COEQUAL? STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS

Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

2003 • THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

2002 • STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

2001 • THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

2000 • OPEN COURTS WITH SEALED FILES: SECRECY'S IMPACT ON AMERICAN JUSTICE

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

1999 • CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

1998 • ASSAULTS ON THE JUDICIARY: ATTACKING THE "GREAT BULWARK OF PUBLIC LIBERTY"

Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

1997 • SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS AND CONTROVERSIES

Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

1996 • POSSIBLE STATE COURT RESPONSES TO AMERICAN LAW INSTITUTE'S PROPOSED RESTATEMENT OF PRODUCTS LIABILITY

Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.

1995 • PRESERVING ACCESS TO JUSTICE: EFFECTS ON STATE COURTS OF THE PROPOSED LONG RANGE PLAN FOR FEDERAL COURTS

Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

1993 • PRESERVING THE INDEPENDENCE OF THE JUDICIARY

Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

1992 • PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM

Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

Law Reviews from Academic Symposia

2021 • THE INTERNET AND THE LAW: LEGAL CHALLENGES IN THE NEW DIGITAL AGE

Hastings Law Journal, Vol. 73 No. 5

2019 • CLASS ACTIONS, MASS TORTS, AND MDLS: THE NEXT 50 YEARS

Lewis & Clark Law Review, Vol. 24, No. 2

2017 • THE JURY TRIAL AND REMEDY GUARANTEES: FUNDAMENTAL RIGHTS OR PAPER TIGERS?

Oregon Law Review, Vol. 96, No. 2

2016 • THE DEMISE OF THE GRAND BARGAIN: COMPENSATION FOR INJURED WORKERS IN THE 21ST CENTURY

Rutgers University Law Review, Vol. 69, No. 3

2015 • THE “WAR” ON THE U.S. CIVIL JUSTICE SYSTEM

Emory Law Journal, Vol. 65, No. 6

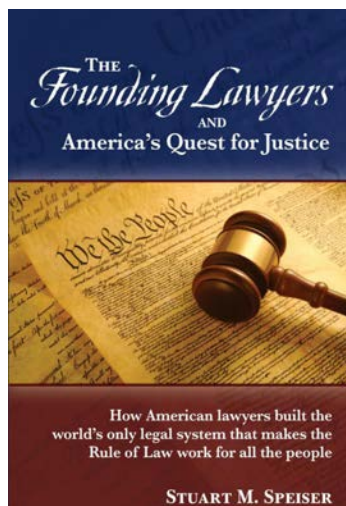
2005 • MEDICAL MALPRACTICE

Vanderbilt Law Review, Vol. 59, No. 4

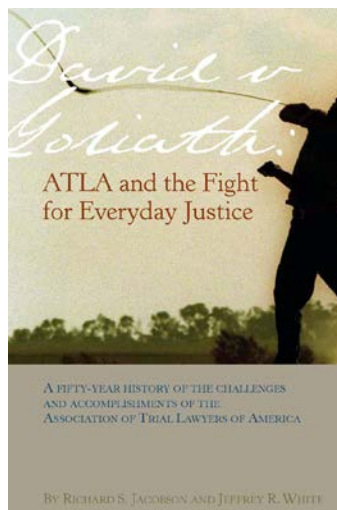
2002 • MANDATORY ARBITRATION

Law and Contemporary Problems, Vol. 67, No. 1 & 2, Duke University School of Law

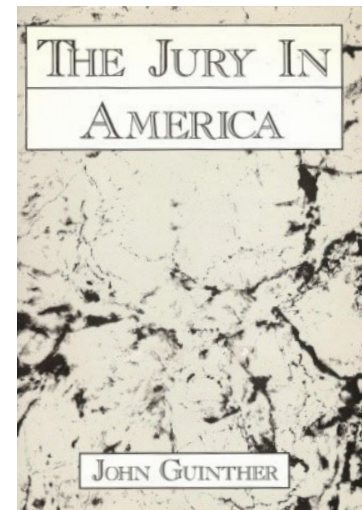
Books distributed by the Pound Civil Justice Institute



The Founding Lawyers and America's Quest for Justice
by Stuart M. Speiser (2010)



David v. Goliath: ATLA and the Fight for Everyday Justice
by Richard S. Jacobson & Jeffrey R. White (2004)



The Jury In America
by John Guinther (1988)

Reports of the Chief Justice Earl Warren Conferences on Advocacy

1989 • MEDICAL QUALITY AND THE LAW

1986 • THE AMERICAN CIVIL JURY

**1985 • DISPUTE RESOLUTION DEVICES IN A
DEMOCRATIC SOCIETY**

1984 • PRODUCT SAFETY IN AMERICA

1983 • THE COURTS: SEPARATION OF POWERS

1982 • ETHICS AND GOVERNMENT

1981 • CHURCH, STATE, AND POLITICS

1980 • THE PENALTY OF DEATH

1979 • THE COURTS: THE PENDULUM OF FEDERALISM

1978 • ETHICS AND ADVOCACY

1977 • THE AMERICAN JURY SYSTEM

1976 • TRIAL ADVOCACY AS A SPECIALTY

1975 • THE POWERS OF THE PRESIDENCY

1974 • PRIVACY IN A FREE SOCIETY

1973 • THE FIRST AMENDMENT AND THE NEWS MEDIA

1972 • A PROGRAM FOR PRISON REFORM

Reports of Roundtable Discussions

1993 • JUSTICE DENIED: UNDERFUNDING OF THE COURTS

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

1991 • SAFETY OF THE BLOOD SUPPLY

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, D.C. attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks.

1990 • INJURY PREVENTION IN AMERICA

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of Everyday Law and TRIAL magazines. Topics include “Farm Safety in America,” “Industrial Safety: Preventing Injuries in the Workplace,” and “Industrial Diseases in America.”

1988-89 • HEALTH CARE AND THE LAW III

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue,” “Health Care Providers and the New Questions of Life and Death,” and “Medical Providers and the New Era of Assessment and Accountability.”

1988 • HEALTH CARE AND THE LAW

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Hospitals and AIDS: The Legal Issues,” “Medicine, Liability and the Law: Expanding the Dialogue,” and “Developing Flexible Dispute Resolution Mechanisms for the Health Care Field.”

1988 • HEALTH CARE AND THE LAW II—POUND FELLOWS FORUM

Report on the 1988 Pound Fellows Forum, “Patients, Doctors, Lawyers and Juries,” written by John Guinther, award-winning author of *The Jury in America*. The Forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.

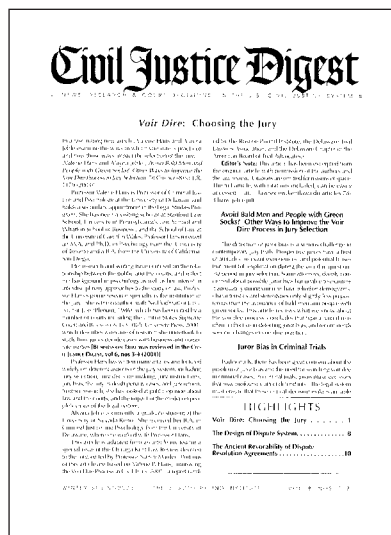
Research Monographs

Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts. This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Pound Foundation, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

The Pound Connective Tissue Injury Research Project: Final Report, by Valerie P. Hans, Ph.D. Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Pound Institute supported a series of research studies on the public's views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

The American Lawyer's Code of Conduct.

Pound's Civil Justice Digest



A quarterly newsletter on current and emerging legal trends. Distributed 1994-2003 to judges, law school professors, and attorneys. Back issues available at www.poundinstitute.org.

For information on how to obtain copies of any of these publications, contact:

Pound Civil Justice Institute
777 Sixth Street, NW, Suite 200
Washington, D.C. 20001
202-944-2841
FAX: 202-298-6390
info@poundinstitute.org



777 SIXTH STREET, NW, SUITE 200, WASHINGTON, D.C. 20001 • 202-944-2841

WWW.POUNDINSTITUTE.ORG • INFO@POUNDINSTITUTE.ORG