

Jury Trial Innovation Round #2

Judge Gregory E. Mize

*May you have a strong foundation
When the winds of change shift*

*And may your song always be sung
May you stay forever young.
(from "Forever Young" by Bob Dylan)*

One would have to live in a closet to avoid the winds of change blowing over our country and the world. The combinations of a global pandemic, societal unrest, tribal politics, and a new European war have created deep social polarities—even among family members. Warfare is being waged between members of political parties, the religious and non-religious, those who are pro-government versus those who are anti-government, individual freedom advocates versus “common good” crusaders. Some are energized to take to the streets in protest while others wearily slip into isolation.

We can take solace that our fellow citizens continue to appreciate jury trials as oases for resolving disputes in a civil, orderly, and deliberative way. *State v. Chauvin*, *State v. Rittenhouse*, *State v. McMichael et al.*, and *Sines et al. v. Kessler et al.* are stage names for dramas involving police arrests, gun violence, and cross-race encounters. Three of those trials were criminal cases, the other a civil dispute. In courtroom theatres, jurors sorted through conflicting and sometimes horrifying evidence while fully aware a politically and racially divided country awaited their verdicts. Some outside commentators with little training in the law criticized courtroom actors and predicted outcomes. Some would say “The judge is clearly biased against . . .,” “the jury is too White,” “the legal instructions are incomprehensible,” or “the crowds outside the courthouse are going to intimidate the jurors.” Despite all of that, jurors in these cases fulfilled their oaths and rendered unanimous verdicts that were largely accepted by the public. Why so? I suggest it is because our Founders rightly assessed that the public must significantly participate in the administration of justice and courts must establish procedures to properly guide citizen jurors in their solemn task.

We all know the original architecture of jury trials had its flaws. But thanks to jury trial caretakers, trial customs and practices inherited from the British have evolved, especially recently, to meet modern circumstances. This progression of reforms stem from litigation doctrines, empirical studies from the legal acad-

emy and social sciences, courageous members of bench and bar who undertake innovative pilot projects, and policy makers who introduce and enact enlightened proposals. American juries are no longer the sole domain of property-owning white males. “Key man” systems that subjectively summon “trusted” citizens for jury duty have been replaced by computerized random selections from governmental administration lists like voter registration and driver license rolls. Commonplace and burdensome jury duty periods running weeks or sometime months are now widely replaced by one-day/one-trial terms of service. Occupational exemptions from jury service have been reduced or eliminated in many states. And many courts provide sitting jurors with basic tools to do their important work (such as the ability to take notes, ask written questions of witnesses, and receive legal instructions at the beginning of trials as well as at the end).

Nevertheless, there remain many challenges with respect to this hallowed democratic institution. For example, George Washington University law professor Rene Lerner argues that civil jury trials should be abolished because the application of laws to facts has become too complex for the common juror.¹ Others seriously debate whether popularly elected judges can be impartial in cases of wide public interest. A growing number of litigators, social scientists, and state supreme court justices believe racial and gender biases often infect jury selections despite the decades old *Batson* doctrine. The social sciences confirm everyone has implicit biases that inform and sometimes distort human decision making. One might then ask, “If judges and jurors have innate biases, how can I trust the justice system?” And it is becoming apparent that the quality of decisions is often undermined by cloudy “noise” pervading modern society.²

In this context, I argue it is time for bench and bar leaders in every jurisdiction to undertake concerted efforts to further modernize jury trial procedures. Those efforts will need to be informed by empirical findings, lessons learned from resolute judges and lawyers who orchestrated innovative pilot projects in

Footnotes

1. See NYU’s Civil Jury Project Inaugural Symposium on “The State and Future of the Civil Jury Trial” (September 26, 2015) NYU School of Law, Panel I: *Originalism and the 7th Amendment*, YouTube (Septem-

ber 16, 2015) https://www.youtube.com/watch?v=7PDMt_knNJE (at time markers 22:00 to 39:30).

2. Daniel Kahneman, Oliver Sibony, and Cass R. Sunstein, *Noise—A Flaw in Human Judgment* (Little, Brown Spark 2021).

the 1990s,³ and recent groundbreaking reforms in Arizona, Connecticut, New Jersey, Washington State, and elsewhere.

This article recounts the history of jury trial innovation efforts in the last thirty years, highlights reforms underway in several court systems to address problems that have resisted solutions, and concludes with a blueprint and exhortation for future reforms.

HISTORY LESSONS 1990 TO 2005

Many say that genuine jury policy 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 1994 is the beginning. The Arizona Supreme Court created the Committee on the More Effective Use of Juries and chose Judge B. Michael Dann as chairperson. Judge Dann was a full-time sitting judge and, at one point, the presiding judge of the Maricopa County Superior Court in Phoenix. He became a jury trial maven after taking a sabbatical in the early 1990s to attend the University of Virginia and get a master's degree in law. His capstone project was to narrate the history of trial by jury in Anglo-American culture. He criticized rote adherence to several Anglo-American jury trial orthodoxies and identified practical lessons from the social sciences to improve jury trials.⁴ His scholarship was published in the *Indiana Law Review*, titled "Learning Lessons and Speaking Rights Creating Educated and Democratic Juries." With "Learning Lessons" as its theoretical base, the committee came up with a document called *The Power of 12*. It included a juror Bill of Rights, and a series of recommendations to the state supreme court. The justices took the committee's work so seriously that, within 12 months, public hearings were held and 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.

Thereafter, in 2001, Judith Kaye, then chief judge of New York State Courts, and the National Center for State Courts convened the first ever National Jury Summit in Manhattan. More than four hundred persons, representing 45 states, attended the three-day event. They focused on all-things-jury including creating a "democratic jury system," reducing juror hardship, "juries in the movies," improving communications with juries, juror privacy, death penalty issues, and jury systems around the world. Many of us who attended believed this was a launch pad for designing and implementing jury trial improvements on a nationwide scale. Attendees went back to their home jurisdictions enlightened by judicial leaders in Arizona and New York who spoke about their efforts and achievements.

Arizona's leadership and the National Summit inspired similar efforts across the country. By 2004 the American Judges Associa-

tion published "Jury Trial Innovations: Charting a Rising Tide"⁵ describing how 30 state court systems, following the lead of the Arizona Supreme Court, were focusing on reforming their jury trial procedures. Most reform efforts followed Arizona's top-down approach, with a supreme court taking the initiative

to create commissions tasked with examining current practices and then recommending improvements. Changes elsewhere were "bottom-up," for example, in Colorado, New Jersey, Hawaii, and other places, where judges and lawyers undertook pilot projects over defined periods of time. Typically, assessments of these pilot projects were published and transmitted to bench and bar leaders, leading in many instances to new practices in those jurisdictions. The authors of "Charting a Rising Tide" hoped the variety of top down and bottom-up efforts would lead to measurable results in other jurisdictions, including:

the increased use of innovative practices by judges, reduced burden upon jurors and employers, reduced citizen non-response to summonses, a greater proportion of our population actually serving on juries, less juror waiting time in court, fewer questions asked by deliberating juries, and a more well-trained judiciary. There will also be more instances of juries being representative of the community in terms of age, education, occupation, and profession. Across our land we should see more efficient and cost-effective jury systems. Trial jurors will be better informed. In other words, juror decision-making and satisfaction will be enhanced. Importantly, there should be greater public trust and confidence in jury verdicts and the courts.⁶

One bottom-up improvement effort occurred in my hometown Washington, D.C., where a nonprofit corporation, the Council for Court Excellence, received private grant funding for the D.C. Jury Project to study how jury trials were typically conducted in D.C. Superior Court and in the U.S. District Court for the District of Columbia. The Project membership was a diverse and balanced group of professionals from bench, bar, academia, court administration, and importantly six former jurors. Their year of intense study and labor culminated in 13 recommendations transmitted to the chief trial judges of both court systems. The recommendations advocated *voir dire* involve more reliance on for-cause strikes than on peremptory challenges. Specifically, there was consensus that trial judges should promote thorough questioning of potential jurors during *voir dire* so that for-cause challenges, based on sufficient information obtained from a prospective juror, would be the predominant way of winnowing out jurors who would not be fair and impartial. Members envisioned an eventually reduced reliance on peremptory challenges

"Many say that genuine jury policy reform in the United States began in 1992 ..."

3. G. Thomas Munsterman et al., *Jury Trial Innovations (Second Edition)*, National Center for State Courts (2006) https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0021/7644/jury-trial-innovations-2d-ed-2006.pdf, published by the Center for Jury Studies at the National Center for State Courts, compiles the panoply of reforms being encouraged in this time period.

4. Judge Dann's handiwork recalls the often-quoted insight of Senator Daniel Patrick Moynihan, "The sciences don't tell us what to do. They tell us the results of what we do."

5. Gregory E. Mize & Christopher J. Connelly, *Jury Trial Innovations: Charting a Rising Tide*, Ct. Rev., Spring 2004, at 4.

6. *Id.*

“[N]ew empirical research is creating fresh problem-definitions and pointing to new solutions.”

because of the effectiveness of for-cause strikes.

Statewide and individual courtroom improvement efforts were also complemented by NGOs. 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 importantly, half a million dollars was donated by law firms and lawyers from around the country to support the program. Their generosity led to the research and publication of the “State of the States Survey of Jury Improvements.”⁷ In the 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 in which they presided or participated. For example, were jurors allowed to ask questions of witnesses? Were jurors permitted to take notes? Who did most of the questioning during *voir dire* — the judge, the lawyer, or both equally? Who does the questioning during *voir dire*—the judge, the lawyers, both? From that survey, we have reliable information from all 50 states about discretionary courtroom practices, including how long it takes to select a civil jury case in South Carolina versus one in Illinois or a criminal case in Connecticut versus one in California.⁸

In 2005, the “ABA Principles for Juries and Jury Trials” were published.⁹ Robert Grey during his year as president of the ABA made the management of jury trials his signature focus. He rounded up veteran lawyers, judges, academicians, and civic leaders to examine current jury trial practices and propose gold standards for their improvement.¹⁰ The preamble to the *Principles* captures the essence of the endeavor:

The American jury is a living institution that has played a crucial part in our democracy for more than two hundred years. The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced. What follows is a set of 19 Principles that define our fundamental aspirations for the management of the jury system. Each Principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints. It is

anticipated that over the course of the next decade jury practice will improve so that the Principles set forth will have to be updated in a manner that will draw them ever closer to the ideals to which we aspire.

The remainder of this article will highlight the ongoing usefulness of the 19 Principles for future reform endeavors.

CURRENT LANDSCAPE

Almost three decades after the reforms inspired by the Arizona project, new empirical research is creating fresh problem-definitions and pointing to new solutions.

On July 21, 2021, the Pound Justice Institute convened the 29th Forum for State Appellate Court Judges. For more than three decades, the Institute has brought together judges, academics, and practitioners for intense, single-day dialogues centering on cutting-edge topics ranging from court funding, separation of powers, aggregate litigation, judicial transparency, and (repeatedly) jury trials. The 29th Forum was titled “Juries, *Voir Dire*, *Batson*, and Beyond: Achieving Fairness in Civil Jury Trials.” 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”) presented original papers written especially for the Forum.¹¹ Valerie Hans identified existing shortcomings in achieving genuinely representative and impartial juries while Shari Diamond exhorted bench and bar to exercise their authority and influence to address common weak points in many current trial operations. Their data-deep presentations inspire several of the action steps suggested below.

Ongoing Challenge—Jury Representativeness. In a series of cases in the 1970s,¹² the U.S. Supreme Court interpreted the 6th Amendment’s “impartial jury” requirement to include a mandate that every jury is drawn from a fair cross-section of the community served by the court. Significantly, the term “fair cross-section” was first enunciated by Congress when it adopted the Jury Selection and Service Act of 1968 (the JSSA). The legislative history of the JSSA was central to the High Court’s determination in *Taylor v. Louisiana* that juries perform a “political function” in reaching their verdicts. In following decades, state and federal jurisprudence made clear that the representative requirement bestowed enforcement rights on parties and imposed new orthodoxies on court-summoning methods. In

7. Gregory E. Mize et al., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, National Center for State Courts (April 2007), https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0016/5623/soscompendium-final.pdf.

8. It’s online and available today for each state.

9. P. Refo et al., *Principles for Juries and Jury Trials*, American Bar Association (2005), https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf.

10. The group was formally known as the American Jury Project. Their intense, yearlong collaborations resulted in the ABA House of Delegates approving the Principles in record time—within the single year of Robert Grey’s presidency.

11. The papers were distributed in advance of the meeting, and the authors

made less-formal presentations of their papers to the judges attending from 28 states. 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 authors have since expanded their analysis in an upcoming law review. Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, ___ U. ILL. L. REV. 101 (2023).

12. *Taylor v. Louisiana*, 95 S.Ct. 692 (1975); *Duren v. Missouri*, 99 S.Ct. 664 (1979).

Duren v. Missouri the Court dictated that venires from which trial juries are drawn must include distinctive demographic groups in numbers that are fair and reasonable in relation to their proportions in the community at large. And if there is an underrepresentation of such group in the venire, that underrepresentation cannot be due to systematic exclusion by courts or public policies. After *Taylor* and *Duren*, the legal academy and social scientists undertook careful studies to demonstrate the effects (largely salutary) of representativeness on the quality of jury deliberations and verdicts. In her paper, Professor Hans asserts the empirically proven values of representativeness include more fulsome deliberations, enhanced legitimacy of verdicts, educational benefits for participating citizens, increased appreciation for the work of courts, and greater civic engagement (through voting in popular elections) after serving on a jury. Of course, these values are not obtained automatically. Jury-summoning processes and jury selection methods are the vehicles to arrive at a representative jury. Because our Anglo-American jury system stretches back to medieval times, many inherited summoning and *voir dire* practices are not up to the task of producing representative juries in our multicultural, economically diverse society. For example, despite some improvements since the 1990s, many jurisdictions use limited source lists to summon citizens to court for jury duty. The traditional top two sources—voter registration and driver license records—do not capture significant portions of the community who do not vote or do not drive motor vehicles. Courts' sole use of these narrow lists undermines the representativeness of sitting juries.¹³ Inherent in the use of source lists are the ways courts reach out to persons named in the lists. Response rates to summons and qualification questionnaires is often abysmal, especially in urban areas with highly mobile populations.

A relic from medieval England has been the view that jury service is a duty not worthy of meaningful compensation. The Crown rounded up jurors by merely exhorting the honor of serving the Crown. In modern times, this usually means jurors receive

paltry stipends that, on an hourly basis, fall well below minimum wage requirements. Consequently, many citizens don't show up for jury service¹⁴ or are excused during *voir dire* on hardship grounds.

It is incumbent on courts to establish processes to update source lists and discourage summoning scofflaws.¹⁵ In addition, legislative definitions of jury qualifications and occupational exemptions, like accreted barnacles, often lead to the exclusion of important segments of the community. The time-honored arguments that the likes of ex-felons, police officers, lawyers, and doctors should not be eligible for jury service need re-examination. And, most recently, the pandemic created new challenges for rounding up representative juries. COVID-19 at its peak contorted, and in some cases even eliminated, traditional jury trial practices. In some jurisdictions, jury selections were happening in hotel ballrooms, rodeo arenas, or on video screens. With the aid of medical science, public health policies, and sufficient public cooperation, it now appears our society is pushing away the tide of COVID's onslaught — leaving courts with the task of determining which virtual jury trial practices should continue to be utilized in the future.

“A relic from medieval England has been ... that jury service is a duty not worthy of meaningful compensation.”

Ongoing Challenge—Implicit Bias. Thanks to the Harvard Implicit Association test, taken by millions around the world, and associated empirical research, we know about the ubiquitous influence of implicit bias on human decision making.¹⁶ To identify and address the effects of bias blind spots upon our individual and corporate judgments necessitates persistent, real-time effort.¹⁷ In the jury trial context, not a single courtroom actor is immune from its effects. Implicit bias is at play both when trial lawyers move to strike a venire member¹⁸ and when a judge rules

13. Despite some improvements since the 1990s, a recent NCSC study found that unrecognized duplicate records and stale addresses on juror source lists and master jury lists complicate assessments of demographic representation and undermine jury yield due to high undeliverable and nonresponse rates. P. Hannagord-Agor et al., *Eliminating Shadows and Ghosts*, National Center for State Courts (September 2022), https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0025/82681/Master-Jury-List.pdf.

14. Herald Editorial Board, *What's Keeping People Away from Jury Service?* HERALDNET (Everett, Washington), August 24, 2022, <https://www.heraldnet.com/opinion/editorial-whats-keeping-people-away-from-jury-service/> (last visited April 13, 2022).

15. See Principle 10, *Principles for Juries and Jury Trials*, *supra* note, 9, at 51-63.

16. For example, Pattern Jury Instruction Sec. 1.02 in the District of Columbia provides: “As human beings, we all have personal likes and dislikes, opinions, prejudices, and biases. Generally, we are aware of these things, but you also should consider the possibility that you have implicit biases, that is, biases of which you may not be consciously aware. Personal prejudices, preferences, or biases have no place in a courtroom, where our goal is to arrive at a just and impartial verdict. All people deserve fair treatment in our system of

justice regardless of any personal characteristic, such as race, national or ethnic origin, religion, age, disability, sex, gender identity or expression, sexual orientation, education, or income level. You should determine the facts solely from a fair consideration of the evidence. You should decide the case without prejudice, fear, sympathy, favoritism, or consideration of public opinion.”

17. Kahneman, Sibony, & Sunstein *supra* note 2, at 240-244.

18. Elisabeth Semel, a director of the Death Penalty Clinic at the University of California Berkeley School of Law, sees interplay between implicit bias and race discrimination in jury selection. “In every study that I know of that has been done across the country, looking both in state courts and in federal courts, there has been a universal finding. The exercise of racially discriminatory peremptory strikes remains an ever-present feature of the jury selection system. So, you can pick California, you can pick North Carolina, you can pick Connecticut, you can pick the state of Washington, Oregon, on and on. And the results are unremarkably the same.” E. Semel *Racial Discrimination Jury Selection*, WASH POST, December 23, 2021, https://www.washingtonpost.com/national/racial-discrimination-jury-selection/2021/12/18/2b6ec690-5382-11ec-8ad5-b5c50c1fb4d9_story.html; See also, JENNIFER K. ELEK & ANDREA L. MILLER, NAT'L CTR. FOR STATE CTS., *THE EVOLVING SCIENCE ON IMPLICIT BIAS* (2021).

“Silent bias colors a juror’s evaluations...”

on challenged strikes.¹⁹ Silent bias colors a juror’s evaluations of witness testimony and jurors’ assessments of each other during their deliberations. In response, some court and bar leaders are creating

judicial trainings, CLE programs, and pattern jury instructions to sensitize judges, lawyers, and jurors to their biases.

Ongoing Challenge—Enforcing the *Batson* Doctrine. The legal academy is connecting the dynamics of implicit bias to jury selection processes and concluding the three-prong *Batson* test is inadequate to stem racial discrimination during jury selection. Recognition of the *Batson* doctrine’s inefficacy and the advent of practical improvements to its administration begins with the Washington State Supreme Court. At the time of this writing, thirteen states have reformed or are studying reforms to improve the effectiveness of *Batson*. What follows is a summary of the concerted steps taken by Washington and four other leading states to reduce the likelihood that racial discrimination occurs in jury selection (and de-selection).

WASHINGTON STATE

In 2013, the Washington State Supreme Court became a leader in examining the effectiveness of *Batson* procedures while ruling on a *Batson* claim.²⁰ In *State v. Saintcalle*,²¹ the high court (*en banc*) denied Mr. Saintcalle’s *Batson* violation argument. But in doing so, stated:

[W]e also take this opportunity to examine whether our *Batson* procedures are robust enough to effectively combat race discrimination in the selection of juries. We conclude that they are not. 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. But we will not create a new standard in this case because the issue has not been raised, briefed, or argued, and indeed, the parties are not seeking to advance a new standard.²² (citations omitted)

The court’s concern about the need to “strengthen *Batson*” continued thereafter. It created a bipartisan commission that,

over the course of four years, proposed General Rule 37 applicable to both criminal and civil cases. Its aim, succinctly stated, was to eliminate “the unfair exclusion of potential jurors based on race or ethnicity.” General Rule 37, adopted by the court in 2018, provides a detailed process for trial judges to rule on *Batson* challenges bases upon race or ethnicity. The rule states in relevant part:

(g) **Circumstances Considered.** In making its determination, the circumstances the court should consider include but are not limited to the following: (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) **Reasons Presumptively Invalid.** Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are 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.

(i) **Reliance on Conduct.** The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations 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

19. See, e.g., Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (finding that judges harbor the same kinds of implicit biases as the general American population).

20. In 2002 the court joined a growing number of states seeking to improve their jury trial systems in a manner like Arizona. It created the Washington State Jury Commission to focus on increasing summons response, accommodating citizens called to jury service, protecting juror privacy, improving jury selection procedures, improving the trial process for jurors, and improving the deliberating

process. The Commission, *Washington State Jury Commission* (2000), https://openlibrary.org/books/OL14514045M/Washington_State_Jury_Commission. The Commission’s final report proposed many improvements beyond addressing the shortcomings of *Batson* doctrine procedures. The Commission, *Report to the Board for Judicial Administration*, Washington State Jury Commission (July 2000), https://openlibrary.org/books/OL14514045M/Washington_State_Jury_Commission.

21. 178 Wash. 2d 34 (Wash. 2013).

22. *Id.* at 35-36.

answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

Since its adoption, the rule has garnered the interest of other state courts as summarized next.²³ In addition, federal funding has become available to examine whether the rule is meeting its intended purpose.²⁴

ARIZONA

Although a rule change modeled on Washington's Rule GR37 had been proposed in Arizona, the Arizona Supreme Court took a dramatically different approach. In August 2021, the court amended the Arizona Rules of Criminal Procedure and the Arizona Rules of Civil Procedure to eliminate peremptory challenges in criminal and civil trials.²⁵ Three months later, the Arizona Task Force on Jury Data Collection, Practices, and Procedures, recognizing the state supreme court had abolished peremptories, recommended reforms to improve information gathering during *voir dire*, enhance public understanding of jury service, maximize summoning efficiencies, and reduce barriers.²⁶ Segments of the legal community opposed the court's elimination of peremptories to the point where the state House of Representatives passed an emergency bill to restore peremptory strikes.²⁷ However it died when the legislature adjourned *sine die*.

CALIFORNIA

A 2020 Study²⁸ by the Berkeley Law School's Death Penalty Clinic titled "The Whitewashing of the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors" documented the shortcomings of the *Batson* procedure and how the California Supreme Court went from a judiciary that championed the eradication of race-based strikes²⁹ to a court that resists the United States Supreme Court's limited efforts to enforce *Batson*. The study concluded *Batson* is a woefully inadequate tool to end racial discrimination in jury selection. On the closing day of its 2020 legislative session, the legislature enacted (and the governor later signed) Assembly Bill 3070 establishing *Batson* procedures like Washington GR 37.³⁰ The law includes this finding:

"The study concluded *Batson* is a woefully inadequate tool ..."

[P]eremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination. In particular, the Legislature finds that requiring proof of intentional

23. GR-37 has also inspired reforms outside of jury selection contexts. The *Seattle Times* reports the state supreme court last summer made its Rule GR 37 *Batson* standards applicable to the evaluation of police seizures, ruling that an objective observer considering the legality of a seizure must be aware of law enforcement's history of bias and discrimination against people of color. M. Carter, *WA Supreme Court overturns Black Man's Rape Conviction Over Bias in Jury Selection*, THE SEATTLE TIMES, October 10, 2022, <https://www.seattletimes.com/seattle-news/law-justice/wa-supreme-court-overturns-black-mans-rape-conviction-over-bias-in-jury-selection/>.
24. DOJ's Office of Justice Programs' National Institute of Justice announced awards of \$2.7 million to discern ways to reduce racial and ethnic disparities in the justice system. Recipients of the awards include Arizona State University to assess how the state's recent elimination of peremptory challenges affects jury selection and racial diversity on juries. U.S. Department of Justice, *National Institute of Justice Funds Research to Address Racial and Ethnic Disparities in Justice System* (August 24, 2022), https://www.ojp.gov/files/archives/press-releases/2022/nij-funds-research-address-racial-and-ethnic-disparities-justice-system?ecd42=518001254&ecd73=304983271&%28Ext%29_%E2%80%93Aug_2022_6185845=.
25. The Arizona Supreme Court announced the rule change in a press release issued August 30, 2021. Supreme Court of Arizona, *In the Matter of Rules 18.4 and 18.5, Rules of Criminal Procedure and Rule 47(e), of the Arizona Rules of Civil Procedure* (August 30, 2021), <https://www.azcourts.gov/Portals/20/2021%20Rules/R-21-0020%20Final%20Rules%20Order.pdf?ver=2021-08-31-105653-157>.

26. Supreme Court of Arizona, Report and Recommendations, Task Force on Jury Data Collection, Practices, and Procedures (October 4, 2021), <https://www.azcourts.gov/cscommittees/Task-Force-on-Jury-Data-Collection-Practices-and-Procedures> (last visited April 13, 2023).
27. Bill 2413 aimed at restoring peremptory challenges in civil and criminal trials. The Associated Press reported one state representative from Mesa said, "It's how we've done things for ages and in my opinion is an essential part to our right to a trial by juries. We're not revolutionizing anything." A county attorney from Mohave told a legislative committee that eliminating peremptory challenges would result in more deadlocked juries by making it harder to weed out biased or unfair potential jurors. P. Davenport, *Arizona Lawmakers Move to Partially Restore Jury Challenges*, AP News, February 5, 2022, <https://apnews.com/article/arizona-judiciary-juries-84674c441df1a5f844bffb52ac18e43>.
28. Berkeley Law Death Penalty Clinic, *The Whitewashing of the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020), <https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>.
29. "In 1978, in *People v. Wheeler*, our state supreme court was the first court in the nation to adopt a three-step procedure intended to reduce prosecutors' discriminatory use of peremptory challenges. Almost a decade later, in *Batson v. Kentucky*, the United States Supreme Court approved a similar approach," at iv.
30. Assembly Bill No. 3070, State of California Legislative Counsel Bureau (2020), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3070.

“Opposition ... resulted in the [Colorado reform] legislation dying on the vine in 2022.”

bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.

conscious and unconscious bias in the use of peremptory challenges.

In July 2022, the high court received the final report of its Jury Selection Work Group.³¹ The Group’s charge was broader than the examination of jury selection practices. For example, it studied the influence of implicit bias in jury trials. With respect to peremptory strikes, it found:

In light of AB 3070 and its modification of the existing procedural framework for the exercise and adjudication of peremptory challenges, the work group reiterated the need to collect data on peremptory challenge motions to understand whether the new framework is operating as intended. The work group considered whether the elimination or reduction of peremptory challenges could be desirable, taking note of judges and scholars who have advocated for that result. Ultimately, the group concluded that AB 3070 should be given time to play out and that the subject could be revisited in time, if necessary. The work group acknowledged that challenges and excusals for cause may also be a source of racial disparities in juries but concluded that this topic was outside the scope of the group’s charge.

COLORADO

In January 2021, a majority of the Colorado Rules of Criminal Procedure Committee recommended the supreme court amend Criminal Rule 24 to recognize and address implicit racial bias in jury selection by adopting provisions like Washington State Rule GR 37. Toward that end, Bill 128 was introduced. It proposed several findings, including (1) people of color are being disqualified from serving on juries based on racial pretext, for reasons including a distrust of law enforcement or English fluency, and (2) judges accept race-neutral rationales for peremptories such as a jurist’s hairstyle, language, and skepticism toward police. The

bill would apply only to criminal trials. Opposition, principally led by the Colorado district attorneys,³² resulted in the legislation dying on the vine in 2022.

CONNECTICUT

In Connecticut, a supreme court decision (authored by the chief justice) in *State v. Holmes*³³ led to the creation of the Jury Selection Task Force³⁴ to address issues surrounding summoning, data collection, juror education, implicit bias, and enforcement of the *Batson* doctrine. The final report of the Task Force was published in December 2020.³⁵ It recommended the adoption of a rule modeled on Washington General Rule 37 and California’s AB 3070. In July 2022, the Connecticut Superior Court adopted Rule Sec. 5-12 designed to “to eliminate the unfair exclusion of potential jurors based upon race or ethnicity.”³⁶ Rule 5-12, largely the same as Washington General Rule 37, applies to criminal and civil trials. The key differences between *Batson* and the Connecticut and Washington State rules include the elimination of *Batson*’s first step and of the requirement that the strike opponent prove purposeful discrimination; the inclusion of “presumptively invalid” reasons; the requirement that the court deny the peremptory challenge if it “determines that the use of the challenges against the prospective juror, as reasonably viewed by an objective observer, legitimately raised the appearance that the prospective juror’s race or ethnicity was a factor in the challenge”; and a definition of the “objective observer” 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.”

NEW JERSEY

Similar to Washington State where an appellate case triggered major jury selection reforms, the New Jersey Supreme Court’s opinion in *State v. Andujar*³⁷ called for a Judicial Conference on Jury Selection to make recommendations to improve the jury selection process in New Jersey by expanding the pool of individuals summoned and eligible to serve as jurors; supporting qualified individuals in serving as jurors; reducing the effects of purposeful discrimination and all forms of bias, including implicit bias, in jury processes; and increasing attorney involvement in jury selection. Subsequently, a two-day conference was held in November 2021. The gathering focused on “The Final Report on New Jersey’s Empirical Study of Jury Selection Practices and Jury Representativeness”³⁸ by Mary R. Rose, Ph.D. describing degrees

31. Jury Selection Work Group, Final Report to the Supreme Court of California (July 2022), <https://newsroom.courts.ca.gov/sites/default/files/newsroom/2022-09/Jury%20Selection%20Work%20Group%20Final%20Report.pdf>.

32. T. Vo, *A Judge May Not Call It Racism, But Colorado Attorneys Say “Implicit Bias” Is Getting People Kicked Off Juries*, THE COLORADO SUN, March 2, 2022, <https://coloradosun.com/2022/03/02/colorado-racial-bias-jury-selection-law/>.

33. 334 Conn. 202 (2019).

34. See State of Connecticut Judicial Branch, Jury Selection Task Force, https://jud.ct.gov/Committees/jury_taskforce/#Purpose (last visited April 13, 2023).

35. See Chase T. Rogers and Omar A. Williams, *Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson* (Dec. 31, 2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelection-TaskForce.pdf.

36. See Rules Committee of the Superior Court, *Rules Committee Minutes, Appendix E* (February 7, 2022), https://jud.ct.gov/Committees/rules/rules_minutes_020722.pdf.

37. 247 N.J. 245, 254 A.3d 606, 611, 622-23 (N.J. 2021).

38. M. Rose, *The Final Report on New Jersey’s Empirical Study of Jury Selection Practices and Jury Representativeness* (June 1, 2021), <https://www.njcourts.gov/sites/default/files/jurors/maryrosefinalreport.pdf>.

of jury representativeness in 95 trials across fourteen counties during a six-week period.³⁹

In April 2022, the Committee of the Judicial Conference on Jury Selection issued its final recommendations regarding jury composition and compensation, as well as cause and peremptory challenges. Among the Committee’s “strategies to address institutional and implicit bias” are recommendations to (1) collect race, ethnicity, and gender data using the juror qualification questionnaire; (2) employ an electronic juror questionnaire; (3) lower the threshold for granting cause challenges; (4) allow attorney-conducted voir dire; (5) reduce the number of peremptory challenges; and (6) modify *Batson*. The Committee proposed that (a) *Batson*’s first step be eliminated; (b) a peremptory challenge may not be used “to remove a prospective juror based on actual or perceived membership in a group protected under the United States or New Jersey Constitutions or the New Jersey Law Against Discrimination”; (c) the trial court will determine whether “a reasonable, fully informed person would believe that a party removed a prospective juror based on the juror’s actual or perceived membership” in a protected group; and (d) the court need not find purposeful discrimination to disallow the peremptory challenge. Although it did not recommend the adoption of a rule modeled explicitly on reforms in Washington, California, or Connecticut, the committee’s official comment proposed that courts be guided by specific provisions of the Washington and Connecticut rules, including the presumed invalidity of reasons historically associated with race discrimination. The committee proposed a pilot program in which its recommendations will be implemented.

On July 12, 2022, the New Jersey Supreme Court adopted Rule 1:8-3A (“Reduction of Bias in the Exercise of Peremptory Challenges”) effective on January 1, 2023.⁴⁰ The new rule applies to criminal and civil trials. There are several key differences between *Batson* and Rule 1:8-3A. The rule eliminates *Batson*’s first step⁴¹ and the requirement that the strike opponent

prove purposeful discrimination. It mandates a trial court deny the peremptory challenge if, under the totality of the circumstances, “a reasonable, fully informed person would believe that a party removed a prospective juror based on the juror’s actual or perceived membership in a group protected [under the statute].” The rule applies to cognizable groups in addition to those defined by race or ethnicity. The rule does not include a list of “presumptively invalid” reasons.

“[L]et us enlarge the critical mass of those devoted to eradicating practices that keep minorities outside of jury deliberations...”

Q: WHERE DO WE GO FROM HERE?

A: START AGAIN!

Much praise is due to the supreme courts of Arizona, California, Colorado, Connecticut, New Jersey, and Washington State for crafting selection processes that weed out racial discrimination and improve information gathering from prospective jurors. Their labors portend a trend aligning with the dialogues occurring at the Pound Justice Institute’s 29th Forum. Now, in 2023, I urge other courts and jury trial caretakers to make additional, concrete commitments to improving how jury trials are conducted. Building upon the lessons learned from the social sciences and the endeavors described above, let us enlarge the critical mass of those devoted to eradicating practices that keep minorities outside of jury deliberation rooms and any traditions that stand in the way better summoning, *voir dire*, juror comprehension, and final deliberations. In closing, I suggest ways to pick up where things left off when the American Judges Association in 2004 published “Jury Trial Innovations: Charting a Rising Tide.” I hope the next rising tide will contain these elements:

39. The findings included (1) “the processes that determine who appears at the courthouse constitute a systemic source of minority-group attrition because concerning levels [of] underrepresentation appeared in nearly all areas studied”; (2) prospective jurors are more likely to be removed for cause rather than by peremptory challenges; (3) “although peremptory challenges can be linked sporadically to minority-group attrition patterns,” they are “not the primary reason” jurors of color are not seated; and (4) “[t]he data do NOT support a conclusion that the number of peremptory challenges allocated to attorneys does no harm to jury selection practices outcomes.”

40. New Jersey Chief Justice Stuart Rabner and State Administrative Director Glenn A. Grant signed an announcement to the bar and public regarding a series of reforms to jury selection procedures in the Garden State including requiring implicit bias training for judges and implicit bias instructions for jurors. Supreme Court of New Jersey, Order Amending Rules 1-8, <https://www.njcourts.gov/sites/default/files/courts/supreme/part3of4-orderamendingrules1-8-31-8-51-38-5andadoptingnewrule1-8-3a-07-12-22.pdf>. Some of the 25 new procedures became effective on September 1, 2022, and others on January 1, 2023. And two recommended reforms would require legislation by the state legislature—one would allow people with criminal convictions who have completed their sentence to have their eligibility restored to serve as a juror, and the other would hike

juror pay. *The New Jersey Monitor* nicely summarizes components of the changes. S. Nieto-Munoz, *Changes Coming to Jury Selection in New Jersey*, NEW JERSEY MONITOR, July 14, 2022, <https://newjersey-monitor.com/2022/07/14/changes-coming-to-jury-selection-in-new-jersey/>.

41. The new rule retains *Batson* step 3 regarding a careful evaluation of a challenged party’s stated reasons for use of a peremptory strike—a task often involving a credibility determination. Interestingly, The New Jersey Supreme Court’s Advisory Committee on Professional Ethics issued a notice erasing a 1998 advisory that lawyers should not face discipline for using peremptory challenges to exclude potential jurors based on their race, suggesting that ethics charges may be justified for such conduct. The decades-old opinion stated that using race-based peremptory challenges is not prohibited under New Jersey’s Rule of Professional Conduct 8.4(g). Advisory Committee on Professional Ethics, Opinion 685 (1998), https://njlaw.rutgers.edu/collections/ethics/acpe/acp685_1.html. In a January 2022, notice to the bar, the committee said that withdrawing the opinion “does not imply that every use of a peremptory challenge found to fall within [the *Batson* doctrine] is necessarily an ethical violation, but merely eliminates the categorical exclusion from consideration under” rule 8.4(g).

“Financial hardship is a leading cause of citizens not serving on juries.”

TOP-DOWN LEADERSHIP:

A. Supreme Courts & Chief Judges.

Creating Task-Oriented Leadership Groups. At the Pound Institute Forum, Professor Diamond said, “Our ability to produce a fair jury trial depends on an attentive and responsive court system.” She

reminded us it is incumbent upon appellate courts to exercise their rulemaking authority to be *top-down* innovation leaders. As shown in Part 2, there is proven value in courts creating jury improvement commissions comprised of judges and lawyers (both plaintiff and defense, prosecution and defense), court administrators, legislators, and academics — and, importantly, former jurors. Of course, once a commission submits findings and recommendations to the court, prompt promulgation of implementing rules is essential.

Appellate Decisions Can Serve as Starting Points to Address Jurisdiction-Wide Issues. As the Washington State Supreme Court did in the *State v. Saintcalles* case, judicial opinions can spotlight jury system problems and chart a path for potential improvements.

Committing to Making Legal Instructions Comprehensible as well as Legally Accurate. Judicial leaders can re-constitute pattern instruction committees to include linguists like the late Professor Peter Tiersma, to help make communications to lay jurors both comprehensible and legally sound. Peter Tiersma’s booklet *Communicating with Juries*⁴² is a practical, hands-on guide to making “judge talk” more plain, clear, and truly useful to jurors.

B. Court Administrators.

Financial hardship is a leading cause of citizens not serving on juries.⁴³ The lengthy terms of jury service *used to be* another major barrier to citizens responding to jury summons. In response, court managers in Houston (Harris County), Texas in 1972 created the precedent for today’s widely used one-day/one-trial term of jury service. Similarly, today’s court administrators can play a major role in documenting the need for increased juror stipends and advocating for increased resources from funding sources. Increasing juror compensation can have a positive effect on economic representativeness of juries.

C. Bar Organizations.

The Spark That Ignites Action. The process by which ABA *Principles for Juries & Jury Trials* were created, approved by the

Board of Governors, and promulgated is a prime example of top-down bar leadership. Similarly, bar organizations can lead assessments of current trial practices and propose new rules of procedure to their highest courts and encourage the public comment period on rule proposals.

Public Education & CLE Curricula. The public comment period for court rules proposals, with the help of extensive media alerts and well broadcast hearings, can be designed as an education event. Bar leaders can also create CLE programs on the topics that inspire jury trial improvements. For example, such programming can include social scientists as well as law professionals who explain the dynamics of implicit bias and how juror diversity in 12-person juries improve the quality of deliberations.⁴⁴

Uniting Special Interests. Organizations like the American Board of Trial Advocates and the American College of Trial Lawyers are comprised of experienced trial lawyers on both sides of a case caption. They admit for membership the best plaintiff and defense lawyers in the land. And, consequently, ABOTA and ACTL consistently promote the need for and the virtues of jury trial improvements. This is an opportune time, for plaintiff-oriented and defense-oriented civil bar groups and prosecution and criminal-defense-oriented groups to join forces in the name of jury trial improvements. If a state supreme court does not create a jury trial improvement commission, specialized bar groups need not wait for a court call. They can become catalysts for needed reforms.

D. American Society of Trial Consultants.

The ASTC is a well-established body of experienced trial consultants who enrich courtroom communications and presentations. In conducting cases before juries, many lawyers rely on ASTC members because of their credentials (often holding doctorates in psychology and other social sciences) and long experience in communicating complicated material with lucidity. Particularly with respect to improving pattern jury instructions, the ASTC can provide valuable leadership in the next round of jury trial improvements.

BOTTOM-UP LEADERSHIP:

A. Individual Judges.

Pilot Projects. History shows us that trial judges have been valuable members of jury improvement commissions. After recommendations have been issued by these improvement groups, judges can and do undertake ways to carry out recommendations in their courtrooms. Speaking from experience,⁴⁵ as a member of

42. P. Tiersma, *Communicating with Juries: How to Draft More Understandable Jury Instructions* (2006), https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0024/8772/communicating-with-juries-original-publish-2006.pdf.

43. See S. Abusaid & J. Papp, *YSL Trial: Weeks of Jury Selection*, *Little Progress*, ATLANTA JOURNAL-CONSTITUTION, January 26, 2023, <https://www.ajc.com/news/crime/ysl-trial-weeks-of-jury-selection-but-not-much-progress/L672WPMSOZC43C7WSBGSEBZBLY/>.

44. See, Erica J. Boyce, *Time to Reflect—Has the Research Changed Regarding the Importance of Jury Size?* 29 VOIR DIRE 8 (Fall, Winter 2022).

45. I became a judge after practicing as a trial lawyer and later as chief

counsel to the D.C. City Council. City Hall was a hub of activity. That’s where common citizens, business leaders, silk-stocking lawyers, and even bag ladies from the street would come to tell council members what was wrong or what was needed in public policy. It was a very exciting place. After joining the bench, I entered a cloister. The Code of Judicial Conduct requiring me to avoid even the appearance of impropriety appropriately limited both my professional and personal activities. My professional connection to the community at large was mainly through jurors. My favorite, most important was being a teacher to the jury, helping them understand what they need to do to reach a fair and just verdict.

the D.C. Jury Project, I embraced our recommendations on improving jury selection processes. Project Recommendation 19, among other things, encouraged trial judges to improve the ability of parties to ascertain grounds to strike jurors for cause “by requiring that *each* juror be examined during the *voir dire* process and by giving attorneys a meaningful opportunity to ask follow-up questions of *each* juror” (emphasis supplied). I decided to put into practice what the Project was preaching. I conformed my courtroom practices to that recommendation. Up until then, the custom and practice in my courthouse was for open court questioning of venire members to create a framework for follow-up questioning of jurors. After answers were received in open court, the tradition was to ask only ask questions of jurors who had a yes answer to any open-court question. Non-responsive jurors were never questioned. They were assumed to be safe jurors.

There were several problems underlying that tradition. For example, many people don't like to answer questions in front of strangers—especially in an imposing place like a courtroom. Some are shy. Some don't speak English. Others might be angry about being involuntarily roped away from their daily routines. Consistent with Recommendation 19, I called to the bench, after open-court questioning was completed, even those who didn't have a yes answer to any previous question. There, in the company of the lawyers, I asked this line of questions, “Did you hear all my questions? I see you didn't answer any of them. Did you understand them?” What I found out is that a sizable 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 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.”

After I wrote an article about my experiences,⁴⁶ many of my fellow judges changed 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 sent an email to our colleagues saying it would be judicial malpractice not to question every single potential juror. I cite this undertaking to show how important it is for judges to undertake pilot projects that seek to discover problems with our default practices and come up with effective correctives.

Daily Promoting Jury Comprehension. Judges serve many roles as trial managers. This includes educating jurors on their role as triers of the facts, evaluators of witness credibility, and faithful followers of the law. Veteran trial judges know well the feeling of frustration when we read verbose, jargon-filled pattern jury instructions to jurors at the close of the evidence. In my

fourth decade as a trial judge, I am convinced that judges must take concerted efforts to promote juror comprehension. Being only legally accurate in our pronouncements, can lead to jury confusion and perhaps inaccurate verdicts. In recent years as a senior judge, I have volunteered to sit on high-volume calendars with many unrepresented litigants. In that role, I am the landlord-tenant court judge or the daytime emergency judge, where most of the people in front of me are *pro se*.⁴⁷ For example, when I have a temporary-restraining-order hearing in a neighbor squabble or an employer/employee dispute and the litigants are unrepresented, I must tell the parties, among other things, what the burden of proof is if they want to get a TRO. Doing that year after year, I have realized that we need to speak in plain English to help them know what the rules of evidence are, what's allowed and not allowed in a hearing. I must talk like a fellow citizen, not like some highfalutin lawyer, academic, or a judge on an elevated bench. Using plain terms is a skill for all of us to learn as trial lawyers and judges speaking to juries. Here again, we can learn from the likes of Peter Tiersma and other linguists to make our courtroom communications better understood by our fellow Americans.⁴⁸

“[B]ut the defendant is my fiancée.”

B. Trial Practitioners.

Lawyers can initiate jury-centered dialogues. For example:

- Have regular meetings at your law firm or with co-counsel in a case to develop action plans that address pressing issues. For example, Marc Breakstone in Massachusetts slowly, methodically, and ultimately successfully organized fellow civil trial practitioners to convince trial judges to cede their exclusive control of *voir dire* questioning and allow lawyers to participate in inquiries of prospective jurors.
- Lobby your congressional delegation to amend the Federal Jury Service and Selection Act, an outdated 1968 statute that, to this day, defines “representativeness” simply 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 more frequently.
- Talk to juries as a regular person would. (When you look at Peter Tiersma’s “Communicating with Juries,” you see how important it is 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.

46. Greg Mize, “On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room,” *CT. REV.* Spring 1999 pp. 10-15. Similar results appeared in civil trials. See, “On Building a Better Voir Dire Process,” *VOIR DIRE* Spring 2008.

47. 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. See PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE TRIAL COURTS* (2015).

48. “Why This Judge Is Adding Pro Se Summaries to Her Rulings,” *THE NAT. L. J.*, (March 16, 2023), describes model practices by U.S. District Court Judge Charlotte Sweeney and U.S. Magistrate Judge Maritza Dominguez Braswell to explain complicated legal concepts to lay persons in understandable terms. Judge Sweeney’s rationale is: “We just want[] to make sure that access to justice means that you also understand the justice you’re going to get.”

C. Legislators.

State senators and representatives, especially those who are bar members, should collaborate with state courts to enact needed reforms. For example, the number of peremptory strikes available per side in criminal and civil cases are established by statute in many states. It would likely be useful for legislators to be informed of ABA Principle 11 and accompanying Commentary advocating, “The number of peremptory challenges should be sufficient, but limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury, and to provide the parties confidence in the fairness of the jury.”

During jury selection questioning, it is quite common for citizens to claim substantial hardship due to the costs of serving on a jury.⁴⁹ Research by the National Center for State Courts⁵⁰ and media reports demonstrate jury service stipends are paltry and cause loss of the occupational income for many jurors. Summoned householders often have to pay for substitute dependent care that is never fully recovered by their jury fee. Legislators typically determine jury service compensation levels. Thus, they play a key role in making jury service feasible for more constituents and jury venires more reflective of the economic diversity of the community at large.

D. Law Professors.

Throughout the modern era of jury trial improvements, the legal academy has been a prominent provider of empirical facts that generate healthy skepticism of the ways “we always do it.” There have been increasing instances of “law and empirical studies” programs that confront longstanding legal myths about jurors and jury trials. Many classroom teachers and researchers have been invaluable members of study commissions and pilot project evaluators. Let’s encourage those veteran jury researchers and current academic deans to promote more interdisciplinary research and cultivate another generation of jury trial reformers.

CONCLUSION

The first national Jury Summit in New York City in 2001 created a critical mass of jury improvement advocates. Social science research since then has added rich data about implicit bias and provided proven ways to create more representative (aka democratic) juries. A handful of state supreme courts have recently unveiled the inadequacies of *Batson* doctrine enforcement and the ineffectiveness of traditional *voir dire* practices.

Fortified with empirical research and blessed with model leadership from several state supreme courts, I encourage readers to join in the creation of a second round of nationwide jury reform. Implicit bias is a natural condition in all human enterprises and, hence, something to be recognized not eliminated. Let us create a Gideon’s army⁵¹ devoted to reducing the influence of bias in courtrooms, increasing citizen participation in jury service, and empowering jurors with educational tools to better understand and fulfill their role as fair factfinders. Let’s us grow the renaissance that began in the 1990s, calling the new growth spurt “The Second Rising Tide of Jury Improvements.” And thereby, maybe we can do some good—perhaps (in words from a prior era of civic advances) even make some good trouble.



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49. See Abusaid & Papp, *supra* note 41.

50. *Juror Compensation in the United States* is a comprehensive list of juror stipend levels in every jurisdiction. See B. Clark, *Juror Compensation in the United States*, National Center for State Courts, April 2022, https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0024/76173/Juror-Compensation.pdf.

51. This analogy is based upon the story in the Old Testament Book of Judges (6:1-7) conveying a proposition that much can be done with a small number of focused soldiers.