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ARTICLES

CHIEF JUDGE JUDITH S. KAYE'S PROGRAM OF JURY SELECTION REFORM IN NEW YORK*

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In her first major initiative as Chief Judge of the State of New York, Judith S. Kaye has undertaken a wholesale re-examination and overhaul of New York's jury system.¹ To date, her groundbreaking efforts have been an unqualified success.

In the summer of 1993, Chief Judge Kaye and Chief Administrative Judge E. Leo Milonas formed the Jury Project, a panel of

* This Article is derived from the Jury Project's report submitted in April of 1994 evaluating the New York State jury system.

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¹ See *Chief Judge Kaye's Statement on the Project*, N.Y. L.J., Apr. 7, 1994, at 7 [hereinafter *Chief Judge Kaye's Statement*].

thirty judges, attorneys, jury commissioners, educators, journalists, and business people,² who were asked to prepare a report evaluating every facet of New York State's jury system—from enlarging the jury pool, to making more effective use of jurors' court time, to improving juror compensation, to upgrading dilapidated juror facilities, to streamlining and modernizing jury selection procedures. That report was submitted in April of 1994. In October of 1994, after inviting and considering the views of the bar, bench, and public, Judges Kaye and Milonas announced a comprehensive program of jury reform that contained virtually all of the proposals contained in the Jury Project report.³

None of the areas tackled by the Jury Project's report is more important, or more controversial, than jury selection.⁴ In one guise or another, voir dire elicited more comments from the public than any other issue on which jurors commented—even more than low jury pay, inadequate court facilities, or mandatory sequestration.⁵ We will discuss the principle features of New York's voir dire process as it has existed for decades, the Jury Project's recommendations, the innovations that are now being implemented or experimented with in a pilot project, and the additional reforms that are being debated in the legislature.

As in the Jury Project's report, we will organize our discussion around the pertinent recommendations contained in the American Bar Association's Standards Relating to Juror Use and Management, which were the result of five years of painstaking work performed by two nationally representative panels of judges, lawyers

² The members of the Jury Project were Colleen McMahon, Esq. (Chair), Hon. Herbert Altman, Hon. Phylis Skloot Bamberger, Eugene Borenstein, Esq., Fortuna Calvo-Roth, Hon. Randall T. Eng, Hon. Ira Gammerman, Norman Goodman, Esq., Stanley Harwood, Esq., Harold Herman, Esq., Carleton Pierce Irish, Herculano Izquierdo, Esq., Susan M. Karten, Esq., Mehrl F. King, Joseph J. Kunzeman, Esq., Nat Leventhal, Esq., Wilber A. Levin, Hon. Patricia D. Marks, Paul O'Brien, Carl P. Paladino, Esq., Bettina B. Plevan, Esq., Roy L. Reardon, Esq., Constance L. Royster, Esq., Lewis Rudin, Hon. Rose H. Sconiers, Randolph F. Treece, Esq., Hon. Patricia Anne Williams, Professor Steven Zeidman, Gloria T. Zinone and Professor Emil Zullo. Counsel for the Project were David L. Kornblau, Esq. (chief), Roberta A. Kaplan, Esq. (deputy) and Paula A. Tuffin, Esq. (deputy). The Project was also assisted by Anthony Manisero, Chester Mount, Marlene Nadel and Ann Pfau, Esq., of the New York State Office of Court Administration.

³ See Gary Spencer, *Far-Ranging Jury System Changes Adopted*, N.Y. L.J., Oct. 25, 1994, at 1 [hereinafter *Far-Ranging Jury System Changes Adopted*] (detailing changes brought about as result of Jury Project report).

⁴ See Gary Spencer & Daniel Wise, *Plan to Revamp Jury System Unveiled: Six Month Study Urges 80 Specific Changes in Process*, N.Y. L.J., Apr. 7, 1994, at 1.

⁵ See *id.*

and jury experts, aided by some of the country's leading scholars and research institutions.⁶

The American Bar Association ("ABA") Standards relating to voir dire posit a system in which the conduct of voir dire is essentially the same in civil and criminal cases.⁷ New York does not have such a system. Criminal voir dire in New York is governed strictly by statute.⁸ It is conducted in the presence of the trial judge, who does some (often most) of the questioning.⁹ Although it is not constitutionally or statutorily required, most criminal voir dire is on the record, in order to preserve the right to contest challenges under *Batson v. Kentucky*.¹⁰ The Criminal Procedure Law ("CPL") gives courts discretion to use juror questionnaires,¹¹ and the Office of Court Administration ("OCA") has promulgated a standard background questionnaire that is used by some but not all judges to accelerate the voir dire process.¹² After both parties have completed their questioning, the People, and then the defendant, may challenge prospective jurors for cause.¹³ The prosecution thereupon exercises all its peremptory challenges, followed by the defendant.¹⁴ The prosecution may not exercise any remaining peremptories after the defendant has exercised his or hers.¹⁵ Each side has between ten and twenty peremptory challenges, depending on the nature and severity of the crime.¹⁶ No challenge for cause is appealable unless all peremptories are used.¹⁷

Civil voir dire in New York, by contrast, is conducted by attorneys without judicial supervision, unless a party requests it.¹⁸ Ju-

⁶ ABA Comm. on Jury Standards, STANDARDS RELATING TO JUROR USE AND MANAGEMENT (1993) [hereinafter STANDARDS]. The ABA adopted the Standards in 1983, and revised the Standards' commentary and references in 1993.

⁷ See STANDARDS, *supra* note 6, § 7 commentary at 73-80 (discussing voir dire procedures).

⁸ See N.Y. CRIM. PROC. LAW §§ 270.15-25 (McKinney 1993) (describing general procedure for challenges of individual jurors).

⁹ *Id.* (requiring court to take lead role in voir dire procedures).

¹⁰ 476 U.S. 79, 99 (1986).

¹¹ N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 1993) (providing procedures for examinations of prospective jurors).

¹² See Gary Spencer, *Jury Project Moves to Halt 'Standing Pool': Expanded Selection Seen Ending 'Permanent Lists'*, N.Y. L.J., Aug. 29, 1994, at 1.

¹³ See N.Y. CRIM. PROC. LAW §§ 270.15-20 (McKinney 1993).

¹⁴ *Id.*

¹⁵ *Id.* § 270.15(2).

¹⁶ *Id.* § 270.25(2) (allowing 20 peremptories in cases involving class "A" felonies; 15 for class "B" or "C" felonies; and 10 for other offenses).

¹⁷ *Id.* § 270.20(2).

¹⁸ N.Y. CIV. PRAC. L. & R. 4107 (McKinney 1992) (noting that any party may request judicial presence).

ries are empaneled wherever space can be found, which is seldom in a courtroom, except in smaller counties upstate. Rules for questioning vary from none (in most instances) to those imposed by particular judges in parts functioning as individual assignment parts.¹⁹ Challenges for cause are difficult to resolve, if only because the attorneys have to find a judge to hear them (none being present in the empaneling room). As a result, civil voir dire can take days or even weeks. Each party has three peremptory challenges, plus one for each alternate seat, but this number is effectively increased in many cases by the widespread practice of agreeing to excuse jurors neither side wishes to seat (sometimes referred to as "cause by consent"). The method and order for exercising peremptories vary from county to county. Voir dire is conducted on the record only in exceptional circumstances.

The differences between civil and criminal voir dire in New York make it necessary to discuss each separately in light of the ABA Standards.

I. CRIMINAL VOIR DIRE

ABA Standard 7(a) suggests the use of juror questionnaires to obtain basic background information about jurors. It is rarely possible to make that background information available to counsel in advance, but this should be done whenever possible. The CPL currently gives courts discretion to use juror questionnaires.²⁰ According to the New York State Association of Criminal Defense Lawyers, the use of criminal juror questionnaires is increasing, and counsel routinely prepare their own questionnaires specifically focused on disqualifying criteria pertinent to the specific case.²¹ As long as all questionnaires are approved by the court, and as long as appropriate steps are taken to protect juror privacy (by limiting circulation of questionnaires to judges and counsel, and by destroying all copies of questionnaires after they are used),

¹⁹ In urban/suburban areas, the pretrial Individual Assignment System judge is not necessarily the trial judge, and trial judges are seldom assigned to cases until after jury selection. This means that there is effectively no judge available to supervise jury selection. Time limits on questioning and questionnaires or other time saving devices are used only when agreed to by the parties or imposed by an assignment judge—a rare occurrence.

²⁰ See N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 1993).

²¹ See Letter from William I. Aronwald, New York State Association of Criminal Defense Lawyers, to Colleen McMahon, Esq., Paul, Weiss, Rifkind, Wharton & Garrison 2 (Nov. 30, 1993) (on file with authors).

courts should continue to use jury questionnaires to speed the jury selection process.

Juror questionnaires are used differently by different judges. Some simply review jurors' written answers to questions with counsel and use it as a springboard for further questioning. Others hand questionnaires to jurors in the box and listen to the panelists answer the questions aloud, observing their demeanor, their ability to read and understand the question, and their ability to communicate. The former method saves considerable time and eliminates one source of complaint for many jurors—listening to the same questions asked over and over. However, the latter method allows the trial judge to identify jurors whose ability to understand and communicate are not compatible with service on a particular case.

Both ABA Standard 7(b) and the CPL call on the trial judge to conduct the initial examination of the prospective jurors, and then permit counsel for the parties to ask appropriate supplemental questions.²² This system works well. Another option is the so-called Federal system, in which the court conducts the entire examination.²³ However, attorney participation, properly monitored and controlled by the court, is important to ensure a fair and impartial jury—particularly where a defendant's liberty is at stake.²⁴

The ABA recommends use of a "struck" system to select juries in both civil and criminal cases,²⁵ while the CPL specifies use of a "strike and replace" method in criminal cases in New York.²⁶ As will be seen, the Project prefers the "struck" system in civil cases. However, given the large number of peremptory challenges avail-

²² See N.Y. CRIM. PROC. LAW § 270.15(1)(b), (c) (McKinney 1993).

²³ See MARILYN J. BERGER ET AL., TRIAL ADVOCACY PLANNING, ANALYSIS, & STRATEGY 190 (1989) (discussing federal procedure in which judge conducts voir dire); cf. FED. R. CIV. P. 47 ("The court may permit the parties . . . to conduct the examination of prospective jurors or may itself conduct the examination."); Rhonda McMillion, *Advocating Voir Dire Reform*, A.B.A. J., Nov. 1991, at 114 (stating that few federal judges permit attorneys to question potential jurors).

²⁴ See generally Tracy L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 CHI.-KENT L. REV. 549, 560-61 (1992) (noting conflict between adversarial view of jury selection, which seeks favorable jurors, and statutory goal, which seeks fairness and impartiality).

²⁵ ABA STANDARD RELATING TO TRIAL COURTS AS AMENDED 102-12 (1987) (suggesting more efficient use of jury system); see also Leonard B. Sand & Steven A. Reiss, *A Report on Seven Experiments Conducted By District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 426-59 (1985) (discussing alternative jury selection techniques).

²⁶ See N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1993).

able in criminal cases (a minimum of twenty and a maximum of forty),²⁷ use of a struck system on the criminal side would not be practical in New York, even if the number of peremptories were somewhat reduced. A better alternative would entail screening an entire array for obvious cause challenges prior to seating the first panel in the box for more intensive questioning. This approach would free jurors who cannot possibly sit on a case from the tedium of waiting in the courtroom until they are reached for individual voir dire, and will allow them to be sent to another voir dire.²⁸

ABA Standard 7(c) requires the court to ensure that the prospective jurors' privacy is reasonably protected during voir dire.²⁹ This is a common area of juror complaint, particularly in criminal cases.³⁰ Jurors are understandably uncomfortable discussing where they live and work, and giving information about their families in front of a criminal defendant. Many also fear retribution from the defendant's family and friends.

Judges have ample authority to curtail improper questioning by attorneys.³¹ But, there is an inevitable conflict between the jurors' desire for privacy and the defendant's right to a public trial and to be present during jury selection.³² Judges generally do their best to balance these legitimate concerns. As long as they continue to be mindful of the jurors' privacy interests and minimize the

²⁷ See *infra* notes 128-32 and accompanying text (discussing number of peremptories available in criminal cases).

²⁸ This, of course, is one of the considerable advantages of obtaining written responses to the juror questions. Trial judges and counsel should devise ways to compensate when written questionnaires are not used—perhaps by addressing a few general questions about time requirements, sequestration, the identity of the defendant and relevant parties, etc., to all potential jurors at the outset of voir dire.

²⁹ See N.Y. PUB. OFF. LAW § 87(2)(a) (McKinney 1988). The New York Freedom of Information Law requires disclosure of records maintained by an agency unless it is specifically exempted. *Id.* One such exemption is for information provided on juror questionnaires. *Id.* Such information is considered confidential. *Id.*; see also *Newsday v. Sise*, 71 N.Y.2d 146, 151-52, 518 N.E.2d 930, 932-33, 524 N.Y.S.2d 35, 38-39 (1987) (explaining absolutely confidential nature of information contained in juror questionnaires), *cert. denied*, 486 U.S. 1056 (1988).

³⁰ See Albert W. Alschuler & Andrew Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 926 (1994) (observing that intrusive and repetitive questioning common in cross examination of witnesses has infected jury selection).

³¹ See N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1993) (noting that repetitious or irrelevant questions will not be permitted).

³² See Alschuler & Deiss, *supra* note 30, at 936.

amount of specific personal information that jurors must divulge in open court, there is no reason to eliminate this discretion.³³

We also strongly support the requirement that voir dire be held on the record in criminal cases. Although this measure is not constitutionally mandated,³⁴ sound policy supports the creation of a clear record of the jury selection in criminal cases. This would enable an appellate court to review compliance with *Batson v. Kentucky* and its progeny,³⁵ and otherwise to ensure that the defendant was tried by a fair and impartial jury.³⁶ The CPL should be amended to accomplish this result. No legislative change may be necessary to implement this proposal, however, as the Court of Appeals may soon rule that it is constitutionally required.³⁷

II. JUDICIAL PRESENCE DURING CIVIL VOIR DIRE: A PILOT PROJECT

Many jurors who go through civil voir dire have a bad experience,³⁸ and they are not reluctant to discuss it.³⁹ All of their complaints have a similar ring. The jurors do not understand why they must sit, often for days and occasionally for weeks, while groups of six are asked the same boring questions over and over. They do not understand why they must wait until their names are called when it is apparent that they will be unable to sit on a par-

³³ For example, jurors can be asked to give general information about where they live (a neighborhood, township, school district) rather than a specific address. It will seldom be appropriate to question jurors about details about their minor children, such as where they go to school. Where such details are required, *in camera* questioning should be considered.

³⁴ See *People v. Childress*, 81 N.Y.2d 263, 268, 614 N.E.2d 709, 712, 598 N.Y.S.2d 146, 149 (1993).

³⁵ See, e.g., *J.E.B. v. Alabama ex. rel. T.B.*, 114 S. Ct. 1419, 1430 (1994) (holding that peremptory challenges may not be based on gender); *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (stating that criminal defendants may not exercise peremptory challenges based on race). See generally Mark L. Josephs, *Fourteenth Amendment—Peremptory Challenges and the Equal Protection Clause*, 82 J. CRIM. L. & CRIMINOLOGY 1000, 1000-04 (1992) (discussing post-Batson developments in Supreme Court).

³⁶ See Josephs, *supra* note 35, at 1024.

³⁷ See *People v. Giles*, 83 N.Y.2d 1003, 1003, 640 N.E.2d 153, 153, 616 N.Y.S.2d 485, 485 (1994) (leave to appeal denied on July 28, 1994 by Bellacosa, J.).

³⁸ See Darryl K. Brown, *The Means and Ends of Representative Juries*, 1 VA. J. SOC. POL'Y & L. 445, 471 n.107 (1994); cf. J. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85, 119-20 (1991) (stating that most judges did not perceive juror unhappiness in negligence cases).

³⁹ The Jury Project established a toll-free juror hotline. Of the 1333 callers, more than half mentioned that their biggest complaint was that their time was wasted.

ticular case.⁴⁰ Jurors often are shocked that there is no judge present and that, in many courthouses, civil jury selection does not take place in a courtroom.⁴¹ They do not like being asked what they regard as intrusive and irrelevant questions by lawyers.⁴² They resent what they perceive as condescension from practically everyone who is officially associated with the court system—court officers, clerks, and attorneys.⁴³ They become furious when unsupervised lawyers and court personnel fail to appear on time, take long lunches, disappear without explanation, and end the day early. Several jurors observed that if they acted this way in their own places of business, they would have been fired long ago. They are livid when cases settle after jury selection; no speeches about the important role they have played in resolving the case convinces them that their time has not been wasted. Many express outrage at these abuses, not just as jurors whose time is being wasted, but as taxpayers whose tax dollars are being wasted on unnecessary jury fees.

The most vocal jurors are likely those who have had the worst experiences. Many lawyers pick civil juries fairly and efficiently, and in many courthouses throughout the State jurors are treated with the respect they deserve. But complaints are not limited to jurors in New York City, downstate, or in urban areas. Something is wrong with civil jury selection in New York, and something should be done about it.

Many Jury Project members believed that the root of these problems is New York's deeply ingrained tradition of permitting lawyers to pick juries in civil cases without a judge being present.⁴⁴ This New York practice is highly unusual; in federal courts and virtually all other states a judge is present during voir dire

⁴⁰ During a recent case tried by one of the authors, the last juror to be called out of an array of thirty had wasted six hours waiting to tell counsel that he used to work for one of the parties.

⁴¹ See Brown, *supra* note 38, at 471.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ This tradition is not derived from the CPLR. See N.Y. CIV. PRAC. L. & R. 4107 (McKinney 1992) (ironically entitled "Judge present at examination of jurors"). The Rule provides: "On application of any party, a judge shall be present at the examination of the jurors." *Id.* Few litigants take advantage of this rule (and prospective jurors are not given the option!). Many New York civil trial lawyers have developed an arsenal of jury selection techniques that they believe would be hampered by judicial supervision. Those who might want a judge present are loath to ask for one at the risk of antagonizing a busy trial judge, who does not usually make time to oversee civil voir dieres.

and does some, if not all, questioning.⁴⁵ New York's civil voir dire practice is inconsistent with ABA Standard 7(b), which provides that the judge should conduct the initial questioning, and is expressly disapproved of in the ABA's report.⁴⁶

The advantages of having a judge present during jury selection are legion. From the jurors' perspective, it endows the proceeding with dignity, and sends the message that jury service is indeed as important as the jurors are repeatedly told it is. It also means that voir dire will take place in a courtroom, rather than in often inadequate empaneling rooms, juror assembly areas or (as frequently happens in New York County) dimly lit hallways.⁴⁷ It means that the judge will be there to stop any abusive or unnecessarily prolonged questioning, delay, or other improper conduct. Equally important, it means that jurors do not have to be sent home after being selected, in order to wait (often for days, and sometimes even weeks) until a judge is free to try the case. When the trial judge presides over jury selection, the trial starts soon after the jury has been selected.

But, requiring that judges be present would be a boon not only to jurors; it offers substantial benefits to the litigants as well as the judicial system. Counsel would be able to obtain immediate rulings on challenges for cause, improper questions or comments, and other objections. Courthouse facilities would be conserved, since there would be no need for separate empaneling areas and there would be no waiting for rooms. Fewer jurors would be used, since the presence of a judge would put an end to the abusive elements of "cause by consent," while ensuring that jurors who truly should not sit are excluded.⁴⁸

Finally, direct judicial supervision of jury selection would lead more cases to settle before an array of twenty-five or more jurors is wasted on a civil case that is not going to be tried.⁴⁹ If the trial judge were assigned to preside over jury selection, he or she could

⁴⁵ See STANDARDS, *supra* note 6, at 74-75; see also J. Alexander Tanford, *The Trial Process*, LAW, TACTICS, & ETHICS 192-93 (1983).

⁴⁶ See STANDARDS, *supra* note 6, at 58 n.10.

⁴⁷ See Brown, *supra* note 38, at 471; see also George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 533-39 (1989) (analyzing empirical study on New York City Civil and Criminal Courts).

⁴⁸ The experience of the Jury Project panel members in other courts is that judges are generally eager to excuse panelists who are truly incompetent to serve and are often the first to suggest it.

⁴⁹ See Priest, *supra* note 47, at 527.

hold a settlement conference before jury selection begins. The elimination of down-time during jury selection, coupled with judicial involvement from the outset, would put pressure on the trial lawyers and litigants to discuss settlement seriously before picking a jury, rather than doing so during a prolonged selection process or on the days (even weeks) that pass between voir dire and trial in many districts.

Two arguments are typically advanced against having a judge preside over civil voir dire.

First, some contend that total attorney control of jury selection is essential to produce fair and unbiased juries.⁵⁰ The concern is that judges know much less about the facts of the case than the attorneys, and do not have sufficient incentives to probe enough in their questioning to find out whether particular jurors harbor subtle biases relevant to their ability to decide the case fairly.

This concern, however, is misplaced. It confuses the issue of whether a judge should be present with the separate question of who should examine the prospective jurors. Currently, in criminal cases in New York, the trial judge is present throughout the voir dire, but conducts only the initial questioning of the panel; the attorneys are then permitted to ask additional questions.⁵¹ If this method (which the ABA recommends)⁵² is fair enough to satisfy the rigorous constitutional demands applicable to the criminal process—where a defendant's liberty is at stake—it surely passes muster in civil cases, also.⁵³

The second, and far more substantial, objection to judicial presence during civil voir dire is based on the scarcity of judicial resources.⁵⁴ Most judges in civil trial parts, struggling to keep up with a crushing caseload, spend their time trying cases, holding conferences, and hearing and deciding motions.⁵⁵ If judges were required to be present during civil voir dire, they could not devote

⁵⁰ See Treger, *supra* note 24, at 551-52.

⁵¹ See N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1993).

⁵² See generally STANDARDS, *supra* note 6.

⁵³ Some studies have found that lawyer-conducted voir dire is more efficient and does not result in a prolonged jury selection process. See ARNE WERCHICK, MODERN CIVIL JURY SELECTION § 11-37 (1992) (noting results of Los Angeles study indicate that attorney-conducted voir dire took 135 minutes, judge-conducted voir dire took 64 minutes, and voir dire conducted by attorneys and judges together took 111 minutes).

⁵⁴ See Priest, *supra* note 47, at 554.

⁵⁵ *Id.*

those hours to their other responsibilities.⁵⁶ Some contend that, unless a large number of additional judgeships are created, the backlog of civil cases would grow even larger once judges began supervising voir dres.⁵⁷ Residents of many smaller counties point out that they already enjoy *de facto* judicial supervision of voir dire, without having a judge sit in the courtroom. In those counties, the small number of both judges and cases allows the courts to operate a pure Individual Assignment System ("IAS"); judges use voir dire time to deal with other duties, but "look in" or otherwise keep tabs on voir dire to make sure it does not get out of hand.⁵⁸

Others, pointing to the experience of federal judges, judges in other states, and New York's criminal judges, believe that imposing strict judicial control over civil jury selection would reduce wasted time and resources⁵⁹ by eliminating voir dres that drag out for days or weeks and by encouraging parties to settle their cases before jury selection begins.⁶⁰ To the extent that the fears of time wastage during judge-supervised voir dire are based on current practices (such as unlimited questioning by counsel and sending out cases for jury selection without regard to whether there are judges available to try them), critics of the present system argue that supervision by the trial judge would cure these ills.⁶¹ Un-

⁵⁶ *Id.*

⁵⁷ There is, however, evidence that judges may successfully assign voir dire to magistrate judges as an alternative to the appointment of more federal judges. See CATHY E. BENNETT & ROBERT B. HIRSCHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION § 11.3 (1993); see also Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A) (1988). The Act states, in relevant part: "A judge may designate a magistrate to hear and determine any pretrial matter pending before the court." *Id.*; see also *Peretz v. United States*, 111 S. Ct. 2661, 2667-68 (1991) (holding defendant who does not object to magistrate conducting voir dire may not later assert challenge of jury selection process).

⁵⁸ It seldom does. The Jury Project received reports from jury commissioners and Bar and bench representatives from the Third, Fourth, Fifth and Sixth Judicial Districts that voir dres rarely take more than one day to complete.

⁵⁹ WERCHICK, *supra* note 53, § 11-5. The United States Judicial Conference's Committee on the Operation of the Jury System revealed many leading judges feel voir dire is viewed as an extremely time consuming, random and much abused component of the trial system which many leading judges who participated in the judicial conference felt could be performed faster and without the abuse if conducted solely by judges. *Id.*; see also Gary Spencer, *Bar Groups Criticize Reforms Proposed for Civil Voir Dire*, N.Y. L.J., May 23, 1994, at 1 (arguing rigid rules are not necessary but only judge's discretion is necessary to keep jury selection on track).

⁶⁰ See *Far-Ranging Jury System Changes Adopted*, *supra* note 3, at 1.

⁶¹ Gary Spencer, *Bar Groups Criticize Reforms Proposed for Civil Voir Dire*, N.Y. L.J., May 23, 1994, at 1 (quoting Chairman of State Bar's Ad Hoc Committee on Jury System who gave opinion that all we need is judicial discretion to regulate jury system); see also

fortunately, data that would prove which theory is correct on this important question does not exist.

Representatives of the bench and bar have expressed many different views on this subject.⁶² The New York State Bar Association recently endorsed the continuation of attorney *questioning* in civil voir dres, but took no position on whether judicial presence should be required.⁶³ The New York State Trial Lawyers Association argues that it would be a waste of judicial time to take judges away from their other duties in order to supervise civil jury selections.⁶⁴ Some judges take this position as well; but they are far from unanimous.⁶⁵ The New York County Lawyers Association recently interviewed forty randomly chosen criminal and civil Supreme Court Justices in New York County.⁶⁶ Although these Justices have the heaviest caseload in the State, and might be expected to oppose additional duties most strenuously, roughly half of the civil judges polled were in favor of adopting the federal voir dire system, in which the judge both presides over and conducts jury selection.⁶⁷ The New York County Lawyers Association favors "greater and, perhaps, mandatory judicial supervision"

N.Y. CRIM. PROC. LAW § 270.15(1)(b), (c) (implying judge shall ensure that selection progresses in efficient and orderly manner). *But see* Robin Topping, *Around the Island Crimes And Courts Law And Order Its Time For Judgment On Jury Duty Revision*, N.Y. NEWSDAY, Aug. 3, 1994, at A27 (reporting opinions of Long Island Lawyers who feel jury project pilot program is over-reaction to small number of abusive attorneys).

⁶² See Richard L. Price, *Listening to the Jurors*, N.Y. L.J., Dec. 20, 1993, at 2 (explaining results of juror questionnaire on ways to improve jury system); Topping, *supra* note 61, at A27. Suffolk Bar Association President John Gross expressed concern whether the client's right to an impartial jury would be compromised. *Id.*

⁶³ See Resolution of NYSBA House of Delegates, Nov. 6, 1993. *But see* STANDARDS, *supra* note 6, at 58. Standard 7(b) states that the trial judge should conduct a preliminary voir dire examination. *Id.*

⁶⁴ See Recommendations of the New York State Trial Lawyers Ass'n Jury Reform Comm., Nov. 15, 1993, at 1 [hereinafter Recommendations of NYSTLA].

⁶⁵ See Norbert L. Kerr, *The Effects of Pretrial Publicity on Lawyers*, 78 JUDICATURE 120, 125-27 (1994) (summarizing results of study which found that judge-supervised voir dire was not more likely to produce bias-free jurors than attorney-supervised voir dire).

⁶⁶ See NEW YORK COUNTY LAWYERS' ASS'N JOINT TASK FORCE ON JURY SERVICE, JURY SERVICE IN NEW YORK STATE: A TIME FOR REFORM (Nov. 9, 1993).

⁶⁷ See *id.* at 5; see also NEW YORK COUNTY LAWYERS ASS'N JURY TASK FORCE, SUPPLEMENTAL REPORT 4-5 (Dec. 7, 1993) [hereinafter NYCLA SUPP.]. See generally, Gary Spencer, *Pilot Projects Chosen for Voir Dire Changes*, N.Y. L.J., Jan. 19, 1995, at 1 (explaining scope and methodology of experiment, which will conclude in second survey being taken); WERCHICK, *supra* note 53, § 11-5 (citing Judicial Conference study which led judges to conclude they could conduct voir dire more efficiently without sacrificing fundamental purpose).

through an amendment of CPLR 4107 to permit a judicial hearing officer or a judge to supervise "lawyer driven voir dire."⁶⁸

It is especially difficult to arrive at a definitive conclusion because of the absence of data concerning just how judicially supervised voir dire proceedings would affect judicial resources and caseloads.⁶⁹ However, we will soon have some concrete data on this very issue. On January 18, 1995, Chief Judge Kaye and Judge Milonas unveiled a pilot project to evaluate civil voir dire supervised by the trial judge.⁷⁰ This sixteen-week project began on January 30, 1995, in each of the four Judicial Departments, including two courthouses in New York County.⁷¹ The pilot project will experiment with a number of the Jury Project's proposed reforms of the civil voir dire process.⁷² As to judicial supervision of civil voir dire, judges participating in the pilot project will experiment with three different levels of judicial supervision: (1) the judge monitors, but is not physically present during, jury selection, and is available for rulings if needed; (2) the judge supervises the commencement of voir dire, and thereafter remains available as needed for rulings; and (3) the judge supervises the entire jury selection process, ensuring that it progresses in an efficient and orderly manner, and that the attorneys' questioning is relevant and not unduly repetitive or intrusive. Feedback will be solicited in all of the pilot courts through a series of in-depth questionnaires and personal interviews with judges, lawyers, and jurors. This feedback will then be used as the basis for additional reform.

⁶⁸ NYCLA Supp., *supra* note 67, at 6; *see also* N.Y. CIV. PRAC. L. & R. 4107 (McKinney 1992) (requiring judicial presence at voir dire upon request of party); *Baginski v. New York Telephone Co.*, 130 A.D.2d 362, 366, 515 N.Y.S.2d 23, 26 (1st Dep't 1987) (holding that statute confers unconditional right on moving party to have judge present at voir dire and failure by court to comply with parties' request results in reversible error).

⁶⁹ *See Spencer & Wise, supra* note 4, at 1. The authors note that even the members of the Jury Project panel were sharply divided on this issue. *Id.* Advocates of judicial supervision feel that it will expedite jury selection, encourage settlements, and guard against improperly intrusive questioning, while opponents believe that it will divert judges from performing their proper function of trying cases. *Id.*

⁷⁰ *See Spencer, supra* note 67, at 1.

⁷¹ The Jury Project also considered the alternative suggestion of using judicial hearing officers to supervise voir dire. The model most often suggested is having a judicial hearing officer ("JHO") monitor three or four voir dieres simultaneously, checking to see that selection is proceeding promptly, to be available for rulings, and where necessary, to intervene in the process to speed it to a conclusion. JHO-supervised voir dire would not address several of the most critical problems in the current system, including the lack of a judicial presence at the voir dire, the inability to obtain immediate rulings, the need to conduct voir dieres in unsuitable facilities, rather than in courtrooms and down time between voir dire and trial.

⁷² *See Spencer, supra* note 67, at 1.

III. UNIFORM STATEWIDE JURY SELECTION RULES

At present, methods for selecting civil juries vary throughout New York state. In the First and Fourth Departments, the prevailing practice is to select juries under "White's Rules."⁷³ Under White's Rules, counsel first ask general questions to the panel as a group to determine whether any prospective juror has knowledge of the subject matter, the parties, their attorneys or the prospective witnesses.⁷⁴ Follow-up questions to individual panelists are permitted. After challenges for cause are exercised, peremptory challenges are exercised singly and alternately, in rounds, by the parties.⁷⁵

Meanwhile, there is no consistent voir dire practice in the Second Department, other than the use of the strike and replace method.⁷⁶ Some judges have jury selection rules that they impose on counsel who will be trying cases in front of them. But since many cases are assigned for trial after jury selection, there is little opportunity for judicial involvement, or the imposition of rules.⁷⁷

In the Third Department, local practice is modeled on departmental rules (now repealed) that are similar to the procedures set forth in the CPL for criminal voir dire. The most notable feature of Third Department practice is that the plaintiff, like a prosecutor, must exercise all challenges—for cause and peremptory—before the defense. This gives a tremendous strategic advantage to the defense and results in widespread criticism of the process, both inside and outside the Third Department.

The New York State Trial Lawyers Association has recommended that civil voir dire "should be conducted in a uniform manner throughout the State. Rules should be published and

⁷³ See *Jury Procedures to be Tested*, N.Y. L.J., Jan. 20, 1995, at 4 (outlining White's method). These rules were named for Justice Robert White, who made them familiar in New York County while he served as the Trial and Assignment judge on furlough from his duties upstate.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.* (summarizing "strike and replace" method).

⁷⁷ See Daniel Moskowitz, *New York Trial Court to Try Separate Track for Business Cases*, WASH. POST, Jan. 4, 1993, at F10 (commenting that IAS was efficient in that single judge was responsible for pretrial, although new judge could be assigned for trial). Despite the adoption of an IAS in New York in the mid-1980s, cases in high-volume districts are often assigned to a different judge for trial after conferencing. *Id.* The trial judge is not necessarily the IAS judge who supervised the case at the pre-trial stage. *Id.* In cases assigned to the four Commercial Parts in Manhattan, the trial judges have adopted rules for jury selection; these rules can be imposed because the trial judge is assigned to the case before jury selection. *Id.*

available.”⁷⁸ This appears to be a sensible approach. Any member of the New York bar should be comfortable picking a jury in any part of the State and should be able to do so according to clear, published rules. At the same time, uniform rules should be tailored so that they do not unduly impinge on practices in those areas of the state where voir dire is a relatively efficient process—notably smaller upstate counties, where jury selection seldom takes more than a few hours.⁷⁹

In establishing uniform rules for civil voir dire, five elements should be considered; juror questionnaires, the “struck” jury system, time limits, scope of the voir dire examination, and a system of “non-designated alternatives.”

A. *Juror Questionnaires*

In criminal cases, trial judges are given discretion to require prospective jurors to complete a questionnaire containing basic information regarding their ability to serve as fair and impartial jurors.⁸⁰ While the questionnaires are used in varying ways by different judges, they have uniformly resulted in a more efficient process, thus saving potential jurors needless aggravation. Due to this success in the criminal area, the Jury Project recommended that such questionnaires be extended to civil voir dire as well. In early 1994, a number of judges and lawyers used the questionnaire on an experimental basis, with a great increase in voir dire efficiency. As a result, use of questionnaires in civil jury selection is now being implemented on a statewide basis. The new system offers a number of advantages that will make the jury selection process more efficient for the courts, and more painless for the potential jurors.

The new rule should leave room for judges and clerks to use the questionnaire in the most effective way. In general, however, the forms should be distributed and completed by jurors who are eligi-

⁷⁸ Recommendations of NYSTLA, *supra* note 64, at 1.

⁷⁹ See Topping, *supra* note 61, at A27 (asserting New York City and Long Island lawyers take longer time than upstate counterparts due to larger amount of cases and different legal culture).

⁸⁰ See N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1992) (stating background information may include, but is not limited to, place of birth, correct address, education, occupation, prior jury service, or knowledge of or relationship with court, party, witness, or attorney in action). Price, *supra* note 62, at 2 (noting in survey of jurors, 88.6% indicated that they believed questionnaire is good idea to save time).

ble for service on civil juries⁸¹ in the juror assembly room. The jurors can then bring the completed forms to any civil voir dres for which they are called.⁸²

In the context of a judicially supervised criminal voir dire, the Jury Project was willing to permit judges to have jurors respond to the questionnaires orally rather than in writing. However, in an unsupervised attorney voir dire, the background questionnaires should be filled out and given to counsel, to cut down on the time needed for questioning prospective jurors.⁸³ Whoever supervises the filling out of the questionnaire should be careful to ensure that jurors fill out their own questionnaires, since ability to read and write may be germane to a particular case.⁸⁴ Obviously, accommodations will have to be made for some jurors to ensure a non-discriminatory system—for example, those who are blind should be provided a fair opportunity to participate.⁸⁵

B. "Struck" Jury System

There are two general methods for voir dire: the "strike and replace" system and the "struck" system.⁸⁶ Under the "strike and replace" method, an initial panel of prospective jurors equal to the jury size (six in civil cases) is randomly chosen from the entire array of prospective jurors. These individuals are seated in the jury box and questioned. Challenges for cause are exercised, and those excused are replaced from the array. The replacement jurors are questioned and challenged for cause in the same manner, and additional replacements are made until the prospective jurors

⁸¹ In most counties, all jurors assemble in a single location and are sent out to civil or criminal cases as their names are drawn. In some urban counties, where civil or criminal cases are tried in different courthouses, some jurors are asked to report for civil jury duty and some for criminal jury duty. The jury commissioners should tailor use of the questionnaire to their particular logistical situation.

⁸² Cf. Paul J. Cambria, Jr., *Jury System is Examined*, N.Y. L.J., Jan. 24, 1994, at S4 (making proposals for scheduling trial times to accommodate needs of judges as well as attorney time conflicts in conjunction with juror questionnaires).

⁸³ See Matthew L. Larrabee & Linda P. Drucker, *Adieu Voir Dire: The Jury Questionnaire*, 21 LITIGATION 37, 38 (1994). "With basic information on all members of the panel already available in written form, you can obtain better information out of oral voir dire in less time." *Id.*

⁸⁴ For example, document-intensive securities litigation or a technical patent suit may require a more sophisticated jury. See Larrabee & Drucker, *supra* note 83, at 41 (noting that ability to observe potential jurors' grammar and spelling would be helpful to achieving this end).

⁸⁵ See BERGER ET AL., *supra* note 23, at 193.

⁸⁶ See generally *id.* at 189-93 (describing jury selection procedures).

in the box are cause-free. Peremptory challenges are then exercised, more replacements are seated, and the process continues until no cause challenges are possible and the parties have exercised or waived all of their peremptory challenges. When a panel of six satisfactory jurors is obtained, the jury is sworn in. Alternate jurors are then selected in the same manner.

Many attorneys dislike the "strike and replace" system because they have to withhold peremptories, for fear the randomly chosen replacement from the array may be worse than the prospective juror that is challenged.

In a "struck" system, no initial panel is selected. Background questions are asked of the entire array of potential jurors, and challenges for cause are exercised by both parties. The pool of potential jurors should be large enough (or supplemented as necessary) so that the number of "cause-free" prospective jurors is equal to or larger than the ultimate jury size desired (including alternates), plus the total number of peremptories that can be exercised by all parties.⁸⁷ The attorneys then exercise their peremptory challenges by alternately striking names from a list of the jurors until the number of jurors remaining equals six, plus alternates.⁸⁸ If there are still too many jurors after everyone has exercised peremptories, six jurors are selected at random to sit as the jury.⁸⁹

There are many advantages to the struck system. First, there is no reason to hold back peremptories, because they are exercised with full knowledge of who will remain on the jury.⁹⁰ Second, because questions can be posed to the entire array (instead of just six prospective jurors in the box), there will be less tedious repetition of basic questions, particularly when the lawyers use the juror questionnaires to cover basic background.⁹¹ Array members

⁸⁷ The Jury Project proposed an initial panel of 25 prospective jurors. Based on a six-person jury with two alternates, plus four peremptory challenges per side (see discussion of ABA Standard 8, *infra* note 122 and accompanying text), a panel of 25 would allow for nine challenges for cause, which normally ought to be sufficient. If experience demonstrates that a 25-member panel size is either too small or too large, OCA (or local jury commissioners) can easily amend the rule accordingly. This is one of the advantages of implementing voir dire procedures by administrative rule rather than statutory amendment.

⁸⁸ See BERGER ET AL., *supra* note 23, at 192.

⁸⁹ See generally *id.* at 164.

⁹⁰ See G. Thomas Munsterman et al., *The Best Method of Selecting Jurors*, 29 JUDGE'S J. 8, 9-13 (1990); see also JAMES W. JEANS, SR., TRIAL ADVOCACY 217, 272-73 (2d ed. 1993).

⁹¹ Larrabee & Drucker, *supra* note 83, at 37 (noting that "[o]ral voir dire can be mind-numbingly repetitive").

with disqualifications that are obvious from their questionnaires, or from a few general questions asked at the outset, can be dismissed quickly, returned to the central jury pool, and used for voir dire in a different case.⁹² Third, use of the struck system makes it easier to remedy a *Batson* violation.⁹³ In the strike and replace system, peremptories are exercised at various times, and each juror who is challenged is excused at the time of the challenge.⁹⁴ Only after two or three peremptories are exercised will a *Batson* pattern become apparent.⁹⁵ Unfortunately, by the time this discriminatory practice is revealed, the challenged jurors are long gone. Thus, voir dire must commence anew after a *Batson* motion is granted.⁹⁶ Under the struck system, all peremptories are exercised at one time, by striking names from a list.⁹⁷ Any suspect pattern will be immediately apparent when counsel reviews the list—which should occur prior to the dismissal of any challenged jurors.⁹⁸ The party challenging the exclusion of jurors can obtain a ruling before the jurors are aware that they have been challenged, and the voir dire is saved.⁹⁹ Fourth, less physical movement of jurors is required in the struck system, since prospective jurors do not have to step up to and down from the jury box as challenges are exercised.¹⁰⁰ Fifth, in the struck system, prospective jurors are spared the embarrassment of being challenged and individually asked to step down from the jury box for no apparent reason. The “struck” jurors are excused as a group.¹⁰¹ Sixth, experience in other courts demonstrates that the struck system saves time.

⁹² Such a disqualification would constitute a challenge for cause. See N.Y. CIV. PRAC. L. & R. 4110 (McKinney 1992) (providing statutory basis of challenge for cause).

⁹³ See *Batson v. Kentucky*, 476 U.S. 79 *passim* (1986) (holding that peremptory challenges based on race violates Equal Protection Clause).

⁹⁴ See BERGER ET AL., *supra* note 23, at 191-92.

⁹⁵ See *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991) (discussing that systematic exclusion of jurors of same race creates prima facie showing of discrimination); *Batson*, 476 U.S. at 97 (same).

⁹⁶ But see *Batson*, 476 U.S. at 99 n.24 (expressing doubt that a bright line rule could be implemented effectively because of wide disparity in procedures); cf. BERGER ET AL., *supra* note 23, at 189-90 (noting it is rare for litigants to challenge entire jury panel).

⁹⁷ See JEANS, *supra* note 90, at 272 (discussing benefit of exercising all peremptories at same time).

⁹⁸ See *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). The challenged jurors should not be dismissed until the list is reviewed for discrimination. *Id.*

⁹⁹ See JEANS, *supra* note 90, at 273. The lawyers' strikes must be communicated to the court and the opponent. *Id.*

¹⁰⁰ See V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS 435 (1985). Since strikes are exercised after all jurors have been questioned, jurors do not exit the juror box until after voir dire. *Id.*

¹⁰¹ See STANDARDS, *supra* note 6, at 94-95; see also BERGER ET AL., *supra* note 23, at 192.

One of the judges on the Jury Project obtained the parties' consent to try the struck system, combined with a juror questionnaire, in both a routine and a complex civil case. He found that jury selection took considerably less time.

Notwithstanding the Jury Project's recommendation for the struck system, OCA has decided to include this system of jury selection as part of its pilot project. Judges participating in the project will experiment with some or all of the jury selection methods, and OCA will then gather data and make further recommendations concerning the issue.

C. *Time Limits*

Civil jury selection in New York simply takes too long.¹⁰² Unsupervised, attorneys are free to drag out the process for days and even weeks, questioning jurors endlessly and excusing dozens of jurors without using peremptories through the notorious practice of "cause by consent." Some of this delay is intentional, especially in the case of trial attorneys who are paid by the day or who use the jury selection period to conduct settlement negotiations. Some of the delay, no doubt, is unintentional—it is simply the natural product of those who have grown accustomed to a system in which civil voir dire is deemed the lawyers' business, with the court's attitude being: "Just let us know when you're done."¹⁰³

But whatever the cause, civil voir dures that go on for days or weeks are unacceptable. They waste the jurors' time, squander scarce courthouse facilities, and contribute to our juror shortage by overconsuming jurors, who, after being dismissed, are lost to the jury system for several years.

The solution to this problem is simple: time limits. The experience of judges who use time limits for questioning is that attorneys are able to police themselves, and that abuses are few. However, when there are abuses, the attorneys are able to obtain rulings because a trial judge has already been assigned to the case.¹⁰⁴ In jurisdictions where cases are not assigned to trial

¹⁰² See *Far-Ranging Jury System Changes Adopted*, *supra* note 3, at 1; see also *Chief Judge Kaye's Statement*, *supra* note 1, at 7.

¹⁰³ See generally BERGER ET AL., *supra* note 23, at 190.

¹⁰⁴ See *supra* notes 22-24 and accompanying text (discussing benefits of judge/attorney conducted voir dire).

judges until after jury selection, there is no one to look to for enforcement, and thus abuses may be more frequent.

OCA has decided to include time limits as part of its civil voir dire pilot project.¹⁰⁵ In the pilot project, the trial judges will determine appropriate time limits following discussion with the attorneys in each case before voir dire begins.¹⁰⁶ The limitations will include: (i) specific periods for the questioning of the initial panel, and the replacement jurors (and alternates when designated alternate jurors are used) as appropriate for the method of jury selection being used,¹⁰⁷ and (ii) the overall period in which the entire selection process will be completed.¹⁰⁸

D. Scope of Examination

ABA Standard 7 provides that voir dire examination should be limited to matters relevant to determining "whether to remove a juror for cause and to exercising peremptory challenges."¹⁰⁹ This may be too broad, however, since by definition a peremptory challenge can be made for any reason or no reason (subject to constitutional requirements).¹¹⁰ Thus, the ABA Standard, read literally, would permit a prospective juror to be questioned on *any* subject.¹¹¹

The only legitimate purpose of a voir dire examination is to uncover potential prejudice or bias on the part of the prospective juror that would interfere with the juror's ability to decide the case fairly and impartially.¹¹² Such prejudice or bias, when significant, may be a proper basis for a challenge for cause.¹¹³ Even if it does

¹⁰⁵ See Spencer, *supra* note 67, at 1.

¹⁰⁶ See *id.* (describing experimental project, including judicial power to impose time limits).

¹⁰⁷ See Spencer, *supra* note 61, at 1 (explaining proposed conversion to "struck" jury system).

¹⁰⁸ See STANDARDS, *supra* note 6, at 58-59; Glass, *Voir Dire in the Federal Courts*, 44 INS. COUNSEL 628, 630-31 (1977).

¹⁰⁹ See STANDARDS, *supra* note 6, at 58.

¹¹⁰ See JON M. VAN DYKE, JURY SELECTION PROCEDURES 139 (1977) (explaining that peremptory challenges may be made for any reason or no reason at all).

¹¹¹ But see STANDARDS, *supra* note 6, at 61 (suggesting that information gathering should be limited to what is essential to selecting fair jury).

¹¹² See NATIONAL JURY PROJECT, INC., JURYWORK: SYSTEMATIC TECHNIQUES § 2.06 (1994) [hereinafter NATIONAL JURY PRODUCT, INC.] (proposing that attorneys should be able to explain why each question is necessary); see also *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) (holding that trial judge's refusal to ask jurors questions about racial prejudice toward mexicans was proper).

¹¹³ See N.Y. CRIM. PROC. LAW § 270.20(1)(b) (McKinney 1993). Removal for cause is satisfied if trial judge is satisfied that juror "has a state of mind likely to preclude him from

not rise to that level, it may lead a party to exercise a peremptory challenge.¹¹⁴ For this reason, the nature and scope of the inquiry should be limited to matters relevant to whether a juror may be challenged for cause.¹¹⁵

OCA, however, declined to adopt this recommendation, finding it inconsistent with the retention of peremptory challenges (discussed below).

E. "Non-Designated" Alternates

The New York Civil Practice Law and Rules ("CPLR") provides for a system of "designated alternates."¹¹⁶ The Jury Project recommended a system of "non-designated alternates." Under this proposal, which could be implemented under statute or by OCA rule, a group of eight or more jurors would be chosen, with alternates being selected at random after the judge's charge, rather than at the outset of the trial. This would encourage all jurors to pay close attention to the evidence and the charge. It would also ensure that none of the jurors feel like "second-class citizens" throughout the trial.

Non-designated alternates will be part of OCA's pilot project.¹¹⁷ Since CPLR sections 4105 and 4106 have not been amended, non-designated alternates can be used in the pilot project only with the consent of the attorneys in a particular case.¹¹⁸

IV. PROTECTION OF JUROR PRIVACY

The privacy of prospective civil jurors, no less than that of their peers on the criminal side, should be protected by the court. Violations can occur in two ways: unnecessarily intrusive question-

rendering an impartial verdict based on the evidence adduced at trial." *Id.*; see also VAN DYKE, *supra* note 110, at 139 (noting challenges for cause must be made on a "narrowly specified, provable, and legally cognizable basis of partiality").

¹¹⁴ See Herald Price Fahringer, *The Fate of Peremptory Challenges*, N.Y. L.J., Nov. 4, 1993, at 2 (stating that no specific reason is needed for exercise of peremptory challenge and that court must excuse challenged jurors without dispute).

¹¹⁵ But see *id.* (arguing Jury Project's goal is elimination of peremptory challenge).

¹¹⁶ See N.Y. CIV. PRAC. L. & R. 4105 (McKinney 1992). The statute provides: "[T]he first six persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and are not discharged or excused, must be sworn and constitute the jury to try the issue." *Id.*; see also N.Y. CIV. PRAC. L. & R. 4106 (McKinney 1992) (providing for system of "designated" alternates who will take place of "regular" jurors who become unable to serve).

¹¹⁷ See Spencer, *supra* note 67, at 4.

¹¹⁸ *Id.*

ing by counsel, and use of information developed in voir dire for other purposes.

Although the presence of a judge during voir dire would presumably help reduce these risks to some degree,¹¹⁹ the best remedy is the widespread adoption of jury questionnaires.¹²⁰ This would reduce the need to publicly disclose personal information, while also allowing for the destruction of unnecessary questionnaires.

ABA Standard 7(d) provides that civil jury selection should be held on the record unless waived by the parties.¹²¹ However, the civil voir dire process is not ordinarily transcribed in New York, and the Jury Project found that no change in the civil context was warranted.

ABA Standard 8 allows for the judicial removal of a prospective juror for cause.¹²² In New York, this Standard would apply only in criminal cases, since there is no judge present during civil voir dire. Although the CPL does not contain a provision expressly authorizing the court to remove a prospective juror for cause on its own initiative, the Jury Project found that in practice, criminal judges often excuse such jurors when appropriate. No change was recommended.

¹¹⁹ See STANDARDS, *supra* note 6, at 58.

¹²⁰ See *id.*; see also NATIONAL JURY PROJECT, INC., *supra* note 112, app. at D-13. See generally BENNETT & HIRSCHHORN, *supra* note 57, § 8. The following counties have used questionnaires to supplement voir dire: Maricopa, Pima (Arizona); Alameda, Contra Costa, Fresno, Kings, Los Angeles, Madera, Marin, Monterey, Napa, Orange, Placer, Riverside, Sacramento, San Diego, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Solana Beach, Stanislaus, Tulare, Yolo (California); New Castle (Delaware); Martin (Florida); Gwinnet, Pulaski (Georgia); Cook (Illinois); Tippecanoe (Indiana); Floyd (Kentucky); Orleans (Louisiana); Anne-Arundel (Maryland); Middlesex, Norfolk (Massachusetts); Kalamazoo, Kalkaska, Washtenaw (Michigan); Anoka, Cass, Crow Wing, Dakota, Hennepin, Itasca, Olmsted, Otter Tail, Polk, Ramsey, Rice, Steele, Washington (Minnesota); Las Vegas (Nevada); Cape May, Essex, Mercer, Monmouth (New Jersey); Bernalillo (New Mexico); Queens (New York); Wake (North Carolina); Blair, Cambria, Chester, Northampton, Philadelphia (Pennsylvania); Minnehaha (South Dakota); Dallas, Harris (Texas); Sauk (Wisconsin). NATIONAL JURY PROJECT, INC., *supra* note 112, at 2-62.13.

¹²¹ See STANDARDS, *supra* note 6, at 58.

¹²² See *id.* at 73. The Standard provides: "If the judge determines during the voir dire that any individual is unable or unwilling to hear the particular case at issue fairly and impartially, that individual should be removed from the panel. Such a determination may be made on motion of counsel or on the judge's own initiative." *Id.*; see also *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

V. PEREMPTORY CHALLENGES

Peremptories—challenges to prospective jurors made without giving a reason—represent another aspect of the voir dire process that is ripe for reform in New York. A number of prominent judges have even argued that because peremptory challenges frequently have been used as a vehicle for racial discrimination, peremptories should be banned entirely.¹²³

Notwithstanding the Supreme Court's recognition in *Batson* that peremptories have been used to exclude prospective jurors solely on account of their race, they have not outlived their usefulness. Peremptory challenges still play an important role, in both criminal and civil cases, in ensuring the fairness and impartiality of juries.¹²⁴ By observing often elusive aspects of prospective jurors' demeanor, experienced trial lawyers can and do identify individuals who may not be able or willing to render a fair and impartial verdict based solely on the evidence and the judge's charge, but who nonetheless are not subject to a challenge for cause.¹²⁵ *Batson*, and the cases that have followed and expanded upon it, provide an appropriate means of preserving peremptories' salutary purpose while prohibiting invidious discrimination during the voir dire process.

Nevertheless, New York's system of peremptory challenges must be changed. New York provides for many more peremptories than the ABA Standards, the Federal courts, and virtually every other state.¹²⁶ This not only exacerbates *Batson* problems, it increases voir dire time and, most important, uses up an inordinate number of jurors and thereby increases the burden on New York's already overburdened jury pool.¹²⁷ Reducing the number of peremptories would help solve these problems, while preserving the right of every New York litigant to a fair and impartial jury.

¹²³ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring); *People v. Bolling*, 79 N.Y.2d 317, 326-31, 591 N.E.2d 1136, 1142-46, 582 N.Y.S.2d 950, 956-60 (1992) (Bellacosa, Wachtler, and Titone, JJ., concurring).

¹²⁴ See, e.g., *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

¹²⁵ See, e.g., *STARR & MCCORMICK*, *supra* note 100, § 10.4.3.

¹²⁶ See FED. R. CRIM. P. 24(b). The Rule limits peremptory challenges to 20 per side in capital trials, and 10 for the defendant and 6 for the government in trials involving offenses punishable for more than one year. *Id.*; see also 28 U.S.C. § 1871 (1988) (providing for peremptory challenges in civil trials).

¹²⁷ See *Spencer & Wise*, *supra* note 4, at 7.

A. Criminal Cases

The number of peremptory challenges provided for by the CPL is among the highest in the United States, with a maximum of twenty peremptories for each side in some instances.¹²⁸ The numbers stand in sharp contrast to ABA Standard 9, which sets a maximum of ten peremptories per side in capital cases.¹²⁹ Rather, all of New York's felonies fall within Standard 9(d)(ii), which allows only five per side.¹³⁰ The CPL provides for double to quadruple this number.¹³¹

New York also provides for far more peremptories in criminal cases than do the federal courts. The Federal Rules provide that in non-capital felony cases the defense is permitted ten peremptories and the Government is permitted six.¹³²

Furthermore, New York's peremptory levels are among the highest of all the states. Only seven other states provide for fifteen or more peremptories in any type of non-capital case,¹³³ and the maximum number allowed in most states is only three to eight. Even in death penalty cases, where the most stringent procedural protections apply, the average number of peremptories given the defendant throughout the country is about thirteen.¹³⁴

¹²⁸ See N.Y. CRIM. PROC. LAW § 270.25(2) (McKinney 1993). For Class A felonies (which involve a maximum sentence of life imprisonment), 20 peremptories must be allowed to both the defense and prosecution. *Id.* For Class B (maximum sentence 25 years) and Class C (maximum sentence 15 years) felonies, each side is permitted 15 peremptories. *Id.* For Class D (maximum sentence seven years) and Class E (maximum sentence four years) felonies, 10 peremptories per side are provided. *Id.* Three peremptory challenges per side are permitted in misdemeanor trials. See N.Y. CRIM. PROC. LAW § 360.30(2) (McKinney 1993).

¹²⁹ See STANDARDS, *supra* note 6, at 77. However, additional peremptory challenges have been granted to the defense in certain instances; see also *United States v. Biaggi*, 853 F.2d 89, 95-96 (2d Cir. 1988); *United States v. Harris*, 542 F.2d 1283, 1294 (7th Cir. 1976).

¹³⁰ See STANDARDS, *supra* note 6, § 9(d), at 76-77 provides:

In criminal cases, the number of peremptory challenges should not exceed

- (i) ten for each side when a death sentence may be imposed upon conviction;
- (ii) five for each side when a sentence of imprisonment for more than six months may be imposed upon conviction; or
- (iii) three for each side when a sentence of incarceration of six months or fewer, or when only a penalty not involving incarceration may be imposed. One additional peremptory challenge should be allowed for each defendant in a multi-defendant criminal proceeding.

Id.

¹³¹ See N.Y. CRIM. PROC. LAW § 270.25(2) (McKinney 1993).

¹³² See FED. R. CRIM. P. 24(b). Under the Federal Rules, a felony consists of any crime punishable by more than one year in jail. *Id.*

¹³³ See, e.g., MICH. STAT. ANN. Rule 2.511 (Callaghan 1985); MINN. STAT. § 546.10 (1988); N.H. REV. STAT. ANN. § 606:4 (Supp. 1995); N.J. REV. STAT. § 2A:78-7 (1994); N.D. R. CRIM. P. Rule 24 (1994); OHIO REV. CODE ANN. § 2945.21 (Baldwin 1994).

¹³⁴ See VAN DYKE, *supra* note 110, at 282.

In view of this substantial disparity, CPL § 270.25(2) should be amended to reflect the following reductions:

Class A felonies—from 20 to 15 peremptories

Class B and C felonies—from 15 to 10 peremptories

Class D and E felonies—from 10 to 7 peremptories¹³⁵

The Unified Court System has proposed legislation making these exact reductions.

These modest reductions would not risk making New York juries significantly less fair or impartial. Many other jurisdictions have been operating with fewer peremptories for a long time. There is no evidence that juries in those states have been significantly less fair or impartial than New York juries. Moreover, the proposed number of peremptories are still markedly higher than the number of peremptories provided for in ABA Standard 9(d).¹³⁶

On the other hand, even the minimal reductions proposed would reduce opportunities for *Batson* violations, and cut down on the number of prospective jurors who will be needed to obtain a jury in a criminal case. The proposed reductions could save approximately 90,000 juror days per year—64,000 in the five boroughs of New York City alone.¹³⁷ Citizens would have to be called for jury service less frequently, and fewer jurors would have the unsatisfying experience of performing jury duty without actually sitting on a jury.¹³⁸

These suggestions face a strong degree of opposition from trial attorneys, on both sides—criminal defense attorneys as well as prosecutors.¹³⁹ These attorneys emphasize the importance of peremptories as a supplement to challenges for cause in achieving the

¹³⁵ The Jury Project recommended no change in the number of peremptory challenges allowed in misdemeanor cases (three per side). See N.Y. CRIM. PROC. LAW § 360.30 (McKinney 1993).

¹³⁶ See STANDARDS, *supra* notes 6 and 130, § 9(d) (detailing ABA Standard 9(d)).

¹³⁷ These calculations are based on 4500 criminal trials per year statewide, and 3200 in New York City (OCA figures). If 10 fewer peremptories were exercised in each of these cases (including both sides), and the average criminal voir dire takes up about two days of a prospective juror's time, the total yearly savings are approximately 90,000 juror days statewide and 64,000 in New York City.

¹³⁸ According to OCA, about 1.8 million juror days per year are used statewide, and about 1.2 million in New York City. Thus, under the proposed reductions, approximately five percent fewer jurors would be needed.

¹³⁹ Most District Attorney's offices and a number of criminal defense groups, as well as the New York State Bar's Ad Hoc Committee on the Jury System and the New York State Bar Association's Criminal Justice Section, wrote the Jury Project objecting to any reduction in peremptories in criminal cases.

goal of a fair and impartial jury. It is for this reason, however, that we do not support the outright abolition of peremptories. A reasonable reduction would simply place New York on a par with the rest of the states, while also improving efficiency.

The CPL currently allows each side two additional peremptories for each alternate juror.¹⁴⁰ This is still double the ABA's suggestion of one peremptory for every two alternates.¹⁴¹ The Jury Project recommended that each side be permitted one extra peremptory for each alternate juror. The Unified Court System's proposed legislation includes this recommendation as well.

B. Civil Cases

The number of peremptory challenges afforded in civil cases should be reduced as well. The reasons are the same as in the criminal context: to reduce voir dire time, to reduce *Batson* problems, and to consume fewer jurors.

Currently, each "party" has three peremptories, plus one additional for each alternate juror.¹⁴² The ABA Standard, as applied in New York (which has six-person civil juries), would allow only two peremptory challenges for each "side," plus one additional challenge for every two alternate jurors.¹⁴³

The Jury Project suggested a middle ground: a CPLR amendment providing for three peremptory challenges for each *side*, plus one additional challenge for every two alternates. The parties should not be able to increase the number of peremptories simply by consent. Rather, the CPLR should permit the parties in civil cases involving a very large number of parties, or in other extraordinary circumstances, to apply to the court for additional peremptory challenges before voir dire begins.

The Unified Court System's proposed legislation would amend the CPLR to effect all of the Jury Project's recommendations concerning peremptories in civil cases.

¹⁴⁰ See N.Y. CRIM. PROC. LAW § 270.25(2) (McKinney 1992).

¹⁴¹ See STANDARDS, *supra* note 6, § 9(f) at 77. Standard 9(f) states: "One peremptory challenge should be allowed to each side in a civil or criminal proceeding for every two alternate jurors to be selected." *Id.*

¹⁴² See N.Y. CIV. PRAC. L. & R. 4109 (McKinney 1992).

¹⁴³ See STANDARDS, *supra* note 6, § 9(e), (f) commentary at 79 (discussing Standards 9(e), (f)).

CONCLUSION

Thanks principally to the vision and dedication of Chief Judge Kaye, New York has become the nation's leader in rethinking and reforming the jury system, a central feature of our democratic system. This much-needed step is long overdue. Nowhere is reform more needed—and more controversial—than in the jury selection process, especially on the civil side. If, as we hope, the legislature quickly passes the Uniform Court System's reform bill and additional changes are implemented following the four-District pilot project, we believe that lawyers, judges, and above all potential jurors will find the jury selection process in New York ready to greet the twenty-first century with pride.

