



The Transformational Legacy of Judith Kaye

**Wednesday, May 11, 2016
United States District Court
Southern District of New York
United States Courthouse
500 Pearl Street
New York, NY 10007-1312**

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Judge Kaye's Dissent in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006)

- In her famous and widely-cited dissent in *Hernandez v. Robles*—in which the majority held that New York's prohibition of marriage between gay and lesbian couples did not violate the equal protection or due process clauses in the New York Constitution—Judge Kaye presciently predicted “that future generations will look back on today's decision as an unfortunate misstep.” 7 N.Y.3d 338, 396 (2006) (Kaye, J., dissenting).
- Judge Kaye would have held that heightened scrutiny applied, and that New York's marriage ban violated both the equal protection and due process clauses of New York's Constitution.
- Although Judge Kaye turned out to be correct, it did not take “generations,” or even one generation; it only took seven years. In 2013, the United States Supreme Court struck down section 3 of the federal Defense of Marriage Act (“DOMA”), which defined “marriage” for all federal rights and benefits as “only a legal union between one man and one woman as husband and wife.” *United States v. Windsor*, 133 S. Ct. 2675 (2013). And, only two years later, it held that state laws prohibiting same-sex marriage are unconstitutional, bringing marriage equality to every state in the Union. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).[†]

Judge Kaye's Dissent in *Hernandez* Dissent Is Widely Cited

- Judge Kaye's *Hernandez* dissent has had far-reaching impacts, and has, in fact, become the majority rule throughout the United States.
- Judge Kaye's *Hernandez* dissent has been cited at least 123 times, in 16 cases and 107 law review articles. It has been cited in eight state court decisions (in California, Connecticut, Maryland, Washington, New York, New Jersey, Iowa, and Montana) and two federal court decisions (9th Circuit and 10th Circuit).
 - **“We therefore agree with Chief Judge Judith S. Kaye of the New York Court of Appeals that ‘[s]uch measures acknowledge—rather than mark the end of—a history of purposeful discrimination.’”** *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 450-51 (Conn. 2008) (quoting *Hernandez*, 7 N.Y.3d at 388-89 (Kaye, C.J., dissenting)) (holding that laws restricting civil marriage to heterosexual couples violated same-sex couples’ state constitutional equal protection rights).
 - **“As Chief Judge Kaye of the New York Court of Appeals succinctly observed in her dissenting opinion in *Hernandez v. Robles*: ‘There are enough marriage licenses to go around for everyone.’”** *In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008).

Judge Kaye's Dissent in *Hernandez* Dissent Is Widely Cited, *Cont'd*

- “Additionally, society does and should permit individuals to marry who will not or perhaps cannot become parents, because the individuals themselves and society as a whole are helped by permitting them to marry as well. As Chief Judge Kaye pointed out in her dissent in *Hernandez v. Robles*, the “relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage.” Different sex couples will continue to get married and stay married even if same-sex couples are also permitted to marry. This is not a zero-sum game—‘[t]here are enough marriage licenses to go around for everyone.’” Mark Strasser, *Let Me Count the Ways: The Unconstitutionality of Same-Sex Marriage Bans*, 27 *BYU J. Pub. L.* 301, 314 (2013).
- “As a judge, Kaye enjoyed one of the longest and most admired tenures in the history of the Court of Appeals. . . . And in perhaps her most controversial votes, she asserted that the New York State Constitution protected the rights of gays and lesbians to legally adopt their partners' children, to take over rent-controlled apartments previously owned by their partners, and to legally marry one another. On this last issue, Kaye authored a twenty-seven page dissent, calling the state's ban on same-sex marriage ‘an unfortunate misstep’ by the court's majority. ‘The long duration of a constitutional wrong cannot justify its perpetuation,’ she wrote, ‘no matter how strongly tradition or public sentiment might support it.’” Benjamin Pomerance, *When Dad Reached Across The Aisle: How Mario Cuomo Created a Bipartisan Court of Appeals*, 77 *Alb. L. Rev.* 185, 218 (2014).

Outline of Judge Kaye's Dissent in *Hernandez*

- **First**, Judge Kaye addressed the due process interests implicated by New York's marriage ban, and concluded that, because marriage is a fundamental right—and “same-sex” marriage is not a new right—New York's marriage ban violated the Due Process clause.
- **Second**, Judge Kaye discussed the appropriate standard of review, concluding that heightened scrutiny should apply for three reasons:
 - Gays and lesbians meet the definition of a suspect class because the group has historically been subjected to purposeful discrimination, the trait of sexual orientation is irrelevant to one's ability to perform and participate in society, and the group is relatively politically powerless;
 - The marriage statute discriminates on the basis of sex because a woman is prevented from doing that which a man can do legally: marry a woman; and
 - The statute implicates a fundamental right such that its classification cannot be upheld unless necessary to the achievement of a compelling state interest.

Outline of Judge Kaye's Dissent in *Hernandez*, Cont'd

- **Third**, Judge Kaye went on to explain that New York's prohibition on same-sex marriage failed even rational basis review. Examining four interests advanced by the State, Judge Kaye found that none was rationally furthered by the exclusion of same-sex couples from marriage: Excluding gay couples from marriage (1) does not further the State's interests in encouraging opposite-sex couples to marry before having children or in encouraging married couples to procreate; and cannot be justified by (2) "a mere desire to preference another group," (3) on the basis of "tradition," or (4) out of a desire to maintain uniformity with other states.
- **Finally**, in addressing the majority's separation-of-powers argument, Judge Kaye noted that the court "cannot avoid its obligation to remedy constitutional violations in the hope that the Legislature might some day render the question presented academic," because "[i]t is uniquely the function of the Judicial Branch to safeguard individual liberties guaranteed by the New York State Constitution, and to order redress for their violation."

Echoes of Judge Kaye's *Hernandez* Dissent Are Heard In Many of the Cases Leading Up To, And Including, *Obergefell*

- To name just a few:
 - *Obergefell v. Hodges*, 135 S.Ct. 2584 (2016)
 - *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014)
 - *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014)
 - *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014)
 - *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014)
 - *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012)

On Due Process and Whether Marriage is a Fundamental Right

Judge Kaye

- “*Lawrence* rejected the notion that fundamental rights it had already identified could be restricted based on traditional assumptions about who should be permitted their protection. . . . **Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.** Instead, the Supreme Court has repeatedly held that the fundamental right to marry must be afforded even to those who have previously been excluded from its scope—that is, to those whose *exclusion* from the right was ‘deeply rooted.’”

Bostic (4th Cir.)

- “We therefore have no reason to suspect that the Supreme Court would accord the choice to marry someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race, owes child support, or is imprisoned. **Accordingly, we decline the Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry.**”

Kitchen (10th Cir.)

- “[I]n describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right. **‘Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.’**”

On Heightened Scrutiny

Judge Kaye

- “[T]his discriminatory classification is subject to heightened scrutiny.”
- Due Process Context: “[T]he legislative classification here infringes on the exercise of the fundamental right to marry, [thus] the classification cannot be upheld unless it is necessary to the achievement of a compelling state interest.”
- Equal Protection Context: “Homosexuals plainly have been, as the Legislature expressly found when it recently enacted the Sexual Orientation Non-Discrimination Act (SONDA), barring discrimination against homosexuals in employment, housing, public accommodations, education, credit and the exercise of civil rights.”

Bostic (4th Cir.) (Applying Strict Scrutiny)

- Due Process Context: “Strict scrutiny applies only when laws ‘significantly interfere’ with a fundamental right. The Virginia Marriage Laws unquestionably satisfy this requirement: they impede the right to marry by preventing same-sex couples from marrying and nullifying the legal import of their out-of-state marriages. Strict scrutiny therefore applies in this case.”

Windsor (2d Cir.) (Applying Intermediate Scrutiny)

- Equal Protection Context: “It is easy to conclude that homosexuals have suffered a history of discrimination. . . . Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal.”

On Equal Protection and The State's Interest In Procreation

Judge Kaye

- “Nor does this exclusion rationally further the State’s legitimate interest in encouraging heterosexual married couples to procreate. **Plainly, the ability or desire to procreate is not a prerequisite for marriage.** Thus, the statutory classification here--which prohibits only same-sex couples, and no one else, from marrying--is **so grossly underinclusive and overinclusive** as to make the asserted rationale in promoting procreation “impossible to credit.” Indeed, even the *Lawrence* dissenters observed that ‘**encouragement of procreation**’ could not ‘**possibly**’ be a justification for denying marriage to gay and lesbian couples, ‘**since the sterile and the elderly are allowed to marry.**’” (citations omitted).

Bostic (4th Cir.)

- “We therefore reject the Proponents’ attempts to differentiate same-sex couples from other couples who cannot procreate accidentally. **Because same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently.**”

Lotta (9th Cir.)

- “Idaho and Nevada’s laws are **grossly over- and under-inclusive** with respect to procreative capacity. Both states give marriage licenses to many opposite-sex couples who cannot or will not reproduce—as Justice Scalia put it, in dissent, ‘the sterile and the elderly are allowed to marry,’ *Lawrence*, 539 U.S. at 604-05—but not to same-sex couples who already have children or are in the process of having or adopting them.”

Rational Basis Review And The Welfare of Children

Judge Kaye

- “The State plainly has a legitimate interest in the welfare of children, but excluding same-sex couples from marriage in no way furthers this interest. In fact, it undermines it. **Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare, as defendants do not dispute.**”

Baskin (7th Cir.) (Posner, J.)

- “[A]t a deeper level, as we shall see, [these laws] are about the welfare of American children.”
- “**The tangible as distinct from the psychological benefits of marriage, which (along with the psychological benefits) enure directly or indirectly to the children of the marriage, whether biological or adopted, are also considerable.**”
- “Consider now the emotional comfort that having married parents is likely to provide to children adopted by same-sex couples.”

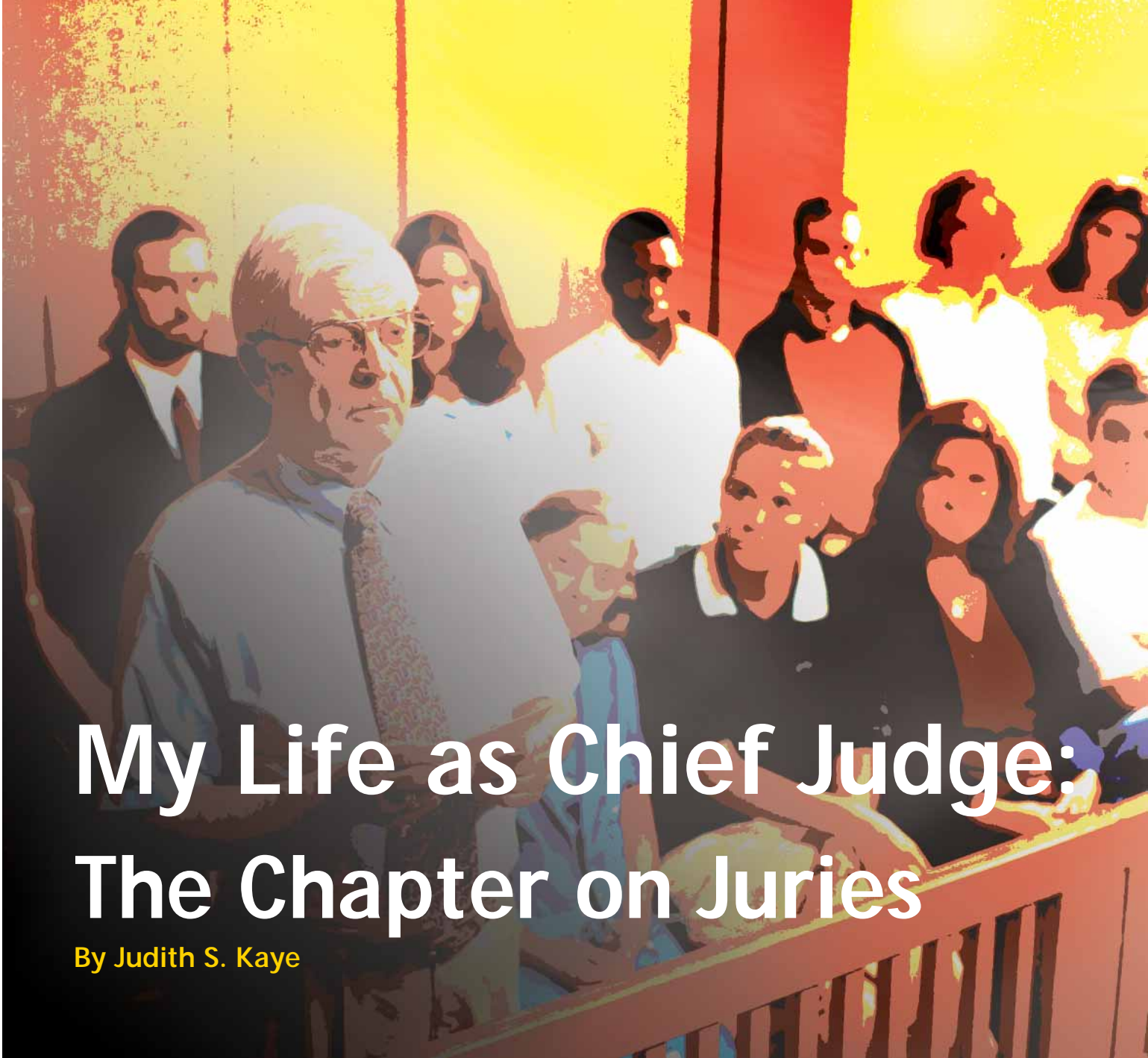
Recognition of the Synergy Between Equal Protection and Due Process Guarantees

Judge Kaye

- Judge Kaye methodically explained why New York’s marriage ban was unconstitutional under both Equal Protection and Due Process principles, and noted that “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.” (quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)).

Obergefell (Kennedy, J.)

- “The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws. **The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.**”



My Life as Chief Judge: The Chapter on Juries

By Judith S. Kaye

A recent speaking engagement prompted me to reflect on my years as Chief Judge. Ultimately, these ruminations took shape, and I share my thoughts with readers of the *Journal*. As Chief Judge I hold two positions, each genuinely a full-time job. As Chief Judge of the Court of Appeals, I am one of seven equals, hearing appeals on a range of issues that defies human imagination. On any one day at Court of Appeals Hall we could be hearing argument on budget-making authority, or education funding, under the State Constitution; a slip-and-fall on a patch of ice; a construction site injury under Labor Law § 240; a multiple murder case; and a teacher's claim that his right to tenure under the Education Law has been violated.

Honest, we have days like that. The very idea of a court such as ours – a second level of appeal – is that we will, through a relatively few cases raising novel issues of statewide significance, settle and declare law that has widespread application. I am proud of our Court, which is sound and efficient in its work, and true to its awesome responsibility. I think of my judicial role, as a Judge of the Court of

Reprinted with permission from the New York State Bar Association *Journal*, October 2006, Vol. 78, No. 8, published by the New York State Bar Association, One Elk Street, Albany, New York 12207.

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Appeals, as Lawyer Heaven. That is as true today as it was on September 12, 1983, over 23 years ago, when I first took my seat on the Court of Appeals.

But the second box of stationery, which I acquired more than 13 years ago, Chief Judge of the State of New York, a chief executive officer role, is right up there too. When I saw *Pride of the Yankees* recently on television, for the 100th time, I thought I could adopt Lou Gehrig's closing line as my own. Genuinely, I feel that I am the luckiest person on the face of the Earth.

Two Basic Questions

As I stepped back and thought hard about what I do, particularly as head of the Third Branch of government, it occurred to me that most often I was returning to two overlapping questions. First, how do we assure the delivery of justice in this modern, fast-paced, rapidly changing society? And second, how do we maintain the trust and confidence of the public so that our work and our decrees are respected? I could think of no better context for a discussion of both questions than the subject of juries.

The jury system is central to the delivery of justice in the New York State courts, where we have close to 10,000 jury trials a year. Jury service, moreover, is the courts' direct link, often our *only* direct link, with the millions of citizens called to serve as jurors – more than 650,000 a year in New York State alone. Surely, 650,000 positive jury experiences would be a great means of fostering public confidence in the justice system. How do we best assure public trust and confidence when jurors come into our courts? Jury issues run the gamut of my responsibilities; I've even been summoned several times to serve as a juror. Believe me, I know the pain of people being rejected during *voir dire*.

The jury, of course, is the subject of innumerable Court of Appeals decisions, on issues such as discrimination in selection, juror misconduct, even how jurors are seated in a courtroom for *voir dire*. But instead of Court of Appeals jurisprudence, I will focus on my executive and administrative Chief Judge role. Both of the fundamental questions I've posed are pertinent to the subject of juries.

The Roots of Our Jury System

The jury system came to our shores with our earliest settlers. Throughout the colonies, the jury was seen as a fundamental right and a way for the public to restrain government power. As you might imagine, the colonists were none too pleased when the Crown dispensed with jury trials for anyone accused of violating the despised Stamp and Navigation Acts. That added to the many grievances against King George III listed in the Declaration of Independence. So it's no surprise that Article III of the United States Constitution provided for a right to trial by jury for all crimes except impeachment; the omission of that right in civil cases ultimately led to inclusion of the Seventh Amendment in the Bill of Rights, guaranteeing

jury trials in certain civil cases. Every state constitution separately secured those rights.

The jury in many ways reflects the progress of America. The right to have, and to serve on, juries has been part of our nation's struggle from its beginnings. Just think: critical as the jury was to the founders of a free nation, they limited service to white male landowners. Although the requirement of property ownership did not last long, it was not until 1880 that the Supreme Court held that jury service could not be restricted by race; not until 1975 that the Court prohibited the systematic exclusion of women from jury service; and not until 1986 that it banned the discriminatory use of peremptory challenges.

New York's public policy echoes our proud history. In the words of Judiciary Law § 500, litigants entitled to a jury "shall have the right to grand and petit juries selected at random from a fair cross section of the community[,] . . . all eligible citizens shall have the opportunity to serve . . . and shall have an obligation to serve when summoned for that purpose, unless excused."

Reality vs. Rhetoric

Regrettably, the reality of jury service has not always matched the rhetoric. By the early 1990s in New York, we were calling the same people every two years like clockwork, and they served on average two full weeks, even if not selected for a trial. One reason for this was that our statutes allowed dozens of automatic exemptions and disqualifications from jury service, ranging from judges, doctors, lawyers, police officers, firefighters, and elected officials to embalmers, podiatrists, people who wore prosthetic devices and people who made them, to individuals with principal child-care responsibilities. Seemingly every group that could lobby Albany for an automatic exemption successfully did, and that sorely depleted our jury pools. To make things worse, the court system did little follow-up on the rooms filled with summonses returned as undeliverable.

Given the huge demand for jurors, and the short supply, New York State used what were called Permanent Qualified Lists. Once qualified for jury service, a person remained qualified. Not a choice list to be on, especially given the condition of our juror facilities, which often were shabby and neglected.

How was the reality measuring up to the rhetoric? I knew for sure that we weren't earning points with the public. So in 1993, months after I became Chief Judge, we



JUDITH S. KAYE is Chief Judge of the State of New York; Chief Judge of the Court of Appeals of the State of New York. This article is based on Judge Kaye's 2006 Burton Lecture, presented at the Rockefeller College of Public Affairs & Policy of the State University at Albany.

Jury Duty Stamp Announced

The United States Postal Service previewed its 2007 Commemorative Stamp program to the philatelic press at a stamp collecting show in late August, announcing that a stamp honoring jury duty will be released. *Linn's Stamp News* (September 11, 2006) reports: "The stamp is square and features silhouettes in various colors showing heads in two separate lines. Across the top of the stamp is a bold 'Jury Duty' and at the bottom is 'Serve with pride.'"

convened a commission of lawyers, judges and public members to review jury service in New York, with the goal of making the New York State jury system one that would be valued and appreciated by jurors, judges, attorneys and litigants alike. In six months, with a dynamic trial lawyer – Colleen McMahon, now a United States District Judge – as chair, The Jury Project handed us a blueprint for comprehensive reform, which we have been implementing ever since.

In fact, this experience was so encouraging that again and again we have convened task forces and commissions to help us address other vexing issues. Over the years, superb commissions of lawyers, judges and others have paved the way on virtually every one of our successful reforms: business courts, fiduciary appointments, drug courts, judicial selection, matrimonial litigation, the legal profession and more.

A Reform Agenda

Without doubt, the centerpiece of New York jury reform was legislation adopting The Jury Project's top recommendation – end automatic exemptions. How shocking, especially for groups that lost their exemption! Fortunately, the Legislature resisted pressure to restore exemptions, and about one million potential new jurors were added to the court lists. Then, the Legislature adopted the recommended expansion of juror source lists to include unemployment and public assistance rosters, adding yet another 500,000 potential jurors.

These reforms sent a strong message: no person, no group is more privileged, or less important, when it comes to jury service, and no one gets excused automatically from this fundamental right, and obligation, of citizenship. We underscored that message with assiduous follow-up of all summonses returned as undeliverable. Besides gaining a more diverse jury pool, we could now spread the burdens and benefits of jury duty more widely, ending the Permanent Qualified Lists, the customary two-week service and the every-two-years-like-clock-work callbacks. The Legislature also increased juror pay and ended automatic sequestration in criminal cases.

These successes were also a powerful lesson for a new Chief Judge. We treasure the independence of the Judiciary, and rightly so. It's essential to our democracy, to our system of checks and balances, that the Judiciary be wholly independent in its core decision-making function. But in so many other ways – most notably systemic reform – we are vitally connected to our partners in government. The jury program – still, by the way, a work in progress – is one of the best examples of profound system-wide reform within the Third Branch.

Which brings me to my next subject: how best to manage the bounty – or, in other words, be careful what you wish for. Not all of the potential new jurors were as pleased as the Chief Judge. Thus, the court system faced a huge new challenge, but always the vision has been clear: to deliver justice for the litigants while affording a positive experience for jurors. This means efficient use of jurors' time in their summoning, selection and service; and it means courteous, respectful treatment. A lawyer-friend – the general counsel of a major media corporation – told me that her recent jury service ranked among the great experiences of her life. We need to multiply that. Invariably the most satisfied jurors are those who have actually served to verdict on a well-run trial—they are more likely to have a favorable impression of service and feel that they have made a contribution.

Implementing the Agenda

The easier part of the challenge, without question, has been the internal administrative part – like employee training in dealing with jurors; an online system for submitting juror qualification questionnaires; more efficient summoning procedures, like allowing jurors to call in by telephone to see if they really need to show up on the summons date; obtaining one automatic postponement by telephone or on the Web; orientation of jurors through handbooks, as well as live and video presentations (which are also available at www.nyjuror.gov); decent facilities and quiet work space, including wireless Internet access and even laptop work stations in juror waiting rooms; clean restrooms with locks on bathroom doors, paper towels and liquid (instead of bar) soap (the Chief Judge checks out that sort of stuff – ladies' and men's rooms); and assuring prompt payment of juror fees. We have excellent court staff, who are always finding new ways to improve the jury experience.

Yes, definitely the easy part, though still – and I would think forever – a work in progress. The really hard part – changes that would give jurors tools to help improve the way they do their job – would involve cultural change.

The entrenched culture I have in mind includes age-old practices of experienced lawyers and judges, such as settling cases only after (instead of before) the jury is selected; endless, unsupervised *voir dire* in civil cases; and proceedings conducted in a foreign language – legalese

– before passive jurors, who are assumed to be taking in information uncritically, recalling it accurately and not thinking about it until they are told, at the end of the trial, what the rules will be for evaluating all the information they’ve absorbed.

Two decades of solid research and experience in other states have shown that change is both possible and desirable.

Earlier, I mentioned statutory reforms that radically changed the face of our juries, best described as top-down reform. New rules and statutes imposed requirements, and court administration made the appropriate adjustments. But changing how trials are conducted by experienced lawyers and judges cannot be accomplished by order of a chief executive officer, particularly a CEO without power to hire, fire or promote; particularly for wonderful people at the pinnacle of their careers, mindful of affording due process and avoiding reversible error, and thus understandably more comfortable staying with ways that are tried-and-true. The sort of change I am advocating here can be accomplished only by the judges and lawyers themselves, from the ground up.

To stimulate the process of reform inside the courtroom, we convened a group of judges from around the state willing to try out some of the well-researched and best-known modern aids to juror comprehension, and we very carefully documented their experience by surveying lawyers and jurors who participated in using these aids. Perhaps the most telling finding was that, where jurors reported that the trials were “very complex,” judges and lawyers reported that those same trials were not “complex.” Doesn’t that speak volumes? What lawyers and judges understand easily does not necessarily get through clearly to the jurors.

At the conclusion of its study, the group issued an overwhelmingly positive report, endorsing such “innovations” as opening statements that give jurors some idea of the nature of the case before *voir dire*; allowing juror note-taking to facilitate better recall of the evidence; permitting jurors to submit written questions to the judge, who would then determine whether they should be asked of witnesses; and providing jurors with a copy of the judge’s final instructions to take into deliberations. This was followed by publication of a “Practical Guide” describing these practices, which we have distributed to all judges.

Will this succeed in changing the picture? Only time will tell.

Public Trust and Confidence

I turn next, and finally, to what may be the most difficult issue of all, how to assure the trust and confidence of the public – jurors and nonjurors – in the work of the courts, particularly given an abysmal lack of civic education and a flood of negative news. A major part of the answer to

my question, perhaps a complete answer, is what I have just been describing: improving in every possible way the jury experience for those called to serve, and generally doing a first-rate job. Still, we need to do more. The public *should* know more about us, and *should* think well of us.

In the words of the great French statesman and observer of American life, Alexis de Tocqueville, “The jury may be regarded as a . . . public school ever open, in which every juror learns his [or her] rights.” I have no doubt that de Tocqueville’s observation remains true today, and that serving on a case to verdict is not only an educational experience but also a satisfying one for a juror.

Sadly, only 18% of those summoned to jury service will actually get selected for a trial. For the other 82%, we depend on courtesy, efficiency and outreach efforts, such as our orientation video, the availability in every juror assembly room of copies of informational periodicals, and Juror Appreciation Week events in courthouses throughout the state. We have also just completed a booklet about juries for teachers and students, *Democracy in Action*, designed to be shared with family, neighbors and friends.

But how do we address the fact that New Yorkers for the most part are unaware of the role of the courts in their daily lives? That is a challenge I put to the Bar: help us build a citizenry that is better informed about all three branches of government, but especially about the courts, which of necessity – and, I must admit, habit – remain somewhat remote and detached. One of our newest initiatives, announced in the 2006 State of the Judiciary, will be a Center for the Courts and the Community, a nonprofit public-private partnership now in formation, to focus on fortifying educational alliances with schoolchildren and adults, and on establishing programs to inform and facilitate the work of the media in reporting on the courts. I’d appreciate your ideas, in whatever form you see fit, for furthering the success of this new effort.

Conclusion

And there, in brief capsule, is the jury chapter in my life as Chief Judge of the State of New York. A dozen other chapters – such as children in the courts, domestic violence, drug courts, matrimonial issues, fiduciary appointments, commercial courts – have the same questions at their core: are we meeting today’s needs, and how are we perceived by the public? Sometimes the answers lie in legislation, sometimes in court rules, sometimes in task forces and commissions, sometimes in small groups seeding reform, always in vital partnerships with our great Judiciary and court staff, with the Bar and with others. When the mountain moves, even a millimeter – as it clearly has in the New York State jury system – it’s absolutely exhilarating.

That’s one of the reasons why, as Chief Judge, I believe I am the luckiest person on the face of the Earth. ■

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April 7, 1994

Making Jury Duty Less Painful and More Efficient

By JAN HOFFMAN

Imagine the impossible: that jury duty could be almost pleasant.

A juror who wasn't picked for trial on the first day would be excused altogether. Compensation would be raised from \$15 a day to \$40, as it is in the Federal courts. The summonses to serve would be fewer and further apart because the lists of people who could be called to jury duty would be nearly doubled.

These are among the recommendations issued yesterday by a state panel studying the overhaul of what it said was New York's clanking, inefficient jury system. The panel was appointed last summer by Chief Judge Judith S. Kaye and Chief Administrative Judge E. Leo Milonas.

Many of the proposals can be put into effect administratively by Judge Kaye, while others require legislative approval. Yet if even a modest number of changes are adopted, court observers say, not only will conditions for the state's jurors be markedly improved, but also the selection of criminal and civil juries will undergo some fundamental changes.

The panel's suggestions included matters of basic comfort, like providing clean bathrooms and heating, as well as curbs on lawyers to speed jury selection.

The panel said the changes are meant to streamline the system and make participation in a jury pool feel like a valuable civic service, not an exasperating duty to be shirked by any means necessary.

In recent years, many other states have struggled to improve their jury systems, adopting some of the ideas suggested by the panel yesterday. But experts on jury systems say that the New York proposals, if put into effect, could be the most extensive overhaul in the country.

Though the panel did not try to calculate the exact costs of its proposals, it said that the increase in jurors' compensation could be partly offset by other recommendations, including ending the mandatory sequestration of felony juries.

Judge Kaye, who took over as the state's top judge last year and made the appointment of the panel her first major project, spoke glowingly about the report, calling it remarkable. Declining to list which proposals she would adopt as priorities, she said they were all of equal urgency.

She added that she would hold a 90-day comment and review period on the proposals.

Legal observers said that several proposals would face particular difficulty in the Legislature, including the

abolition of occupational exemptions and the ending of mandatory sequestration.

Judge Kaye and the State Office of Court Administration can control some initiatives, however, such as authorizing some judges to supervise civil jury selection or voir dire, streamlining the summons, deferral and questionnaire procedures, and requiring county jury commissioners to move toward the one day, one trial system.

To make the juror experience more dignified, she said, an inventory of "every broken tile, every decrepit bathroom" in the state's courts had been completed and money appropriated for repairs.

One proposal by the panel that has already drawn opposition from prosecutors and defense lawyers is trimming the number of peremptory challenges that lawyers can use to strike a prospective juror.

The lawyers who handle civil suits have their backs up too. Swamped by complaints about long, querulous civil jury selection, which, unlike any other state, is run by lawyers in New York, the panel advised that judges be appointed to supervise lawyers in a pilot project.

Castigating the increasingly common and time-wasting practise of settling civil cases after a jury is picked but before the first witness takes the stand, the panel recommended that a presettlement conference just before a jury is selected be mandatory and that a \$1,000 fee split by litigants be imposed if a case goes to trial.

The panel was also showered with complaints about rude and patronizing judges, lawyers and court officers, so it called for civility training for court personnel. Pointing out that courthouse conditions were less than ideal, the panel said that jurors should be entitled to such amenities as chairs with backs and seats. Critical Public Comments

The mandate of the Jury Project, headed by Colleen McMahon, a partner at Paul, Weiss, Rifkind, Wharton & Garrison, was to find ways to make juror pools more representative of the local communities, and to make the experience of being a juror both efficient and satisfying. The 30-member commission conducted public hearings and received thousands of letters and calls. A vast majority of the comments, the report noted, were sharply critical.

Chief among them, Ms. McMahon said, was that the experience was a waste of time. "The courts can no longer view the juror pool as a drinking fountain," the report said, "ready at all times to supply attorneys and judges with a fresh flow on a moment's notice. When water sits around for too long, it becomes stagnant. The same is true for jurors."

But almost uniformly, Ms. McMahon said, high marks were given by those who actually did get to hear a case. "Jury service is painful, like childbirth," she said. "You have to make arrangements with your boss and get a sitter for the kids and there is no parking and it's raining and you walk five blocks to court and there are no chairs and you sit on the floor and you wait to be called.

"But when you get to sit on the jury and listen to the evidence, you forget all about the pain."

To reach the goal of making more jurors eligible so every juror would have to serve less time and be called less frequently, the panel made several suggestions.

In addition to motor vehicle, tax and voting lists, it said, names should be drawn from welfare and **17**

unemployment rolls. New York, which now permits more occupational exemptions than any other state, should do away with all but those for sitting state or Federal judges.

Although 90 percent of eligible names are now culled for service, perhaps only a third to a half are chosen at random. Jury commissioners rely repeatedly on that short list. To end the practice of summoning the same people again and again, the report suggested that the random list be revised annually.

The report also looked at ways to reduce the time that jurors must spend in court. Buffalo, like Philadelphia, Miami and Houston, allows jurors to be excused if they are not picked for trial on the first day. Many trials only take a few days and if a juror does get on a panel, service would conclude at verdict.

The report reserved its harshest condemnations for lawyers who pick juries merely as a threatening tactic to force a settlement. In some counties, it said, 80 to 90 percent of the civil juries were picked, sent home to wait, and then told weeks later that the case had been settled. Settlement Conferences

To reduce the number of civil juries picked and then sent into limbo, the report recommended that mandatory settlement conferences be held just before jury selection, and that plaintiffs and defendants each pay a jury-use fee of \$500. The report also proposed that judges supervise lawyers during voir dire, both to speed up proceedings and to reduce what many jurors described as abusive questioning.

But Craig A. Landy of the New York County Lawyers Association said he had an "allergy to fees that cut off access to the courthouse." And Richard Godosky, a prominent plaintiffs' lawyer, said: "After the jury is selected, most cases are settled. If the selection of the jury is the end of the case, select as many juries as you can!"

Chart: "WHAT COULD CHANGE: Altering the Jury System" Recommendations issued yesterday by a state panel studying the overhaul of New York's jury system. CURRENT SYSTEM Jurors may serve up to two weeks, every two years. PROPOSAL One-day service or one trial. CURRENT SYSTEM Juror compensation is \$15 a day. PROPOSAL Raise to \$40, as in the Federal system. CURRENT SYSTEM Many occupational exemptions allowed, including embalmers, physical therapists, lawyers and Christian Science nurses. PROPOSAL Eliminate all occupational exemptions, except for sitting state or Federal judges. CURRENT SYSTEM Mandatory sequestration of all juries deliberating felony verdicts. (New York State is the only jurisdiction with such a requirement.) PROPOSAL Abolish mandatory sequestration, giving judges discretion to choose when appropriate. CURRENT SYSTEM A fee of \$50 to parties, other than the State and City of New York, that demand a jury trial. PROPOSAL Raise to \$1,000, with the cost to be shared by all both sides. Waived for the poor. CURRENT SYSTEM Jury selection in Civil cases usually conducted by lawyers without a judge present. (New York State is the only jurisdiction with this practice.) PROPOSAL Pilot project to permit judges to supervise the lawyers to speed the process and to control the questioning. (pg. B3)

THE JURY

PROJECT

REPORT TO THE
CHIEF JUDGE OF
THE STATE OF
NEW YORK

MARCH 31, 1994

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PREFACE

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . .

*New York State Constitution
Art. 1, Sec. 2*

The Jury Project was formed during the summer of 1993 to review jury service in New York State. The panel of thirty judges, attorneys, jury commissioners, educators, journalists and business people was asked to think about how New York might attain three objectives: jury pools that are truly representative of the community; a jury system that operates efficiently and effectively; and jury service that is a positive experience for the citizens who are summoned to serve. We were charged with recommending rule changes, legislative proposals, and educational programs and materials.

That jury service reform was the first issue tackled during Judith S. Kaye's tenure as Chief Judge of the State of New York underscores the importance of trial by jury to our judicial system. It also demonstrates the Unified Court System's sensitivity to concerns about the equities and conditions of jury service that have been expressed in recent years by a variety of interested persons and groups, from the New York State Judicial Commission on Minorities to the Jury Commissioners' Association. But the Chief Judge's choice initially arose out of one of the recurring concerns that have bred so much dissatisfaction among jurors and potential jurors in

New York. Judge Kaye wondered why some people she knew were called for jury duty every two years, while so many of her other, equally eligible acquaintances were never summoned. That particular question – why me and not my neighbor? – has puzzled, bemused and annoyed generations of New Yorkers, who could think of no logical reason why the blessings and burdens of jury service did not seem to fall on all. From such acorns, long and multi-faceted reports grow.

The problems that will be discussed in this report are not new. But it is quite discouraging to realize how very old they are. In 1930, the Columbia Law Review published an article entitled "Proposed Legislation for Jury Reform in New York."¹ The article noted that a large proportion of the population, including "most of the more educated classes," was relieved from jury duty. It called for the elimination of all statutory exemptions (except for court officers) and a stricter standard for excuses.² It also pointed out that New York afforded criminal defendants more peremptory challenges than any other state in the Union, and endorsed sharp reductions.³

These old recommendations, still on the table, serve as a sobering reminder that we have not made overmuch progress in the last sixty-four years. New York has pioneered many improvements in juror management since 1930. But we have allowed other problems to become fixtures of our judicial system. The widespread belief that an effort like The Jury Project was long overdue lent a sense of urgency to our work.

The task facing The Jury Project was made immeasurably easier by the existence of the American Bar Association's Standards Relating to Juror Use and Management. The ABA

¹ "Proposed Legislation for Jury Reform in New York," 30 Colum. L. Rev. 721 (1930).

² Id. at 722.

³ See id. at 726.

Standards (as we call them) are the result of five years of painstaking work performed by two nationally representative panels of judges, lawyers and jury experts, aided by some of the country's leading scholars and research institutions.⁴ By serving as a comprehensive model juror-utilization system, the ABA Standards gave The Jury Project something tangible to shoot for. Equally important, they gave us something to shoot at. We made ample use of both opportunities. The Chair directed the task force and staff to presume that New York would embrace the ABA Standards as written, and to justify any deviations from those standards by referring to local impediments that were both unique and unremovable. The ABA Standards were our organizing principles, and in many instances we needed only to endorse them and to suggest specific ways in which they might be implemented.

However, there were indeed local impediments to the wholesale endorsement of the ABA Standards, and those impediments were both unique and unremovable. The principal one is New York City. Few people realize what an extraordinary consumer of judicial and jury resources New York City is. It is not the only large city in the United States, but the number of jury trial parts in the five boroughs -- 115 civil and 179 criminal -- far exceeds the number in comparable municipalities, like Boston, Philadelphia or Washington, D.C.⁵ Thanks largely to its importance to the business community, the City (and particularly New York County) is burdened

⁴ The ABA adopted the Standards in 1983, and revised the Standards' commentary and references in 1993. The Standards have been adopted by The Conference of State Court Administrators, The National Association of Trial Court Administrators, The National Association For Court Administration, The National Conference of State Trial Judges, The National Conference of Special Trial Judges, The National Conference of Special Court Judges, The National Conference of Metropolitan Courts, The National Bar Association, The National Conference of Federal Trial Judges, The Lawyer's Conference and The Appellate Judges' Conference. The National Center for State Courts provided support to the developers of the ABA Standards through grants from the State Justice Institute and the Law Enforcement Assistance Administration, Department of Justice.

⁵ Only Los Angeles and Chicago have over 200 trial courts of general jurisdiction, and neither has close to 300, as New York City does.

with a trial calendar that is totally out of proportion to its population (and, hence, to the pool of available jurors). 1.2 of the State's 1.8 million juror days are served in New York City, although just 40% of the State's population lives there. Budgetary realities mean that there are neither the judges nor the facilities to keep up with this crushing litigation load. And no other area in the State contains as high a proportion of persons who are either statutorily disqualified or exempt from serving as jurors. New York City's special problems of juror procurement, management and utilization are not insoluble, but it is easy to forgive frustrated local officials from concluding that they are, particularly in a time of revenue depletion and budget cutting. Some of the ABA Standards needed to be modified to take these extraordinary conditions into account.

It is equally easy to sympathize with upstate residents who fear that a system of uniform jury standards, structured to address the peculiar needs of the downstate metropolitan area, may leave them with new problems of their own. It is a truism (but one that bears repeating) that "downstate" and "upstate" are very different places, where law is practiced and the courts are run in very different ways. Whether recommending the adoption of the ABA Standards or devising our own solutions, The Jury Project tried to be sensitive to local differences and local needs. We confess to a bias for uniform procedures in what is supposed to be a unified court system equally accessible to all members of a statewide Bar. However, where we suggest adoption of a uniform rule (either the ABA's or one of our own), we justify that choice by pointing out that the rule, properly implemented, should not alter local practice in those counties where jury selection and utilization are operating efficiently.

It bears noting that the task force may disagree with some judges, jury commissioners, clerks and lawyers about how efficiently jury selection and jury operations are conducted in their counties. That is because we evaluated those processes by a new standard -- the juror's standard: "In the time I spent away from my regular activities, did I perform a valuable service for my

community?" Sitting on a jury, not sitting in the central jury room, is the hallmark of performing a valuable service for the community. While a juror's problems with inadequate pay, inhospitable facilities, physical discomfort and lost time are very real, those issues are often forgotten in the thrill and the responsibility of hearing evidence and reaching a verdict. By the same token, they are magnified if the juror never gets to try a case. Therefore, one of our goals was to maximize the number of summoned jurors who actually got to serve on a jury that tried a case. Many of our recommendations (including those that will seem most disruptive to those of us who spend significant amounts of time in the courts) are made with that end in mind.

Perhaps the most refreshing aspect of Chief Judge Kaye's mandate to The Jury Project was her charge that we be visionary, not dragged down by seeming practical impediments or prior failed efforts. Carrying out that charge was rather like not mentioning the elephant that is standing in the middle of the room. We admit that we rejected some potential remedies because politics — in the Legislature or among the organized Bar — is a reality. In our view, being visionary involves implementing the vision as well as having it.

On the other hand, we have not hesitated to recommend some measures that may prove controversial. Several of our proposals (like uniform rules for civil voir dire or reducing the number of peremptory challenges in criminal cases) have already drawn protests. Others have failed to pass muster before previous legislatures (for example, ending mandatory sequestration of juries in criminal cases or abolishing statutory exemptions from jury service). Whether the addition of our voices, arguments and findings will be enough to get these measures adopted, we cannot say. But our consensus (and often unanimous) belief is that their implementation is imperative, and that no competing considerations, political or otherwise, come close to outweighing their merits.

all the jurors of New York – that this report is dedicated. For their sakes, may our work bear fruit.

New York, New York
March 31, 1994

The Jury Project

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.
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Mehrl F. King
Joseph J. Kunzeman, Esq.
Nat Leventhal, Esq.
Wilber A. Levin
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Carl P. Paladino, Esq.
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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
Professor Emil Zullo

Counsel

David L. Kornblau, Chief Counsel
Roberta A. Kaplan, Deputy Counsel
Paula A. Tuffin, Deputy Counsel

Office of Court Administration

Anthony Manisero
Chester Mount
Marlene Nadel, Esq.
Ann Pfau, Esq.

Note from the Chair

I would be remiss if I did not tender thanks to Chief Judge Kaye, Chief Administrative Judge Milonas and the Office of Court Administration for the extraordinary assistance offered by some extraordinary people on their staff: Mary deBourbon, who arranged our public hearings and handled our public relations, Nick Capra, the Director of Facilities, and Ann Marie Hewitt of the OCA Budget Office. Most especially, I thank Tony Manisero, Chip Mount, Ann Pfau and Marlene Nadel, who were de facto members of The Jury Project and whose in-depth knowledge of jury administration and willingness to track down the answer to any crazy question we came up with made our overwhelming task seem manageable.

Two outside consultants were particularly helpful in our work. First is G. Thomas Munsterman, Senior Staff Associate of the National Center for State Courts. Nobody knows more about jury management and jury reform than Tom does, and his insights, suggestions and historical perspective were invaluable to us. Second, Professor Nancy L. King of Vanderbilt Law School shared with us her comprehensive research on the legality of affirmative action in jury selection. Her generosity saved us considerable work, and her criticisms of our ideas were right on target.

Many bar groups and professional organizations shared thoughts and ideas with us, and I could not possibly thank them all. I am particularly grateful to The New York State Bar Association for facilitating constructive meetings with judges and practitioners from around the State. Judges, administrators and Jury Commissioners throughout the State gave generously of their time in meeting with us, writing to us and arranging tours of their facilities. We could not possibly have finished our work without their assistance. And the hundreds of jurors who called our hot line, wrote eloquent letters and testified at our public hearings probably performed the most valuable service of all.

David Kornblau, Roberta Kaplan and Paula Tuffin agreed to serve as counsel to The Jury Project before we knew where we were headed or how much work would be involved. They immersed themselves

in the work of the Project, ably assisted the three task force subcommittees that devised recommendations for the larger group to debate, and kept the project going when I had to absent myself for a four week trial. I am forever in their debt.

David, Roberta, Paula and I could not have participated in The Jury Project without the cooperation, understanding and support of my partners at Paul, Weiss, Rifkind, Wharton & Garrison. For 18 years, I have been proud to be part of an institution that believes public service by lawyers is not just an obligation, but an honor. I am grateful for the herculean efforts made by the firm's library, paraprofessionals and secretarial staff, and the research assistance received from associate Michael Bowen. Particular thanks go to Jean Cullen, my secretary, who acted as chief administrative officer for the project and who assembled the report with her amazing skill and unfailing good humor.

Finally, I thank the members of The Jury Project for service above and beyond the call of duty. Various acquaintances who have had experience with task forces warned me that counsel and our OCA staff would do all the work and everyone else would show up at the end to bless or curse it. Either they were too cynical or Chief Judge Kaye is unusually gifted in her ability to select people for this sort of endeavor. The members of The Jury Project worked hard. They met three times as a group and on dozens of other occasions in subcommittees. They held hearings and toured court facilities and talked to administrators, judges and jurors all over New York. They took on homework, did it and reported back. They formulated, debated and refined the recommendations in our report. Not every member of the task force agrees with every word or every suggestion in this document, but when the group could not act unanimously, a substantial majority of the members were able to forge a consensus view. It was a privilege to have worked with them; I hope to have the honor of doing so again.

Colleen McMahon

March 1995

Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York

Colleen McMahon

David L. Kornblau

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McMahon, Colleen and Kornblau, David L. (1995) "Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York," *Journal of Civil Rights and Economic Development*: Vol. 10: Iss. 2, Article 1.
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ARTICLES

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

COLLEEN McMAHON**
& DAVID L. KORNBLAU***

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.

** Ms. McMahon served as the Chair of the Jury Project. Ms. McMahon formerly practiced commercial litigation as a partner at the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison. She is presently a Justice for the Supreme Court of New York, New York County.

*** Mr. Kornblau served as Chief Counsel to the Jury Project. He is formerly a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison in New York and currently acts as Assistant Chief Litigation Counsel at the U.S. Securities and Exchange Commission in Washington, D.C. The authors wish to thank all of the members and staff of the Jury Project.

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 McMahan, 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 dire.

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 dices, 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 dices 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 dices 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 dire 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.

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Judicial

A Judge's Perspective on Jury Reform From the Other Side of the Jury Box

By *Judith S. Kaye*

Thursday, August 15, 1996—I emerged from the subway station at City Hall and enjoyed the short stroll down to the Manhattan Criminal Courts building at 100 Centre Street. I was a little anxious. After all, I was trying out for a new role in the New York State court system, and hoped to be sitting by designation, in a criminal trial that afternoon. Why was I, the Chief Judge of the state, so uncertain about my status? Because I was reporting to the courthouse not as a judge, but as a juror.

My stroll down Centre Street that morning in August was a small part of a larger journey that had actually begun three years earlier, and is still far from complete—the journey to reform the New York State jury system.

The Jury Project. When I became Chief Judge of the State of New York, the jury system was one of the first things I wanted to examine. In the summer of 1993, I appointed a task force, called "The Jury Project," to conduct a top-to-bottom review of New York's jury system. Using the American Bar Association's Standards Relating to Juror Use and Management as a guide, The Jury Project recommended a far-ranging program of legislative, administrative, and attitudinal changes for the court system.

Based on The Jury Project's work, the New York State jury reform program focused on three major objectives: jury pools that are truly representative of the community; a jury system that operates efficiently and effectively; and jury service that is a positive experience for the citizens who are summoned to serve.

Representative Jury Pools. First, we dismantled the "permanent qualified lists" that arbitrarily over summoned some citizens and under summoned others so that every citizen whose name appears on any of the underlying source lists has an equal chance of being called to serve. Next, we expanded the number of source lists that we use: voter registration, driver's license, state income tax, unemployment, and public assistance rosters. This provides us with a database of 16 million names that includes citizens from all walks of life. Finally, the legislature repealed the state's entire list of automatic exemptions. Thus, the new year brought a number of new faces into jury boxes across the state—doctors, lawyers, police officers, and yes, judges. Press reports noted how much more diverse the jury pool had become, and how much more willing jurors were to serve.

Efficient Jury System. The second major objective of our jury program was to establish an *efficient* jury system. We knew from our juror complaint hotline that "wasted time" was the number one criticism registered.

New York's established tradition of allowing attorneys to select civil juries without any judicial supervision was also a particular source of discontent. Many jurors told similar stories of days and weeks of boring and repetitive questioning and unexplained delays, frequently followed

by settlement of the case immediately after completion of this tedious, time-consuming process.

New rules governing the conduct of civil voir dire were adopted following a pilot study that tested the effects of various levels of judicial supervision; alternative methods of jury selection; use of time limits on attorney questioning; and use of non-designated, alternate jurors. The rules identify the methods of jury selection that are the most efficient. Judges must designate one of these selection methods in each case, preside at the commencement of civil jury selection, set time limits on questioning, and continue monitoring as appropriate. The rules have had a positive impact on the length of civil voir dire. In just the first nine months of 1996, the average length of civil jury selection in New York dropped from 9.3 hours to 6.7 hours—a reduction of over 25 percent.

Better use of technology has also helped us improve the efficiency of our jury system. In ten of the largest counties of the state, jurors can now postpone their first summons for up to six months—usually to a specific date of their choice—by using an automated telephone system. All counties have call in systems to help ensure that the supply of jurors reporting closely corresponds to the court's projected demand—thus, reducing juror waiting time and trial part downtime.

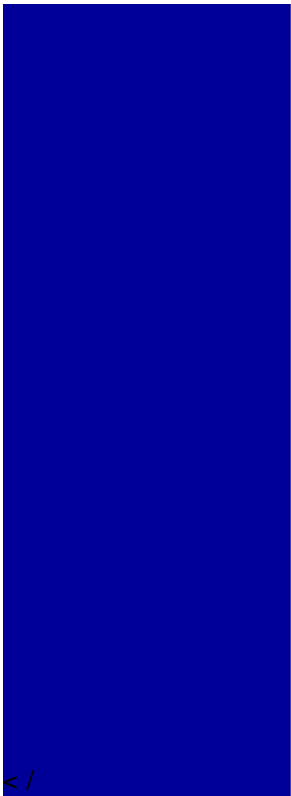
But efficiency in a jury system is not just a matter of machinery—it's also a matter of active court management. The court system held "juror utilization workshops" for New York City jury commissioners and court administrators, who then developed their own county-specific juror utilization plans which focus on better communication between court parts and jury administrators, as well as between court staff and jurors.

Jury Service as a Positive Experience. In New York, we are working to ensure that jury service is an experience that inspires trust and respect in our courts. Because the physical condition of our court-houses is seen by many as a metaphor for our system of justice, our jury program included the provision of clean and comfortable juror facilities.

Courteous and professional treatment by courthouse staff is another component of a positive jury experience. In New York, we have emphasized service to the public in formal training programs, as well as through day-to-day management supervision. Juror exit surveys confirm that our efforts are paying off. In 1995, nearly 90 percent of the jurors who completed surveys indicated that they found court staff to be professional and courteous.

But without question, one of the best ways to improve the basic jury experience is to minimize the burdens of service. To that end, we expanded our jury pools and improved juror management techniques; we cut our statewide average term of service by 50 percent in less than three years, with 58 of the 62 counties in the state now on a "one day/one trial" system; we instituted a system whereby people are summoned less frequently, with all counties except Manhattan and the Bronx, both currently on a four-year (or longer) summoning schedule; we secured legislation that eliminates mandatory sequestration on an experimental basis in all but the most serious criminal trials (and we hope to make the experiment permanent); and we are increasing juror compensation from \$15 to \$40 over the next two years.

Do I Think Judges Should Serve Jury Duty? You bet I do. Judges' participation serves at least four important functions. The first is the symbolic value of judges themselves demonstrating that every citizen has an equal duty to serve. Second, as a practical matter, exempting



one group of busy professionals would quickly lead to the excusal of others, and begin the landslide back to the bad old days where an unfortunate few were called like clockwork while the rest of us blithely ignored the system. Third, with time, I believe that attorneys will become more comfortable with the notion of judges and other law-trained individuals serving as jurors, and more of them will be chosen to sit. This will allow a large group of well-educated citizens to contribute their collective wisdom and life experiences to the deliberative process.

Finally, jury duty may also help judges be more effective when they move back from the box to the bench. When drafting instructions, they will be able to draw on their experience of having to comprehend and apply the boilerplate passages we often use. They may have new interest in other measures designed to promote juror comprehension, such as note taking, preliminary instructions, and interim summations.

Honorable Judith S. Kaye is the Chief Judge of the State of New York.

- **This article** is an abridged and edited version of one that originally appeared on page 18 in *The Judges' Journal*, Fall 1997 (36:4).

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Fordham Law Review

 Volume 67 | Issue 1

Article 1

1998

Lawyering for a New Age

Judith S. Kaye

Recommended Citation
Judith S. Kaye, *Lawyering for a New Age*, 67 Fordham L. Rev. 1 (1998).Available at: <http://ir.lawnet.fordham.edu/flr/vol67/iss1/1>

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