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Jarod S. Gonzalez

ARTICLE

A CUSTOM FIT: TAILORING TEXAS CIVIL JURY SELECTION PROCEDURES TO CASE TIERS

JAROD S. GONZALEZ*

* Jarod S. Gonzalez, Frank McDonald Professor of Law, Texas Tech University School of Law; B.A., *summa cum laude*, University of Oklahoma, 1997; J.D., *with highest honors*, University of Oklahoma College of Law, 2000. I appreciate the excellent comments from the participants at the Fourth Annual Colloquium on Current Scholarship in Labor and Employment Law who attended a presentation of the idea that led to this Article. I thank Sally Pittman and Elizabeth Caulfield for their dedicated research assistance on this Article. Thanks also to Professors Brian Shannon, Daniel Benson, and Dustin Benham for providing helpful comments regarding earlier drafts of this Article. McDonald Research Professorship funds provided support for the research and writing of this Article. I am solely responsible for any mistakes or errors that appear.

I. INTRODUCTION: JURY SELECTION REFORM AND REJUVENATING THE CIVIL JURY

The jury trial must re-stake its place as a linchpin of the Texas civil justice system.[1] Citizens serving on a civil jury are entrusted with making factual decisions about disputes that impact the legal rights and remedies of the litigants, and set standards for the behavior of the public.[2] A civil jury stands as the conscience of the

1. Some observers may disagree. *See* MARK TWAIN, ROUGHING IT 341 (Hartford, Am. Publ'g Co. 1872) (referring to juries as "the most ingenious and infallible agency for *defeating* justice that human wisdom could contrive").

2. *See* Trapnell v. Sysco Food Servs., Inc., 850 S.W.2d 529, 545 (Tex. App.—Corpus Christi 1992) (emphasizing the right of Texans to have questions of fact determined by a jury), *aff'd*, 890 S.W.2d 796 (Tex. 1994); SEAN G. OVERLAND, THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS 4 (2009) (discussing the functions and importance of the civil jury, including the task of acting as a legal fact finder and representing the community's values). *See generally* Eric L. Muller, *Solving the* Batson

community and, through factual findings, allocates responsibility for harms suffered by individuals in our society.[3] Having a citizenry that directly participates in resolving civil disputes between members of a community has significant societal value, and this value is etched in the United States and the Texas Constitutions.[4] Unfortunately, civil jury trials take place less frequently in twenty-first century Texas than in prior eras, primarily due to the increased use of pretrial motions, the increase in case settlements, and the rise of nonjudicial forums for resolving

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Paradox: Harmless Error, Jury Representation, and the Sixth Amendment, 106 YALE L.J. 93, 137 (1996) (explaining that the United States Supreme Court supports the jury acting as the voice of the community).

3. *See* United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969) (asserting the jury as the "conscience of the community").

4. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."); TEX. CONST. art. I, § 15 (amended 1935) ("The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."); TEX. CONST. art. V, § 10 ("In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury . . . ."). The Constitution of the Republic of Texas and successive constitutions have fiercely protected the right to trial by jury. *See* REPUB. TEX. CONST. of 1836, Declaration of Rights, para. 9, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1082 (Austin, Gammel Book Co. 1898) (asserting the right of a jury trial); *see also* TEX. CONST. art. I, § 15 (amended 1935) (proclaiming the right of a jury trial inviolate); TEX. CONST. art. V, § 10 (providing for the right to a jury trial when demanded by a party); TEX. CONST. of 1845, art. I, § 12 (declaring the "right of trial by jury" inviolate); TEX. CONST. of 1845, art. IV, § 16 (granting the right to jury trial upon application in court). Article I, section 15 of the currently operating 1876 Texas Constitution, the Bill of Rights Jury Article, protects the right to trial by jury in cases where the right existed at common law. TEX. CONST. art. I, § 15 (amended 1935); *see* White v. White, 108 Tex. 570, 196 S.W. 508, 581 (1917) (affirming the fundamental principle that jury trial provisions in the Constitution merely guarantee the right to a jury trial in causes where it existed under common law). The jury right under the Texas Constitution is broader than in most other states because article V, section 10, the Judiciary Article, extends the right to "trial of all causes." TEX. CONST. art. V, § 10; *see Trapnell*, 850 S.W.2d at 545 (proclaiming that Texas has its "own, independent constitution with rights which are different and sometimes greater than those found in the federal [C]onstitution"). The Judiciary Article was added to the Texas Constitution in 1845 because the Bill of Rights Jury Article did not extend to equity causes of action. *See* State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 292 (Tex. 1975) (confirming that the right to a jury trial did not originally extend to causes in equity, but was added in 1845); Cockrill v. Cox, 65 Tex. 669, 673 (1886) (indicating an addition to the Texas Constitution for causes in equity). At common law, juries did not decide equity causes. *See* Parsons v. Bedford, Breedlove, & Robeson, 28 U.S. (3 Pet.) 433, 446 (1830) (asserting that, under common law, a jury was used only in extraordinary cases for causes in equity).

private disputes, such as arbitration.[5] Consequently, civil juries play an important role in rejuvenating the Texas civil justice system.

Part of the justice system's rejuvenation should involve a re-evaluation and improvement of the current process for selecting civil juries.[6] While improved jury selection procedures will not alone revitalize the civil jury, enhanced provisions take a good step toward bolstering it. Improvements in jury selection procedures that create impartial trials, increase efficiency in the system, honor the time commitment of jurors, reduce game playing by attorneys, improve jury decision making, and heighten the public's belief in the fairness of the system will contribute to advancing an institution that stands as a hallmark of the American experience.[7] Most of the world has relegated the civil jury to the dustbin of history, but many Americans, Texans included, still see the value in continuing the most democratic of public institutions.[8] The civil

5. *See* Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 412, 416 (2008) (stating that "[t]he actual number of cases tried to juries is now quite low," and attributing that result, in part, to the increased use of pretrial dispositive motions and settlements); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1260 (2005) (tracking, numerically, the sharp decline in federal civil jury trials from the mid-1980s to the early 2000s); Carl Reynolds, *Texas Courts 2030—Strategic Trends & Responses*, 51 S. TEX. L. REV. 951, 977–78 (2010) (portraying the decline of civil jury trials in Texas through statistics over a twenty-year period).

6. *See generally* TEX. GOV'T CODE ANN. §§ 62.001–.501 (West 2005 & Supp. 2011) (outlining the current procedures for selecting civil juries in Texas).

7. *See generally* Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process*, JUDGES' J., Winter 2008, at 4, 5 (attributing certain principles to improving the essence of a jury trial and amplifying juror participation); Note, *Psychological Tests and Standards of Competence for Selecting Jurors*, 65 YALE L.J. 531, 541 (1956) (claiming improvements in jury selection procedures enhance the operation and efficiency of the jury system).

8. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 30 (1986) (discussing how many European countries experimented with the jury system but subsequently abolished or limited the practice). *But see* Robert J. Grey, Jr., *Op-Ed: Sitting in Judgement: American Jury System Holds Verdict on Our Democracy*, A.B.A. NOW (Mar. 21, 2005), http://www.abanow.org/2005/03/op-ed-sitting-in-judgement-american-jury-system-holds-verdict-on-our-democracy/ (citing statistics from a July 2004 public-opinion poll which found that "Americans overwhelmingly (75 percent) prefer to have their cases tried by a jury rather than a judge"). Even in common law countries, like England, where the ancient right of a jury trial thrived for several centuries, the use of juries has markedly declined, especially in civil cases. Sally Lloyd Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, LAW & CONTEMP. PROBS., Spring 1999, at 7, 13. Nonetheless, of the Americans questioned in a public opinion poll by the American Bar Association, 75% do not feel that

jury in this country has taken a few hits over the last several years, but it still endures.[9] The key is to make jury selection better and more adaptive to the realities of modern litigation.

Currently, the primary flaw in Texas jury selection procedures is the one-size-fits-all approach—no matter the dollar size of the case, the nature of the case, the claims asserted by the parties, or other case-specific factors, the jury selection process remains basically the same, characterized by extensive peremptory challenges and denial of any type of merit-based jury selection.[10] In short, a venire is seated by random selection of a cross section of the community, and then peremptory challenges are extensively used to create an "impartial" jury.[11] But cookie-cutter cases are rare. Some cases would be best served by disallowing peremptory challenges completely, and in other cases a small number of challenges may be preferred.[12] Some cases should be decided by twelve citizens with no direct qualifications or experience, while other cases would be better served by a decision from a collection

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jury service is a burden to be avoided, and 84% of those polled believe it is a civic duty that should be fulfilled even if inconvenient. Robert J. Grey, Jr., *Op-Ed: Sitting in Judgement: American Jury System Holds Verdict on Our Democracy*, A.B.A. NOW (Mar. 21, 2005), http://www.abanow.org/2005/03/op-ed-sitting-in-judgement-american-jury-system-holds-verdict-on-our-democracy/.

9. *See Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1412 (1997) ("Nonetheless, the civil jury remains a fixture of the American legal system, though it has seen far better days."). *See generally* SEAN G. OVERLAND, THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS 2–4 (2009) (noting the anecdotal evidence of "large and seemingly inexplicable damage awards" via media reports, but explaining that such reports are often taken out of context or without a full explanation of the evidence presented at trial); Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 412 (2008) (explaining that some "media portrayals of jury verdicts in tort cases as disproportionate and inconsistent have revealed a crisis of legitimacy").

10. *See* GOV'T §§ 62.001–.021 (describing the jury selection rules and jury service requirements for petit juries in civil cases); TEX. R. CIV. P. 216–236 (setting forth the various rules for jury selection prior to, during, and after voir dire). "Merit" refers to a prospective juror's demonstrated experiences and abilities in regards to the underlying nature of the case. *See generally* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 209 (2006) (stating that jurors with exceptional qualifications facilitated comprehension of the dispute in question).

11. *See* GOV'T § 62.004 (establishing random selection of jurors); *id.* § 62.020(e) (addressing peremptory challenges entitled to each party); *see also* TEX. R. CIV. P. 223 (clarifying that jurors' names are randomly selected); *id.* R. 232 (identifying the process of making peremptory challenges).

12. *See generally* Edward S. Adams & Christian J. Lane, *Constructing a Jury that Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 727–31 (1998) (discussing alternatives to peremptory challenges).

of experienced individuals qualified to decide cases involving a particular subject matter.[13] Ideally, a tiered approach would outlaw peremptory challenges in some cases, grant flexibility to trial judges regarding the use of peremptory challenges in other cases, and provide judges the discretion to use special juries in particular circumstances. Like a skilled tailor who custom fits a piece of designer clothing to the client's body, a trial judge should have the flexibility to fit the jury selection procedures to the case at hand. Such flexibility is currently lacking in Texas law.

This Article conducts an evaluation of current jury selection procedures under Texas law and the operation of federal law in Texas, and suggests a few ways to specifically improve Texas law as it relates to such procedures. Part II examines the competing values that undergird Texas civil jury selection procedures, which have been mixed together in such a way to produce law that is tough to justify. Moreover, the rigidity of the law precludes jurists from weighing these values differently depending on the nature of the case. Part III recalibrates the values that support procedures for random selection, procedures to preclude partial jurors from serving on a case, and procedures for merit-based selection, and also discusses in detail special jury laws and their benefits. Finally, Part IV sketches out a proposed rule change to the Texas Rules of Civil Procedure to provide a tiered system for jury selection that alters current law regarding the use of peremptory challenges and merit-based selection.

II. THE COMPETING VALUES THAT UNDERGIRD TEXAS JURY SELECTION PROCEDURES

Modern civil jury selection generally entails a random selection procedure to place citizens into a venire—a panel of persons selected for jury duty—and then provides attorneys and judges the right to extensively question the potential jurors to discover whether such individuals are qualified and suited to fairly decide the case.[14] The questioning of potential jurors is called voir

13. *See* Keith Broyles, Note, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714, 736 (1996) (discussing the use of a "specially qualified jury in complex cases").

14. *See* GOV'T § 62.004 (establishing random selection of jurors); *see also* TEX. R. CIV. P. 230 (identifying the type of questions prohibited during voir dire examination);

dire.[15] Before proposing changes to Texas jury selection procedures, one must examine the basics of the current system with special attention paid to peremptory challenges and the problems caused by the use of such challenges.[16] Theoretical questions must be posed and analyzed. What traits are necessary for a juror to be qualified to decide a civil case? Should jury selection laws focus more on the rights of litigants to fair and "good" decision making by juries, or on the fairness of the overall process to society and to the individual jurors themselves?

A. *Civil Jury Selection Systems in Texas and Federal Courts*

1. Random Selection Procedures to Compile a Pool of Potential Jurors

Every jury selection system has established requirements for eligibility to serve as a juror in a civil trial.[17] During the early part of Texas history, the local sheriff hand-picked potential jurors from only select members of the community.[18] The selection duties were later assigned to local jury commissioners or court

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Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 708 (Tex. 1989) (recognizing that courts permit a broad range of questions on voir dire).

15. Voir dire is a law term of Middle French origin that literally means "to speak the truth." Whitaker v. State, 653 S.W.2d 781, 782 (Tex. Crim. App. 1983); *see* R. Brent Cooper & Diana L. Faust, *Procedural and Judicial Limitations on Voir Dire—Constitutional Implications and Preservation of Error in Civil Cases*, 40 ST. MARY'S L.J. 751, 752 (2009) (identifying voir dire as a French phrase). Voir dire refers to "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." BLACK'S LAW DICTIONARY 1710 (9th ed. 2009).

16. *See* GOV'T § 62.021 (West 2005) (dismissing a prospective juror removed by peremptory challenge). *See generally* Albert P. Jones, *Peremptory Challenges—Should Rule 233 Be Changed?*, 45 TEX. L. REV. 80, 82 (1966) (indicating the problem with peremptory challenges is the allocation to "each party" instead of "each person"); Edward P. Schwartz & Warren F. Schwartz, *The Challenge of Peremptory Challenges*, 12 J.L. ECON. & ORG. 325, 326–27 (1996) (criticizing peremptory challenges for failing to create an impartial, democratically representative jury).

17. *See* GOV'T § 62.102 (West Supp. 2011) (describing the general qualifications for jury service); *see also* 28 U.S.C. § 1865(b) (2006) (outlining the qualifications of a juror); CAL. CIV. PROC. CODE § 203 (Deering Supp. 2012) (listing exceptions to persons qualified to be jurors); N.Y. JUD. LAW § 510 (McKinney 2003) (providing the qualifications of jurors).

18. Davis v. Fisk Elec. Co., 268 S.W.3d 508, 529 (Tex. 2008) (Brister, J., concurring); *see* Gulf, C. & S.F. Ry. Co. v. Greenlee, 70 Tex. 553, 8 S.W. 129, 130 (1888) (explaining that the court would direct the sheriff to pick qualified jurors).

clerks, but nonetheless, hand-picking potential jurors continued.[19] As recently as the 1960s, federal courts in Texas still employed a "key-man" system of jury selection.[20] Jury commissioners selected notable citizens to serve as jurors, typically "*men* of recognized intelligence and probity."[21] The key-man approach tended to produce juries composed primarily of white men who owned property, excluding women and racial minorities even though United States Supreme Court jurisprudence mandated that intentionally preventing black citizens from serving on juries violated the Fourteenth Amendment.[22] In 1968, Congress enacted the Jury Selection and Service Act, which officially abolished the key-man system in the federal courts.[23] Similarly, the current Texas civil court jury selection process only permits random selection of venires for petit juries and provides no place for blue-ribbon juries or key-man systems.[24]

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19. *See* Act approved Aug. 1, 1876, 15th Leg., R.S., ch. 76, §§ 4, 7, 1876 Tex. Gen. Laws 78, 79, *reprinted in* 8 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 835, 915 (Austin, Gammel Book Co. 1898) (providing authority for the court to select jury commissioners who then selected jurors); *Davis*, 268 S.W.3d at 529 (listing the sheriff and jury commissioners as able to select jurors from the local community in early Texas).

20. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99 (1994); *see* Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861–1878 (2006 & Supp. IV 2011)) (abolishing the key-man system).

21. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99 (1994) (emphasis added).

22. *See* Norris v. Alabama, 294 U.S. 587, 591–96 (1935) (explaining how the key-man system used for selecting jurors resulted in a lack of black citizens being chosen for jury service in a particular Alabama county); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 951–52 (1998) ("Although the exclusion of racial minorities from juries had been constitutionally forbidden since 1880, in practice many states found ways to preserve white domination of the venire. The pattern of excluding women was even more blatant: the first state to allow women to serve on juries appears to have been Utah in 1898, and women were not generally eligible to serve on federal juries until 1957.").

23. Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53; *see* Davis v. United States, 411 U.S. 233, 246 n.3 (1973) (stating that the adoption of the Jury Selection and Service Act of 1968 precluded further use of the key-man system).

24. *See* TEX. GOV'T CODE ANN. § 62.001 (West 2005) (describing the use of a jury wheel for petit juries in civil cases to generate prospective jurors at random). Texas law still maintains a constitutional form of the key-man system for selecting grand jurors in criminal cases. *See* TEX. CODE CRIM. PROC. ANN. art. 19.06 (West Supp. 2011) ("The jury commissioners shall select . . . citizens of the county to be summoned as grand jurors . . . . The commissioners shall, to the extent possible, select grand jurors who the commissioners determine represent a broad cross section of the population of the county, considering the factors of race, sex, and age."); Castaneda v. Partida, 430 U.S. 482, 497

The current jury selection procedures for Texas civil cases are more inclusive and democratic, producing more diverse jury panels than prior generations for a variety of reasons.[25] Because of the few eligibility requirements, the vast majority of the adult population qualifies to serve on a civil jury.[26] To serve as a juror, the person must be: "at least [eighteen] years of age"; "a citizen of [Texas] and of the county in which the person is to serve as a juror"; "qualified under the constitution and laws to vote in the county in which the person is to serve as a juror"; "of sound mind and good moral character"; and "able to read and write."[27] The person must not be under indictment, or have a conviction for a felony or misdemeanor theft.[28] Finally, the potential juror must not have previously served as a petit juror in the months immediately prior to being called for jury service.[29] Similar basic qualifications of citizenship, minimum age, literacy, and the absence of a felony criminal record are required for jury service in federal district courts under the Jury Selection and Service Act.[30]

Texas and federal jury selection laws go beyond merely providing broad eligibility for citizens to serve as jurors in theory; the laws also work to achieve an actual practice of diverse selection of jurors for the jury.[31] Statutes require court system

(1977) (finding that the Texas key-man system of selecting grand jurors is facially constitutional but subject to abuse because it is highly subjective).

25. *See generally* GOV'T § 62.001(a) (requiring selection of jurors from widely inclusive sources); Powers v. Ohio, 499 U.S. 400, 407 (1991) (describing jury service as an important democratic element).

26. *See* GOV'T § 62.102 (West Supp. 2011) (describing the minimum requirements for jury service in Texas).

27. *Id.* § 62.102(1)–(5).

28. *Id.* § 62.102(7)–(8).

29. *Id.* § 62.102(6).

30. 28 U.S.C. § 1865(b) (2006).

31. In *Taylor v. Louisiana*, the United States Supreme Court held that the Sixth Amendment gives criminal defendants the right to a jury trial, and an impartial jury is drawn from a fair cross section of the community. 419 U.S. 522, 538 (1975). The Court emphasized that "petit juries [in criminal trials] must be drawn from a source fairly representative of the community" and the "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* The fair-cross-section concept has influenced jury selection in civil cases even though the Supreme Court has never specifically ruled that the concept applies as a constitutional requirement in civil cases. *See* Fleming v. Chi. Transit Auth., 397 F. App'x 249, 250 (7th Cir. 2010) (affirming that "the right to a [federal] jury trial in civil cases is based in the Seventh Amendment, not the Sixth, and the Supreme Court has not recognized a [c]onstitutional mandate that

officials to find a broad cross section of eligible jurors to create a pool from which the court officials can randomly draw names to ultimately constitute a venire.[32] Under Texas law, names of potential jurors are drawn from source lists, which include state voter registration and state driver's license rolls.[33] The drawn names constitute a jury wheel.[34] Names of potential jurors are then randomly chosen for jury service from the wheel, or are selected based on an approved random selection plan that utilizes electronic or mechanical equipment.[35] The prospective jurors are summoned to appear at a certain date and time at the appropriate courthouse.[36] From the group of citizens responding to the summons, panels of prospective jurors are created and seated in

jury pools in civil cases reflect a fair cross-section of the community"); *see also* Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 439 (2008) (recognizing the uncertainty about whether the requirement of a fair cross section applies in civil cases as a constitutional matter); Mark A. Nordenberg & William V. Luneberg, *Decisionmaking in Complex Federal Civil Cases: Two Alternatives to the Traditional Jury*, 65 JUDICATURE 420, 424 (1982) (opining that the Supreme Court's "relative silence with respect to civil actions may suggest that there is no constitutional cross section requirement in federal civil cases"). The fair-cross-section requirement is legislatively required in federal and state courts in Texas. *See* 28 U.S.C. § 1861 (2006) (entitling litigants to a jury chosen at random and representing a cross section of the community); GOV'T § 62.001 (West 2005) (establishing the jury source as a cross section of the community).

32. *See* 28 U.S.C. §§ 1861–1863 (2006) (stating that all federal court litigants with the right to trial by jury are entitled to juries selected at random from a fair cross section of the community, prohibiting discrimination in jury service on account of race, color, religion, sex, national origin, or economic status); GOV'T §§ 62.001–.015 (West 2005 & Supp. 2011) (describing general provisions for random selection of names for petit jury service in civil courts). Because each federal district must devise its own jury plan, some differences may exist between jury selection procedures in the federal district courts, and even between districts within the same state. *Compare* UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS, JURY PLAN (2008), *available at* http://www.txnd.uscourts.gov/pdf/misc_orders/misc05_1-12-09.pdf (outlining the current plan for selecting grand and petit jurors), *with* UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TEXAS, JURY PLAN (2009), *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1171&download=true (promulgating a plan for randomly selecting jurors).

33. GOV'T § 62.001(a).

34. *See id.* § 62.003 (outlining the process for constructing a jury wheel).

35. *Id.* § 62.004 (permitting the drawing of names from a jury wheel); *see also id.* § 62.011 (allowing names to be drawn electronically or mechanically for jury service instead of from a jury wheel).

36. *See id.* §§ 62.012–.014 (describing the procedures for summoning jurors to jury service). "[A] person summoned for jury service who does not comply" is subject to possible civil and criminal penalties. *Id.* § 62.0141.

the courtroom for the case in which the panel is assigned.[37] The panel of prospective jurors, or veniremembers, is further refined by an exemption system in which qualified jurors may elect not to serve if they fit a certain statutorily-defined category.[38] Exemption categories under Texas law include, but are not limited to, elderly individuals, students, primary caretakers of young children, and military members on active duty and deployed outside their county of residence.[39] A prospective juror summoned to jury duty may either appear at the courthouse and attempt to establish an exemption, or may use procedures to establish an exemption prior to appearing for jury service.[40]

In Texas, after establishing exemptions, either party may request that the trial judge conduct a jury shuffle, which entails placing the names of the veniremembers in a receptacle, shuffling,

37. *Id.* § 62.015. The assignment for service varies depending on the particular Texas county. Some Texas counties, typically those with larger populations, are governed by interchangeable jury panels. *Id.* § 62.016 (West Supp. 2011); *accord id.* § 62.017 (West 2005) (providing additional provisions for interchangeable jurors); *id.* § 62.0175 (West Supp. 2011) (delineating interchangeable jurors for single district and county court counties); *see also* TEX. R. CIV. P. 223 (regulating the use of interchangeable juries). Under an interchangeable system, prospective jurors summoned for jury service comprise a general panel used for serving various courts within the county, such as district courts, county courts at law, county courts, and justice courts, in a given week. GOV'T §§ 62.016–.0175. The prospective jurors may be sent to serve at a specific court on a venire for a particular case in that court. *See id.* §§ 62.016(e), .017(e), .0175(e) (authorizing the use of a juror at a specific court under the interchangeable juror provisions); TEX. R. CIV. P. 223 (outlining the process used for interchangeable jury service). After serving on the venire in that court, if not seated as a juror, the person may be sent back to the general panel and, in some counties, could conceivably be sent to serve on another venire in another court. *See* GOV'T §§ 62.016(b), .017(b), .0175(b) (selecting jurors to serve for as many weeks as needed); *see also* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 120.01[5][a] (2011) (explaining that "persons summoned for jury service make up a general panel for service as jurors"). Other counties not subject to the interchangeable jury statute utilize a procedure where prospective jurors are summoned to a court for that week and then assigned to the court as the venire for a particular case. TEX. R. CIV. P. 224.

38. *See* GOV'T § 62.106(a) (West Supp. 2011) (listing various juror exemptions).

39. *Id.*

40. *Id.* § 62.0111(b)(2) (West 2005) (establishing that a summoned juror may communicate with the county officer by computer or telephone); *id.* § 62.107(a) (West Supp. 2011) (allowing a prospective juror to establish an exemption without appearing in person). The Texas Government Code permits authorized plans that allow prospective jurors summoned to jury service to provide exemption information to the appropriate court official to determine whether the prospective juror is exempt from jury service. *Id.* § 62.0111. Such information may be provided electronically, by automated telephone system, or by providing the ground of the exemption in a signed statement prior to the date on which the prospective juror is summoned to appear. *Id.* §§ 62.0111(b), .107(a).

drawing, and transcribing the names on the jury list in the order drawn.[41] The venire is then reseated according to the drawing.[42] A jury shuffle allows an attorney to view the entire venire and make judgments about the panel's composition. An attorney may decide to shuffle the panel in hopes that preferred prospective jurors will move to the front of the panel, increasing the chance of being selected for the jury, and less favored jurors will move outside the projected strike zone.[43] In short, if the original randomly selected panel appears lacking from the strategic perspective of a party, the party should ask the judge for a shuffle.[44] The jury shuffle is apparently unique to Texas; no other jurisdiction in the United States employs the procedure.[45] As discussed below, the jury shuffle is extremely problematic because attorneys could use the process to manipulate the race, gender, and socioeconomic composition of the venire, and thus the panel as a whole.[46]

2. Voir Dire

After exemptions are determined and attorneys have had the opportunity to request a jury shuffle, the venire is seated in the courtroom for a particular civil case, and voir dire commences.[47]

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41. TEX. R. CIV. P. 223.

42. *See id.* (instructing the newly shuffled names to be transcribed in the new order drawn).

43. *See* Miller-El v. Dretke, 545 U.S. 231, 253 (2005) (stating how veniremembers moved to the back in a jury shuffle are likely to completely avoid voir dire); Michol O'Connor & Byron P. Davis, *O'Connor's Texas Rules—Civil Trials* § 3.4(2) (2011) (explaining that the "order in which the panelists are listed on the jury list is important because the first [twelve] (or six in county court) unchallenged panelists will sit on the jury").

44. *See generally* Ford v. State, 73 S.W.3d 923, 926 (Tex. Crim. App. 2002) (identifying the jury shuffle as a strategic tool implemented by the parties).

45. *See* William V. Dorsaneo III et al, *Texas Civil Procedure: Trial and Appellate Practice* § 2.01[E][1] (2010) ("There is considerable controversy about the jury shuffle. Texas appears to be the only state that authorizes its use, which has been criticized on the basis that it is not race-neutral.").

46. *See* Davis v. Fisk Elec. Co., 187 S.W.3d 570, 582 n.2 (Tex. App—Houston [14th Dist.] 2006) (illustrating the use of the jury shuffle to affect racial composition of jury), *rev'd on other grounds*, 268 S.W.3d 508 (Tex. 2008); *see also Miller-El*, 545 U.S. at 254–55 (considering whether the prosecutor's jury shuffle indicated discrimination against black venire panelists); William V. Dorsaneo III et al., *Texas Civil Procedure: Trial and Appellate Practice* § 2.01[E][1] (2010) (discussing the criticisms of jury shuffles in the context of race).

47. *See* Turner v. State, 828 S.W.2d 173, 177 (Tex. App.—Houston [1st Dist.] 1992,

The overt purpose of voir dire is to elicit information from veniremembers that will enable attorneys to intelligently exercise peremptory challenges, and to ascertain whether prospective jurors should be stricken for cause.[48] In reality, attorneys use voir dire for a variety of reasons, which may not always be ethical, legal, or even preferable from a systemic perspective. Attorneys may attempt to accentuate favorable law or facts, limit the impact of unfavorable law or facts, obtain commitments from prospective jurors, argue the case itself, and build rapport with prospective jurors.[49] In essence, trial attorneys use the first impression before the prospective jury members to retain as many supportive veniremembers as possible and to convince future jury members as to which party should win the case.[50] The entire voir dire process takes place before any piece of evidence is introduced to the jury, and before the attorneys make opening statements.

The voir dire procedures in Texas civil trials may differ significantly from the procedures used in federal civil trials.[51] One

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writ ref'd) (holding that in a noncapital murder trial, voir dire begins when the state's counsel questions the prospective jurors). *See generally* TEX. R. CIV. P. 223 (portraying voir dire as starting after juror assignment for a particular court); *id.* R. 226a (providing the instructions to be read to the venire immediately before commencement of voir dire, after various veniremembers are exempted and the panel is seated).

48. Johnson v. Reed, 464 S.W.2d 689, 691 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.); *see* David Crump, *Attorneys' Goals and Tactics in Voir Dire Examination*, 43 TEX. B.J. 244, 244 (1980) (stating the goal of voir dire is to obtain information for determining which veniremembers to strike).

49. *See* David Crump, *Attorneys' Goals and Tactics in Voir Dire Examination*, 43 TEX. B.J. 244, 244–45 (1980) (listing different purposes and goals of attorneys during voir dire). Two Texas Supreme Court cases made progress in limiting the effect of attorneys' improper evidence preview during voir dire. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 753 (Tex. 2006) (holding that if evidence is previewed, the court does not abuse discretion by refusing to allow questions regarding the weight given to the evidence); Cortez v. HCCI–San Antonio, Inc., 159 S.W.3d 87, 94 (Tex. 2005) (finding that asking the venire to comment on the evidence is inappropriate and not a disqualification of the juror). Controlling the preview of evidence will likely be an issue regardless of the changes advocated in this Article, and consideration should be given to whether current law does enough to address this problem.

50. *See* David Crump, *Attorneys' Goals and Tactics in Voir Dire Examination*, 43 TEX. B.J. 244, 244–45 (1980) (describing attorney tactics and intentions during voir dire).

51. *See* Stephan Landsman, *The Civil Jury in America*, LAW & CONTEMP. PROBS., Spring 1999, at 285, 292 (reviewing the differences in conducting voir dire in state civil trials and federal civil trials).

key difference is who may question the venire.[52] Attorneys are generally given great freedom to question the veniremembers in Texas courts.[53] In contrast, the judge typically handles most of the questioning in federal civil trials with only a short amount of time given to attorneys to question the panel.[54] The specific voir dire procedures in federal court vary depending on the particular district court judge.[55] But, in general, attorneys conducting civil trials in Texas have a better chance in state court than in federal court to favorably shape the composition of the jury and to influence the view of the case, because attorneys are given greater leeway to question the panel and are granted more peremptory challenges.[56]

Traditionally, the voir dire process commences when the judge or an attorney begins the oral examination of the venire in the courtroom, and voir dire starts the trial.[57] However, before oral

52. *Compare* FED. R. CIV. P. 47(a) (granting the court power to examine prospective jurors), *with* TEX. R. CIV. P. 226a (conveying attorneys in state courts the right to question the prospective jurors).

53. *See* TEX. R. CIV. P. 226a, pt. I, para. 4 ("The parties through their attorneys have the *right* to direct questions to each of [the veniremembers] concerning [the veniremember's] qualifications, background, experiences and attitudes." (emphasis added)); Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989) (granting broad latitude in questioning the venire).

54. *See* FED. R. CIV. P. 47(a) (allowing the court to question the jurors itself); *see also* Hicks v. Mickelson, 835 F.2d 721, 725 (8th Cir. 1987) ("[I]t is common practice in many [federal] district courts for voir dire to be conducted entirely by the court."); Michael C. Smith, *O'Connor's Federal Rules—Civil Trials* § 5.1 (2010) (stating that the trial judge conducts the entire voir dire in most federal courts); Stephan Landsman, *The Civil Jury in America*, LAW & CONTEMP. PROBS., Spring 1999, at 285, 292 (indicating the federal judges alone conduct voir dire in the majority of cases).

55. *See* BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 6.03 (5th ed. 2007) (recognizing "that there is no uniform recommended procedure for selecting jurors to serve in . . . civil cases and that trial judges will develop the patterns or procedures most appropriate for their districts and their courts"); *see also* Ramsey v. Bowersox, 149 F.3d 749, 756 (8th Cir. 1998) ("[T]rial judges have broad discretion to decide how to conduct voir dire . . . ."); Labbee v. Roadway Express, Inc., 469 F.2d 169, 172 (8th Cir. 1972) (holding that a federal district court has broad discretion in fashioning the form and scope of voir dire in civil cases).

56. *See* Sydney Gibbs Ballesteros, *Don't Mess with Texas Voir Dire*, 39 HOUS. L. REV. 201, 208 (2002) ("In sum, the current rules in Texas regarding the conduct of voir dire afford the lawyer wide latitude in questioning prospective jurors."). *Compare* 28 U.S.C § 1870 (2006) (providing three peremptory challenges to each party), *with* TEX. R. CIV. P. 233 (granting six peremptory challenges to each party).

57. *See* Mu'Min v. Virginia, 500 U.S. 415, 419 (1991) (noting the trial court ruled that voir dire commenced with collective questioning of the venire); United States v. Warren, 973 F.2d 1304, 1307 (6th Cir. 1992) (commenting that a trial commences when the voir dire

questioning actually begins, attorneys have already spent time gathering information and evaluating the suitability of the prospective jurors. Under Texas law, persons summoned to jury service are provided with a written jury summons questionnaire that asks for biographical and demographic information prior to or at the time the prospective jurors report for jury service.[58] The judge assigned to the case, appropriate court personnel, the litigants, and the litigants' attorneys may review the questionnaires.[59] Moreover, in addition to the generic questionnaires, attorneys often prepare supplemental questionnaires tailored to the individual facts of the case for the veniremembers to submit more detailed, case-specific information.[60] Attorneys use the veniremembers' responses to make strategic decisions during voir dire and to aid in exercising peremptory challenges.[61]

Once the order of the venire is set and seated, the oral questioning of the veniremembers begins.[62] In Texas courts, attorneys are given wide latitude to question prospective jurors within the broad outlines of the issues relevant to the particular trial.[63] Within these wide goal posts, the attorneys collect the information from prospective jurors needed to exercise challenges for cause and peremptory challenges.[64]

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begins); Williams v. State, 719 S.W.2d 573, 577 (Tex. Crim. App. 1986) (finding voir dire to commence when counsel is recognized by the court to begin questioning prospective jurors).

58. TEX. GOV'T CODE ANN. § 62.0132 (West 2005).

59. *Id.* § 62.0132(g). In some Texas courts, attorneys may not receive the juror information cards until the morning of the scheduled voir dire, making review of the information difficult. *See generally* Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989) (acknowledging that the trial judge has discretion over voir dire examination).

60. *See* Carr v. Smith, 22 S.W.3d 128, 131 (Tex. App.—Fort Worth 2000, pet. denied) (explaining that the sixty veniremembers filled out a sixty-three-question, confidential questionnaire prepared by the defendant's attorneys).

61. *See id.* at 134 (discussing a detailed jury questionnaire and how the questions asked were relevant to the attorney's voir dire strategy).

62. *See Mu'Min*, 500 U.S. at 419 (commenting that voir dire commenced with collective questioning of the venire); *Williams*, 719 S.W.2d at 577 (claiming voir dire begins when counsel questions prospective jurors).

63. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749–50 (Tex. 2006) (recognizing that trial courts allow "'broad latitude' to counsel" in conducting voir dire (quoting *Babcock*, 767 S.W.2d at 709) (acknowledging litigants' broad freedom in a voir dire examination)).

64. *See id.* at 749–50 (evaluating potential jurors' information to use in determining who to strike).

3. Challenges for Cause

Texas and federal law provide several grounds for disqualifying a prospective juror upon a challenge for cause.[65] The ground most difficult to judge in practice is the disqualification of a prospective juror for "bias or prejudice in favor of or against a party in the case."[66] The application of the "bias" and "prejudice" concepts to prospective jurors based on information provided by those individuals is not a precise science, but is an evaluating function necessary in any jury selection system.[67] A party is entitled to unlimited challenges for cause.[68]

The trial judge establishes procedures for the attorneys to follow in exercising challenges for cause.[69] Texas Rule of Civil Procedure 227 states that challenges for cause may be made orally during the voir dire examination.[70] Trial judges often wait until

65. *See* FED. R. CIV. P. 47(c) (delineating that a juror may be excused for good cause); TEX. GOV'T CODE ANN. § 62.105 (West 2005) ("A person is disqualified to serve as a petit juror in a particular case if he: (1) is a witness in the case; (2) is interested, directly or indirectly, in the subject matter of the case; (3) is related by consanguinity or affinity within the third degree . . . to a party in the case; (4) has a bias or prejudice in favor of or against a party in the case; or (5) has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact."). Under case law interpretation of Federal Rule of Civil Procedure 47(c), challenges for cause in federal civil trials are confined to instances in which partiality arises "from the relationships, pecuniary interests, or clear biases of a prospective juror." 9 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 47.20[1] (3d ed. 2010); *see* Bailey v. Bd. of Cnty. Comm'rs of Alachua Cnty., 956 F.2d 1112, 1128 (11th Cir. 1992) (finding the relationship between the juror and the appellant created bias); Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981) (explaining the use of challenge for cause to strike impartial jurors); STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 993 (2010) (identifying partiality as the main grounds for challenges for cause). *But see* Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1468 (10th Cir. 1994) (implying that, in some instances, relationships are not a source of bias).

66. GOV'T § 62.105(4); *see* Photostat Corp. v. Ball, 338 F.2d 783, 785 (10th Cir. 1964) (noting that the United States Constitution does not furnish a precise formula or procedure for determining a prospective juror's state of mind regarding impartiality, but stating that statutory provisions and the common law have laid out certain safeguards for judging bias or prejudice).

67. Because of the imprecise nature in judging bias, "[d]oubts about the existence of actual bias should be resolved against permitting the juror to serve." *Bailey*, 956 F.2d at 1128 (quoting United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976)).

68. *See* STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 993 (2011) ("Parties can challenge the entire panel [for cause] or the selection process.").

69. *See generally* 28 U.S.C. § 1870 (2006) (authorizing the court to make determinations on challenges); TEX. R. CIV. P. 227 (mandating that the court decides any challenge).

70. TEX. R. CIV. P. 227.

the entire examination of the venire is complete before considering all the challenges for cause outside the presence of the venire.[71] This approach provides both sides the opportunity to attempt to "rehabilitate" veniremembers who expressed an apparent bias before the trial judge makes a ruling on a for-cause challenge.[72] Attorneys must follow a special error preservation procedure for trial court rulings on cause challenges in state civil courts.[73] After the for-cause challenge procedure ends, the parties may exercise peremptory challenges.[74]

4. Peremptory Challenges

Once the trial judge rules on the for-cause challenges, the remaining veniremembers not stricken are deemed fit to serve in the particular case.[75] Both Texas and federal law give civil

71. *See generally* Cortez v. HCCI–San Antonio, Inc., 159 S.W.3d 87, 91–93 (Tex. 2005) (explaining the role trial judges play in granting challenges for cause and stating they "must not be too hasty in cutting off examination that may yet prove fruitful").

72. *See, e.g., id.* at 91–92 (disapproving cases holding that "once a veniremember has expressed 'bias,' further questioning is not permitted and the veniremember must be excused" from service).

73. *See id.* at 90–91 ("[T]o preserve error when a challenge for cause is denied, a party must use a peremptory challenge against the veniremember involved, exhaust its remaining challenges, and notify the trial court that a specific objectionable veniremember will remain on the jury list."). The error is harmless if the opposing party strikes the objectionable veniremember and the objectionable veniremember does not serve on the jury. *Id.* at 91; *see* Halprin v. State, 170 S.W.3d 111, 121–22 (Tex. Crim. App. 2005) (finding an error harmless because the objectionable veniremembers did not sit on the jury).

74. *See* TEX. R. CIV. P. 232 ("If there remain on such lists not subject to challenge for cause, twenty-four names, if in the district court, or twelve names, if in the county court, the parties shall proceed to make their peremptory challenges. A peremptory challenge is made to a juror without assigning any reason therefor."). In most Texas counties, if there are insufficient jurors to comprise a strike zone, the entire trial starts over from scratch—a so-called "busted panel." *See, e.g.*, McCoy v. State, 996 S.W.2d 896, 899 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (recognizing that if too many jurors are dismissed for cause, and thus preventing a sufficient number for a proper strike zone, the disqualification of the panel would result in a "bust"). *See generally* Bratcher v. State, No. 01-08-00610-CR, 2009 WL 1331344, at *3 (Tex. App.—Houston [1st Dist.] May 14, 2009, pet. ref'd) (mem. op., not designated for publication) (expressing concern over the busted panel); *In re* Commitment of Barbee, 192 S.W.3d 835, 845 (Tex. App.—Beaumont 2006, no pet.) (referencing attempts by counsel to bust the juror panel).

75. *See* TEX. R. CIV. P. 228 ("A challenge for cause is an objection made to a juror, alleging some fact which by law disqualifies him to serve as a juror in the case or in any case, or which in the opinion of the court, renders him an unfit person to sit on the jury."); *see also* TEX. GOV'T CODE ANN. § 62.105 (West 2005) (listing reasons for disqualification of a juror); 9 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 47.20[1] (3d ed. 2010)

litigants the right to exercise a predetermined number of peremptory challenges, allowing attorneys to strike remaining prospective jurors from the venire without the assignment of a reason.[76] In federal court, each party in a civil case is entitled to three peremptory challenges.[77] Under the Texas Rules of Civil Procedure, each party is entitled to three peremptory challenges in a civil case tried in a constitutional county court and six challenges in a case heard in district court.[78] In civil cases tried in state court where more than two parties are involved in the case, a party may ask the court to realign the parties based on interest and then

(challenging for cause in federal civil trials when partiality arises "from the relationships, pecuniary interests, or clear biases of a prospective juror").

76. *See* FED. R. CIV. P. 47(b) (directing the court to allow three peremptory challenges in civil cases); TEX. R. CIV. P. 232 ("A peremptory challenge is made to a juror *without assigning any reason therefor.*" (emphasis added)); *see also* Batson v. Kentucky, 476 U.S. 79, 89 (1986) ("[A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried . . . ." (citation and internal quotation marks omitted)); 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2483 (3d ed. 2008) ("No reason need be given for the use of a peremptory challenge.").

77. 28 U.S.C. § 1870 (2006); *see* FED. R. CIV. P. 47(b) (instructing the court to follow 28 U.S.C. § 1870 for the number of allowed peremptory challenges). The number of jurors in a federal civil jury trial ranges from six to twelve. FED. R. CIV. P. 48(a). Unless otherwise stipulated by the parties, a jury consisting of at least six members must return a unanimous verdict. *Id.* R. 48(b).

78. TEX. CONST. art. V, §§ 13, 17; *accord* GOV'T § 62.201 (West 2005) (requiring the jury to be comprised of twelve persons in a district court case, unless the parties agree to fewer); *id.* § 62.301 ("The jury in the county courts and in the justice courts is composed of six persons."). Texas statutory county courts conform to the same jury selection practices and procedures of the constitutional county courts. GOV'T § 25.0007(a) (West Supp. 2011). Accordingly, a party may be entitled to a six-member jury in a statutory county court at law. *See In re* G.C., 66 S.W.3d 517, 521 (Tex. App.—Fort Worth 2002, no pet.) ("If the case were heard in the statutory county court, then, pursuant to the government code, the parties would be entitled to a six-member jury."). Each civil party in a statutory county court is also allowed three peremptory challenges. *See* GOV'T § 25.0007(a) ("The drawing of jury panels, selection of jurors, and practice in the statutory county courts must conform to that prescribed by law for county courts."); TEX. R. CIV. P. 233 (allowing three peremptory challenges for a case tried in county court). However, for statutory county courts at law, in which the authorizing statute specifically provides for a twelve-person jury in certain cases, each civil party presumably receives six peremptory challenges. *See generally* GOV'T § 25.0042(i) (West Supp. 2011) ("If a case under the Family Code or [s]ection 23.001 is tried before a jury, the jury shall be composed of 12 members."); *id.* § 25.1762(i) ("In matters of concurrent jurisdiction with the district court, if a party to a suit files a written request for a 12-member jury with the clerk of the [Nacogdoches] county court at law at a reasonable time that is not later than 30 days before the date the suit is set for trial, the jury shall be composed of 12 members.").

balance the number of peremptory challenges in such a way that neither "side" has a competitive advantage.[79] For example, a competitive advantage exists when one civil plaintiff sues four defendants sharing common defenses, interests, and trial strategies in district court, and each party receives the same number of strikes. Without an equalization process, the defendants would have a total of twenty-four peremptory challenges to exercise, and the plaintiff would only have six.[80] The defendants could effectively select the jury.[81] An equalization process results in a more manageable ratio between plaintiffs' and defendants' peremptory challenges to achieve some sense of rough justice.[82] A similar process exists for multiple-party cases tried in federal district courts.[83]

The procedure for exercising peremptory challenges varies depending on whether the case is in a Texas or federal court, and on the preferences of the assigned judge.[84] In Texas civil trials,

79. *See* TEX. R. CIV. P. 233 (describing the procedures for determining whether aligned parties are antagonistic on any issues and for allocating peremptory challenges to avoid an unfair advantage); *see also* Garcia v. Cent. Power & Light Co., 704 S.W.2d 734, 736 (Tex. 1986) (clarifying that when no antagonism exists between litigants, the number of strikes remains the same); Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979) (describing the process for realigning the parties and assigning the appropriate number of peremptory strikes); Michol O'Connor & Byron P. Davis, *O'Connor's Texas Rules—Civil Trials* § 6.2(2)(3)(b) (2011) (summarizing the procedure for a motion to realign the parties to equalize the peremptory strikes).

80. *See generally* TEX. R. CIV. P. 233 (assigning six peremptory challenges in district court and three in county court).

81. *See Patterson Dental*, 592 S.W.2d at 920 ("[T]he four-to-one disparity of strikes allowed was erroneous . . . effectively allowing the defendants to select the jury which would try their case.").

82. *See id.* (noting that, in equalizing peremptory challenges, "exact numerical equality between the sides" is not required and judicial discretion is allowed, though "in most cases a two-to-one ratio between sides would approach the maximum disparity allowable").

83. *See* 28 U.S.C. § 1870 (2006) ("Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly."); Standard Indus., Inc. v. Mobil Oil Corp., 475 F.2d 220, 225 (10th Cir. 1973) (holding that the trial court did not abuse its discretion in granting a total of six peremptory challenges for the two plaintiffs and a total of ten challenges for the five defendants).

84. *Compare* 28 U.S.C. § 1870 ("In civil cases, each party shall be entitled to three peremptory challenges."), *with* TEX. R. CIV. P. 233 ("[E]ach party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court."). The procedure varies based on the preference of the individual judge because the court has discretion to equalize and distribute peremptory challenges. *See* 4 Roy W. McDonald & Elaine A. Grafton Carlson, *Texas Civil Practice* § 21.26 (2d ed.

after the challenges for cause are decided, a strike zone of veniremembers is created for exercising peremptory challenges.[85] The strike zone includes the number of persons needed to fill a jury, plus additional persons to allow parties to exercise allotted peremptory challenges.[86] Consequently, in a two-party case in district court where a twelve-person jury is seated,[87] at least twenty-four prospective jurors must remain on the venire after challenges for cause.[88] To make a peremptory strike and exclude a potential juror, a party simply draws a line through the name of the prospective juror on the veniremember list.[89] The parties typically make peremptory strikes simultaneously during a break in the proceedings and then submit those strikes to the judge or clerk.[90] In district court, the first twelve members of the venire not stricken by either party comprise the jury.[91]

2001) ("[T]he court in its discretion may, and when convenient should, provide sufficient additional prospective jurors on the panel to leave a full jury should all the peremptory challenges be exercised and no two be directed to the same juror.").

85. *See* TEX. R. CIV. P. 232 (establishing a minimum strike zone of at least twenty-four names remaining on the jury list for a district court, and twelve names for a county court); Boitnott v. State, 48 S.W.3d 289, 293 n.2 (Tex. App.—Texarkana 2001, pet. ref'd) ("A panelist is outside the strike zone if, taking into account challenges for cause and possible peremptory strikes, the panelist is beyond the maximum range of possible jurors who may be impaneled in a given case.").

86. *See* TEX. R. CIV. P. 232 (allowing litigants to make peremptory strikes if a sufficient number of veniremembers remain for exercising all parties' peremptory challenges); 4 Roy W. McDonald & Elaine A. Grafton Carlson, *Texas Civil Practice* § 21.26 (2d ed. 2001) (explaining that the court has the discretion to provide additional potential jurors to the venire to ensure a full jury if parties exercise the total allowed peremptory challenges without excusing the same juror).

87. TEX. GOV'T CODE ANN. § 62.201 (West 2005).

88. TEX. R. CIV. P. 232. In a two-party case in county court where a six-person jury is seated, at least twelve persons must remain on the venire after for-cause challenges have been exercised. *Id.*; *see* GOV'T § 62.301 (West 2005) ("The jury in the county courts and in the justice courts is composed of six persons.").

89. 4 Roy W. McDonald & Elaine A. Grafton Carlson, *Texas Civil Practice* § 21.26 (2d ed. 2001).

90. *See* TEX. R. CIV. P. 234 ("When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk."); Dunlap v. Excel Corp., 30 S.W.3d 427, 432 (Tex. App.—Amarillo 2000, no pet.) ("A party exercises its peremptory challenges by delivering its list of peremptory challenges to the clerk." (citing Beavers v. Northrop Worldwide Aircraft Servs., Inc., 821 S.W.2d 669, 681 (Tex. App.—Amarillo 1991, writ denied))); 4 Roy W. McDonald & Elaine A. Grafton Carlson, *Texas Civil Practice* § 21.28 (2d ed. 2001) (explaining that after parties exercise their peremptory challenges, the lists are delivered to the clerk and the clerk compares the challenges of the parties).

91. *See* TEX. R. CIV. P. 234 ("The clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been erased; . . . those whose names are

In federal civil trials, each trial judge has discretion over the procedural requirements for exercising peremptory challenges.[92] Consequently, judges employ a variety of schemes based on personal preference.[93] One scheme, practiced by Judge Voorhees, "direct[s] counsel to exercise their peremptory challenges in writing and simultaneously."[94] The jury is subsequently comprised of the twelve lowest numbered, unchallenged panelists.[95] This scheme is similar to the procedure typically found in state court.[96] Some judges adopt a scheme that requires "[c]ounsel [to] exercise their challenges in alternation, at the clerk's bench" from amongst the entire venire.[97] Other federal judges use a struck jury system where parties alternate exercising challenges among an initial group of panelists.[98] "Persons challenged from that group are replaced by other panelists, in the order of their selection."[99] The struck jury system is a variant of the peremptory challenge system and has more applicability to criminal cases where a greater number of peremptory challenges are typically allowed.[100]

5. Instructing the Jury

After the challenge procedure is complete and the jury is finalized, the trial judge provides an additional set of instructions

called shall be the jury."); *Dunlap*, 30 S.W.3d at 432 (reiterating that the first twelve names not stricken by a challenge will constitute the jury). In county court, the first six names not erased for cause or discharged by peremptory challenge shall be the jury. TEX. R. CIV. P. 234.

92. *See* BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 6.03 (5th ed. 2007) (explaining that no uniform procedure for selecting juries exists, leaving trial judges to develop appropriate procedures for selecting jurors).

93. *See* GORDON BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 16–18 (1982) (describing preferences of judges for different schemes of jury selection).

94. *Id.* at 18.

95. *Id.*

96. *See* TEX. R. CIV. P. 234 ("The clerk shall . . . call off the first . . . names on the lists that have not been erased.").

97. GORDON BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 17 (1982).

98. *See id.* at 16 (describing a struck jury system as the "exercise of peremptory challenges by giving the prosecution (plaintiff) the first opportunity to challenge any among an initial group of twelve panelists. . . . When the prosecution is satisfied and tenders the jury, the defense is given the opportunity to challenge jurors.").

99. *Id.*

100. *See generally id.* (explaining the struck jury system).

to the jury, and the clerk administers the juror oath.[101] The parties subsequently proceed to opening statements and the introduction of evidence.[102]

6. Justifications for and Limitations on the Use of Peremptory Challenges

A striking feature of the federal and Texas civil jury selection procedures is the use of peremptory challenges to seat a jury.[103] True believers in a peremptory challenge system contend that the procedure ultimately provides a seated jury comprised of fairer, more impartial jurors because prospective jurors with extreme perspectives who survive the for-cause challenges are stricken through peremptory challenges.[104] In other words, both parties' attorneys will strike prospective jurors strategically, resulting in a fairer jury.[105]

The three defining characteristics of a pure peremptory challenge system are: (1) no reason is given for the challenge; (2) the true reason for the challenge is immaterial; and (3) the true reason may be irrational or stereotypical.[106] Basically, an

101. *See* TEX. R. CIV. P. 226a, pt. II (requiring that the trial judge, with appropriate limitations, give a generic set of oral and written instructions to the selected jury); 4 Roy W. McDonald & Elaine A. Grafton Carlson, *Texas Civil Practice* § 21.28 (2d ed. 2001) (explaining that the jurors are sworn and receive instructions immediately after being chosen); *see also* GORDON BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 20–21 (1982) (describing, in a federal civil case, how the judge makes additional comments and the clerk administers the final oath to the jury immediately after selection).

102. *See* TEX. R. CIV. P. 265 (outlining the order the court follows for jury trial proceedings); 4 Roy W. McDonald & Elaine A. Grafton Carlson, *Texas Civil Practice* § 21.33 (2d ed. 2001) (providing the general order of proceeding for a jury trial).

103. *Compare* TEX. R. CIV. P. 234 (establishing procedures for exercising peremptory challenges in state court), *with* GORDON BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 18 (1982) (detailing the peremptory challenge process used in the federal district court in Texas).

104. *See* V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 2.13[A] (4th ed. 2009) ("The purpose of the peremptory challenge is to ensure a fair and impartial jury by enabling each party to dismiss the most partial potential jurors.").

105. *Cf.* William V. Dorsaneo III et al., *Texas Civil Procedure: Trial and Appellate Practice* § 2.03(7) (2010) (observing that while the overall goal of the jury selection process is "the production of a fair jury, neither side is trying to select" a fair jury—each side wants a jury that will help it win).

106. *See generally* Swain v. Alabama, 380 U.S. 202, 220 (1965) ("The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."), *overruled on other grounds by* Batson v. Kentucky, 476 U.S. 79 (1986).

attorney is permitted to exercise peremptory challenges based entirely on hunches and stereotypes, and such motivations are outside the court's control.[107] Eliminating the right to challenge for no stated reason would undercut the original purpose of peremptory challenges.[108] As the United States Supreme Court observed in *Lewis v. United States*,[109] "the right of peremptory challenge" is an "arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose."[110] However, peremptory challenges are no longer exercised with full freedom.

In 1986, the United States Supreme Court held in *Batson v. Kentucky*[111] that exercising race-based peremptory challenges in a criminal trial violated the Equal Protection Clause of the United States Constitution.[112] The Court later, in *Edmonson v. Leesville Concrete Co.*,[113] extended the *Batson* holding to race-based peremptory challenges in federal civil trials.[114] The holding was also extended to cover additional categories such as ethnicity and gender.[115] Likewise, the Texas Supreme Court held that race-based peremptory challenges in state civil trials violate equal protection.[116] *Batson* and its progeny have developed a set of procedures for attorneys challenging an opposing party's alleged use of a peremptory challenge for prohibited reasons.[117] As a

107. *See id.* (permitting the rejection of a prospective juror based on real or imagined partiality); Whitsey v. State, 796 S.W.2d 707, 728–29 (Tex. Crim. App. 1989) (Teague, J., concurring) (stating that a legitimate hunch is sufficient for exercising a peremptory challenge). *But cf.* Eric N. Einhorn, Note, Batson v. Kentucky *and* J.E.B. v. Alabama ex rel. T.B.*: Is the Peremptory Challenge Still Preeminent?*, 36 B.C. L. REV. 161, 167–68, 176 (1994) (criticizing the accepted use of peremptory challenges based on hunches and stereotypes).

108. *See Swain*, 380 U.S. at 222 (finding that requiring a reason for a strike would make "each and every challenge . . . open to examination, either at the time of the challenge or at a hearing afterwards").

109. Lewis v. United States, 146 U.S. 370 (1892).

110. *Id.* at 378 (quoting Lamb v. State, 36 Wis. 424, 427 (1874)).

111. Batson v. Kentucky, 476 U.S. 79 (1986).

112. *Id.* at 85–86; *see* U.S. CONST. amend. XIV, § 1 (providing equal protection).

113. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

114. *Id.* at 631.

115. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 144–45 (1994) (applying *Batson* to gender issues); Hernandez v. New York, 500 U.S. 352, 362 (1991) (using the *Batson* theory for issues involving ethnicity).

116. Powers v. Palacios, 813 S.W.2d 489, 491 (Tex. 1991).

117. "[A] three-step process [is] utilized in resolving a *Batson* [or *Edmonson*] objection. . . . At the first step of the process, the opponent of the peremptory challenge

result, *Batson* and its progeny have imposed significant limitations on the historic right of peremptory challenges in federal and Texas courts.[118]

B. *Modern Synthesis of Texas Jury Selection Values*

In examining the entirety of the jury selection procedures in Texas and federal civil trials, three key values emerge: (1) the democratization of civil juries produces fairer juries for litigants and society; (2) a purely random selection process harms the rights of litigants; and (3) the targeting of specific protected groups for exclusion from jury service harms the rights of litigants, prospective jurors, and society at large.[119] Considerable tension exists between these values, thus explaining the current law. Although the law promotes a more democratic jury selection process, the law does not fully allow for random selection, which enables stereotyping and discrimination to creep into the process.[120] The key values are mixed together and weighed to

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must establish a prima facie case of . . . discrimination." Goode v. Shoukfeh, 943 S.W.2d 441, 445 (Tex. 1997). If the first step is satisfied, the second step shifts the burden "to the party who exercised the [peremptory challenge] to come forward with a race-neutral explanation" for the challenge. *Id.* Finally, if a race-neutral explanation is provided, "the trial court must determine if the party challenging the strike has proven purposeful racial discrimination, and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge." *Id.* at 445–46.

118. *See Batson*, 476 U.S. at 86 (holding that a defendant's equal protection right is violated in a criminal action when a peremptory challenge is exercised based on race); *see also J.E.B.*, 511 U.S. at 129 (concluding that a peremptory challenge based on gender is a violation of equal protection); *Edmonson*, 500 U.S. at 616 (finding that exercising a peremptory challenge based on race constitutes a violation of equal protection in a civil action); *Hernandez*, 500 U.S. at 355 (ruling that the Equal Protection Clause is violated when a peremptory challenge is exercised based on ethnicity); *Palacios*, 813 S.W.2d at 491 (determining that a violation of equal protection exists when race is a factor in a peremptory challenge).

119. *See J.E.B.*, 511 U.S. at 140 (asserting that peremptory challenges based on race or gender are harmful to litigants, the community, and prospective jurors); Powers v. Ohio, 499 U.S. 400, 413 (1991) (noting that a verdict will not be considered acceptable if the jury is unlawfully chosen at the outset); David Zonana, *The Effect of Assumptions About Racial Bias on the Analysis of* Batson*'s Three Harms and the Peremptory Challenge*, 1994 ANN. SURV. AM. L. 203, 224 (1995) (proposing that there is a high risk that a minority juror will be inadvertently excluded with random selection, defeating the end goal of representativeness).

120. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."); *see also* Whitsey v. State, 796 S.W.2d 707, 729 (Tex. Crim. App. 1989)

produce a law that applies in a one-size-fits-all fashion to state and federal trials.

1. Democratization of Civil Juries

Until the venire is seated in a civil case, the jury selection procedures focus on furthering the random selection and cross section principles.[121] Both state and federal systems are designed to randomly draw persons for jury service from various demographics, occupations, beliefs, education, and experience levels.[122] The names for the jury wheel are randomly drawn from voter registration and driver's license lists to catch a wide cross section of citizens.[123] Therefore, the venires are created through random selection procedures.[124] Then, the general questions asked to prospective jurors are few: Are you at least eighteen years of age? Are you literate? If so, you will qualify.[125] The message is clear: Most anyone can be a good civil juror. In summary, the initial jury selection procedures promote the belief that a jury comprised randomly from a cross section of the community produces fairer juries than a system less concerned with diversity and more concerned with matching an individual's merit-based qualifications to a particular case.[126]

(Teague, J., concurring) (allowing a peremptory challenge to be based on a hunch); Jones v. State, 781 S.W.2d 415, 418 (Tex. App.—Houston [1st Dist.] 1989, writ ref'd) (opining that *Batson* permits the exercise of a peremptory challenge on a legitimate hunch).

121. *See* 28 U.S.C. § 1861 (2006) (identifying the plan for random selection of the jury); TEX. GOV'T CODE ANN. § 62.001–.005 (West 2005 & Supp. 2011) (outlining the selection of names from a cross section of the community at random with the use of the jury wheel).

122. *See* 28 U.S.C. § 1861 (promulgating the right to a jury selected at random and representing a cross section of the public); GOV'T § 62.001(a) (providing the source covering the entire community used for collecting names). *See generally Taylor*, 419 U.S. at 527 (expressing that a jury representative of the community is essential to our tradition of public justice).

123. GOV'T § 62.001; *see also* 28 U.S.C. § 1863(b)(2) (2006) (identifying the source for names as the voter registration lists).

124. *See supra* Part II(A)(1).

125. *See* 28 U.S.C. § 1865 (2006) (promulgating qualifications for jury service in federal court); GOV'T § 62.102 (West Supp. 2011) (delineating juror qualifications).

126. *See Taylor*, 419 U.S. at 530 ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community . . . in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from

2. Lack of Trust in a Pure Random Selection Process

During voir dire, the focus of the jury selection procedure shifts significantly. Both Texas and federal law back away from completely trusting pure random selection to produce a better, fairer jury.[127] To have complete faith in a random selection process would mean having a limited voir dire procedure, only permitting for-cause strikes in narrow situations, completely disallowing peremptory challenges, and abolishing unusual procedures such as the jury shuffle.

A purely random selection process must have some mechanism for "causing out" prospective jurors due to bias.[128] A system where a civil party's mother, brother, sister, or close relative is allowed to serve on the jury for the party's case, however unlikely, is impractical. Nonetheless, disagreement arises over the extent to which certain alleged biases cause out prospective jurors.[129] For example, in civil cases that have generated extensive pretrial publicity, prospective jurors with some knowledge of the case are often caused out because of their familiarity with the facts or the person involved.[130] Frankly, this approach is bizarre; screening out prospective jurors for being informed of world events leads to juries filled with ignorant, naive members of society.[131]

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the pool."); Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross[]section of the community. This does not mean, of course, that every jury must contain representatives of all . . . groups of the community . . . . Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society.").

127. *See generally* FED. R. CIV. P. 47 (regulating peremptory challenges); TEX. R. CIV. P. 232 (allowing for the use of peremptory challenges).

128. *See* Connors v. United States, 158 U.S. 408, 413 (1895) (claiming that an unbiased jury is necessary to help ensure a jury returns a verdict that is fair and just); *see also* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749 (Tex. 2006) (emphasizing the importance of voir dire to expose improper juror biases).

129. *Cf.* Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1180 (1995) (discussing that the Supreme Court gives tremendous deference to the rulings of state courts and federal trial judges on matters concerning jurors and individual impartiality).

130. *See* Mu'Min v. Virginia, 500 U.S. 415, 429 (1991) (indicating that jurors may be impacted by pretrial publicity to such an extent as to render them irreversibly prejudiced); *In re* Commitment of Hill, 334 S.W.3d 226, 229 (Tex. 2011) (quoting Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989)) (recognizing that media coverage creates the potential for bias).

131. *See* Sandra Day O'Connor, *Juries: They May Be Broke, But We Can Fix Them*, FED. LAW., June 1997, at 20, 23 (describing, in cases involving pretrial publicity, the nonsensical procedure of courts being forced to search "high and low for jurors who never

Although a purely random selection process must have some mechanism for screening out prospective jurors with an obvious bias, a purely random selection process is incompatible with any form of peremptory challenge.[132] Indeed, outside the United States, some common law jurisdictions have abolished the peremptory challenge because the procedure undermines cross section and random selection principles.[133] Alternatively, the lack of faith in random selection is highlighted in Texas law by use of the jury shuffle and by the large number of peremptory challenges granted to each side.[134] Federal law backs away from purely random selection by only allowing the use of peremptory challenges.[135] Thus, the ultimate conclusion is that the use of peremptory challenges furthers the right to a fair jury trial.

3. Exclusion of Specific Groups of People from Jury Service

The random selection process is designed to prohibit the exclusion of specific groups of people from jury service.[136]

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read newspapers, never watch the news, and never give much thought to issues of public importance").

132. *But see* Batson v. Kentucky, 476 U.S. 79, 91 (1986) (expressing that, although the right to peremptory challenges does not exist in the Constitution, challenges have been widely accepted as ensuring a qualified and unbiased jury).

133. In 1988, England abolished the peremptory challenge right. Criminal Justice Act, 1988, c. 33, § 118(1) (Eng.). Scotland, Wales, and Northern Ireland have also abolished the use of peremptory challenges. *See* Justice and Security Act (Northern Ireland), 2007, c. 6, § 13 (abolishing peremptory challenges); *see also* Amy Wilson, Note, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363, 377 (2009) (explaining that England abolished the peremptory challenge partly to create a jury selection system that better reflects the diverse cross section of English society).

134. *See* TEX. R. CIV. P. 223 (describing the procedure for shuffling the jury); *id.* R. 233 ("Except as provided below, each party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court."); *see also* Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 982 (1994) (stating that litigants are able to view the jury panel and then make the decision to shuffle).

135. *See* 28 U.S.C. § 1870 (2006) ("In civil cases, each party shall be entitled to three peremptory challenges."); FED. R. CIV. P. 47(b) ("The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870."). The number of jurors in a federal civil jury trial ranges from six to twelve. FED. R. CIV. P. 48(a). "Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least [six] members." *Id.* R. 48(b).

136. *See, e.g.*, Rodriguez v. State, 832 S.W.2d 727, 728 (Tex. App.—Houston [1st Dist.] 1992, no writ) (reiterating that a venire is to represent a cross section of the public).

However, once peremptory challenges are brought into the mix, opportunities inherently appear for parties to shape the jury based on characteristics such as race, gender, ethnicity, or disability.[137] *Batson* and *J.E.B. v. Alabama ex rel. T.B.*[138] attempted to prevent the exclusion of a specific group by prohibiting race- and gender-based peremptory challenges.[139] While *Batson* and *J.E.B.* likely produce some prophylactic effects, the approaches fail to address the root of the problem. In reality, *Batson* and *J.E.B.* simply defeat the point of using peremptory challenges without solving the underlying issue of using race and gender in selecting a jury.[140] The *Batson* and *J.E.B.* procedures appear ill-suited to discover intentional discrimination and unconscious stereotyping.[141]

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137. *See generally* 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2483 (3d ed. 2008) ("No reason need be given for the use of a peremptory challenge."); Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 989 (1994) (explaining the ability to use peremptory strikes to exclude jurors without providing a reason).

138. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

139. *See id.* at 145 (announcing that gender-based peremptory challenges violate the Equal Protection Clause); Batson v. Kentucky, 476 U.S. 79, 88 (1986) (holding that race-based peremptory strikes violate the Equal Protection Clause).

140. *See, e.g.*, Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 178–79 (2005) (reporting strong criticism of *Batson*).

141. The real-life effect of *Batson* is difficult to measure. *See id.* at 179 (commenting on the problems created by *Batson* in detecting discrimination). Little data has been collected on the frequency of and rulings on *Batson* motions in state or federal cases. *See* V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 17.07[D] (4th ed. 2009) (discussing the lack of information on *Batson* motions). One way to potentially gauge *Batson*'s effectiveness is to discuss the use of *Batson* with litigators who have had the most experience with the procedure. *See id.* (stating desire to learn the thoughts of lead trial attorneys on *Batson*). In 2008, STARR Litigation Services, a trial consulting firm, conducted a survey of 138 experienced lead trial attorneys, including civil trial attorneys. *See id.* § 17.08 (describing the survey conducted by STARR Litigation Services). The results were mixed. Interestingly, 83% of those surveyed reported having no experience with *Batson* challenges. *Id.* § 17.08[C]. Of those who had experience with *Batson* challenges, only two attorneys were "successful in having the challenge affirmed by the judge." *Id.* § 17.08[D]. The survey indicated some concern among *Batson*-experienced attorneys that the procedure is too complicated, requires too much proof, and takes too much time out of voir dire. *See id.* § 17.08[E] (quoting reasons provided by civil attorneys for not using *Batson*). Moreover, the results conveyed a sense that some attorneys may be reluctant to raise *Batson* challenges to avoid angering the opposition or the judge, or for other pragmatic reasons. *See id.* (reporting responses of civil attorneys to survey). A view was expressed that some judges may be reluctant to grant peremptory challenges for

III. RECALIBRATING TEXAS JURY SELECTION VALUES

The Texas and federal jury selection laws presently exist as a result of the aforementioned jury selection values being weighed in a certain way.[142] The law's calibration is off and should be recalibrated. Texas jury selection procedures are off kilter for two primary reasons. First, the laws undervalue random selection. Second, the laws underestimate, or fail to recognize, that some cases require a juror qualification standard different from the one that currently exists.

A. *Undervaluing Random Selection*

The dominant jury selection process for the majority of Texas civil cases should be a random selection of prospective jurors from a cross section of the community.[143] Greater trust should be placed in random selection. The balance of values should be tilted against the current use of peremptory challenges.[144] The use of

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civility reasons. *See id.* § 17.08[F] ("Most trial judges resist interfering with the strategies of trial attorneys."). As one very experienced senior trial attorney explained:

> [Most judges] desire civility. It's a tough thing to ask a judge to look into the mind of someone he sees in his [c]ourtroom all the time and decide that the race-neutral reason [the challenged lawyer] just offered was pretense. It is much easier not to second-guess the peremptory challenge and therefore not to affirm the challenge.

Id. § 17.08[D]. Legal commentators express a variety of views regarding the effectiveness of *Batson*. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 172 (1989) (stating that "most prosecutors will probably comply with [*Batson*] in good faith"); Antony Page, Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 178–80 (2005) (contending psychological research indicates that attorneys will often be wrong about their motivations for challenging a juror, and *Batson* is ill-suited to address race and gender discrimination because of the prevalence of unconscious discrimination by attorneys).

142. *See* Mendoza v. Ranger Ins. Co., 753 S.W.2d 779, 781 (Tex. App.—Fort Worth 1988, writ denied) ("Every citizen is entitled to a fair and impartial trial before an impartial jury, fairly representative of the community." (citing Thiel v. So. Pac. Co., 328 U.S. 217, 220 (1946))).

143. *See* Singleton v. State, 881 S.W.2d 207, 211 (Tex. App.—Houston [1st Dist.] 1994, writ ref'd) (recognizing the constitutional right to an impartial jury representative of the community); *see also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (contending that the right to a fair-cross-section jury trial is a fundamental guarantee of the Sixth Amendment).

144. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 167 (1989) (noting the problems created through the use of peremptory challenges).

the jury shuffle in Texas should be abolished.[145] Both peremptory challenges and the jury shuffle destroy the random nature of jury selection and lead to the manipulation of the jury panel's composition.

The peremptory challenge is nestled deep in the heart of Texas trial practice, and most civil trial attorneys fiercely protect that right, perhaps because attorneys overestimate their own strategic ability to use peremptory challenges effectively.[146] But trial attorney preferences and traditions, even ancient traditions,[147] are not sufficient to justify the continued practice of peremptory challenges unless they further the ends of justice. To the detriment of the civil justice system in this country, the peremptory challenge has helped spawn a multi-million dollar industry of jury consulting.[148] Jury consultants, often psychologists, offer "scientific jury selection" services as a means to aid attorneys in identifying favorable jurors, conducting voir dire, and exercising strikes.[149] Little evidence exists that the so-called scientific procedures actually produce better results than the hunches and folklore relied on currently by attorneys exercising strikes.[150]

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145. *See* TEX. R. CIV. P. 223 (describing a jury shuffle); Michael M. Gallagher, *Abolishing the Texas Jury Shuffle*, 35 ST. MARY'S L.J. 303, 305–06 (2004) (challenging the use of the jury shuffle in Texas).

146. *See* Davis v. Fisk Elec. Co., 268 S.W.3d 508, 530–31 (Tex. 2008) (Brister, J., concurring) (stating that lawyers are "tenaciously protective" of peremptory challenges because of the belief that the challenges can be used to "mold a favorable jury," but arguing that studies show such belief is unfounded).

147. *See* Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 951–53 (1994) (stating that "[s]ome type of peremptory challenge has been allowed in almost every system of jury trial, from the Romans" to eighteenth-century England, through modern-day America, and describing the historical use of the peremptory challenge in Blackstone's England).

148. Matthew Hutson, *Unnatural Selection*, PSYCHOLOGY TODAY, Mar.–Apr. 2007, at 90, 92.

149. *Id.* at 92–93, 95.

150. *See Davis*, 268 S.W.3d at 531 n.35 (Brister, J., concurring) (citing academic literature findings that attorneys conducting voir dire and exercising challenges consistently produce low levels of accuracy in judging juror verdict preference prejudices); JOEL D. LIEBERMAN & BRUCE D. SALES, SCIENTIFIC JURY SELECTION 150 (2007) (concluding after extensive research that, on average, demographics and personality indicators improve the ability to predict a prospective juror's decision by less than 10%–15%); Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 722 (1991) ("[T]he best current prediction methods provide only slightly more accuracy than the attorneys' judgments."); *see also* Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L.

Assuming this "art form" does work in shaping the jury panel, what exactly does it say about our system of justice to permit this type of manipulation of the jury composition? The use of peremptory challenges says that justice will go to the party who hires the smarter jury consultant or who hires the attorney more skilled at deciding which prospective juror to strike. The retort from proponents of the current system, that the process is fair because both parties have a chance to engage in the practice, is unconvincing.[151]

The ineffectiveness of jury consultants is a strong point against the argument that peremptory challenges are vital to the civil trial system.[152] If a connection actually exists between the skill of a jury consultant and the advantage of using a consultant, the advantage leans toward wealthy litigants, and thus needs to be eliminated in order to level the playing field.[153] Of course, the connection between money and skill in the courtroom is a reality in many areas of litigation and the trial process; free market capitalists would argue that the system is working properly.[154] Even if room for capitalism in the justice system is best in the

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REV. 503, 505–06 (1965) (explaining the difficulty in determining what will influence a juror's decision); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229, 250 (1990) (discussing the potential increase in success if a reliable relationship is discovered through the use of a jury survey); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 517 (1978) (describing the inability to determine what factors in jury selection contribute to attorneys' success).

151. *Cf.* William V. Dorsaneo III et al., *Texas Civil Procedure: Trial and Appellate Practice* § 2.03(7) (2010) (observing that even though the goal is to produce a fair jury, neither party is trying to select a fair jury, as each party is attempting to select a jury to win).

152. *See* Jeremy W. Barber, *The Jury Is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1240 (1994) ("[T]he whole system may be posited upon a faulty assumption: that there is a correlation between juror characteristics and the favoring of one party, and that a particular juror in the jury box will behave according to this relationship.").

153. *See id.* at 1239 ("[A]ll too often, only the wealthiest litigants or the state can afford [jury] services."); *see also Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1464 (1997) ("[C]onsultants may increase the disparity between the access that the rich and the poor have to a fair trial.... [A]ny advantages that consultants provide are restricted to the few who can afford the expense.").

154. *See generally* David A. Domansky, Note, *Abusing Standing: Furthering the Conservative Agenda*, 29 WM. & MARY L. REV 387, 389 (1988) (commenting that some believe "free market capitalism" is the "best remedy for economic and social ills").

broad context of litigation, jury selection is one area where the playing field must be level for all parties.

The extensive use of peremptory challenges harms the civil justice system in additional ways. First, as previously mentioned, the procedure creates an uneven playing field for litigants and gives rise to the possibility of "stacked" juries.[155] Second, the procedure is inefficient.[156] Since an extensive number of peremptory challenges require larger venires, an increased number of prospective jurors must be summoned for jury service.[157] Additional veniremembers require more time-consuming voir dire because, despite time constraints, each panelist must be questioned in as much detail as possible.[158] Third, the procedure allows attorneys to strike excellent prospective jurors to the detriment of litigants, prospective jurors, and society in general.[159]

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155. *See* Coats v. Windham, 281 S.W.2d 207, 219 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.) (complaining of a stacked jury); Jeremy W. Barber, *The Jury Is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1242 n.91 (1994) ("Perhaps it is all right for both sides to have access to similar weapons for fighting courtroom battles, but it is open to question whether it is ethically proper to permit those who already have the upper hand to extend their advantage by employing science for the purpose of stacking the jury." (quoting JAMES P. LEVINE, JURIES AND POLITICS 57 (1991)) (internal quotation marks omitted)).

156. *See* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 639–40 (1994) (showing personal and social characteristics have little impact on jury verdicts, yet a great deal of time is devoted to using characteristics in peremptory challenges, affecting efficiency).

157. *See* TEX. R. CIV. P. 232 (establishing an adequate strike zone for the use of peremptory challenges); *see also* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 639 (1994) (arguing that the need for voir dire and large venires would be reduced with the elimination of peremptory challenges).

158. At times, a quiet veniremember is a dangerous panelist because the attorneys have less information to use in deciding whether to exercise a challenge. *See* Lisa A. Blue & Robert B. Hirschhorn, *Goals and Practical Tips for Voir Dire*, 26 AM. J. TRIAL ADVOC. 233, 238 (2002) (emphasizing the need to get jurors to speak up during vior dire). Less information about a prospective juror provides less predictive power about how that individual will view the case. *See id.* ("The only way to know if prospective jurors are good or bad for your case is to get them to talk about themselves, their ideas, and their feelings.").

159. *See* Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 64–65 (2001) (asserting that frequently "the brightest and most capable members of the panel [are] struck"). *See generally* TEX. R. CIV. P. 232 (allowing the exercise of peremptory challenge without providing any reason); 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2483 (3d ed. 2008) (explaining that no reason for a peremptory challenge is necessary).

Perfectly reasonable and fair prospective jurors are stricken by peremptory challenges on the arbitrary judgment of how the juror will potentially view the case based simply on demographics, personality characteristics, or specialized juror profiling techniques.[160]

Striking excellent prospective jurors is problematic enough when used for reasons based on demographic information such as occupation.[161] For example, attorneys rarely serve on civil juries in jurisdictions where peremptory challenges are permitted.[162] Litigators frequently strike attorneys from a jury due to the belief that attorneys will overthink the case or have too much influence on other jurors.[163] Even more pernicious is when excellent prospective jurors are stricken on the basis of race, ethnicity, gender, religion, sexual orientation, or disability.[164] It is debatable how often race, gender, and other discriminations influence the exercising of strikes.[165] The *Batson/Edmonson* law has made strides in preventing challenges exercised on a prohibited basis.[166] However, given the diversity of Texas, the

160. *See* V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 7.02[A] (4th ed. 2009) (explaining how jury consultants create a juror profile regarding the most desirable and least desirable jurors).

161. *See* City of Beaumont v. Bouillion, 896 S.W.2d 143, 154 (Tex. 1995) (recognizing that federal courts do not consider occupation as a cognizable group); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 861–62 (1997) (quoting a professor after conducting research on peremptory challenges as stating, "I cannot count the number of times I have seen prospective jurors . . . excused peremptorily because of their educational level or their occupation").

162. *See* Shirley S. Abrahamson, *A View from the Other Side of the Bench*, 69 MARQ. L. REV. 463, 469 (1986) (arguing that lawyers on a jury may overly influence deliberations).

163. *See* Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1074 n.30 (1966) ("It is preferable that attorneys and policemen not be permitted to serve on juries. There is a great likelihood that lawyers, at least, will dominate the deliberations of the jury simply because of their professional expertise, and even if they do not, the mere presence of attorneys or policemen (at least in a criminal case) is certain to distort the lay influence brought to bear through the institution of the jury.").

164. *But see, e.g.*, Batson v. Kentucky, 476 U.S. 79, 139 (1986) (holding the use of peremptory challenges on account of race violates the Constitution).

165. *See* V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 17.07[D] (4th ed. 2009) (discussing the lack of information on *Batson* motions); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 66 n.13 (1993) (listing commentaries that have addressed the debate of jury discrimination affecting verdict outcomes).

166. *Cf.* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the*

number of peremptory challenges available in a civil case, the pressures on attorneys to win cases, and human nature, the type of group-based stereotyping prohibited under federal discrimination law is still a substantial problem in Texas jury selection.[167]

If group-based stereotyping is commonplace in the use of peremptory challenges, the damage affects the civil system from multiple angles, even in a system where *Batson/Edmonson* exists to prevent discriminatory challenges.[168] Specifically, imagine a hypothetical breach of contract case tried in a Texas district court. The plaintiff, an African American mechanic, sues his former employer for unpaid wages. During voir dire, the defendant–employer's attorney peremptorily strikes a forty-eight-year-old African American teacher from the venire. The plaintiff's attorney makes a *Batson/Edmonson* challenge. The use of a successful *Batson* challenge communicates the following messages to civil trial participants[169]:

Employer's attorney: "You are racist. And a liar. You use illegal methods to obtain a jury you think favors your case."[170]

Plaintiff's attorney: "You are willing to go so low as to play the race card."

Excluded Juror: "Once again, you are a victim of racism."[171]

Plaintiff: "Your skin color matters in this case, not the facts in your claim for unpaid wages."

Veniremembers: "You are a participant in a trial that has racist overtones."[172]

Peremptory Challenge, 85 B.U. L. REV. 156, 179 (2005) (commenting on the problems created by *Batson* in detecting discrimination).

167. *See* Davis v. Fisk Elec. Co., 268 S.W.3d 508, 530–31 (Tex. 2008) (Brister, J., concurring) ("Whether because of the state's diversity, the generous allowance of peremptory strikes, or something else, *Batson* challenges are far more frequent [in Texas] than anywhere else.... More than any other state, we in Texas must consider whether peremptory strikes are worth the price they impose.").

168. *See* Roberta K. Flowers, *Does It Cost Too Much? A 'Difference' Look at* J.E.B. v. Alabama, 64 FORDHAM L. REV. 491, 498 (1995) (claiming stereotyping is an essential part of practicing peremptory challenges). *See generally* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629–31 (1991) (applying the *Batson* holding to civil cases); *Batson*, 476 U.S. at 139 (holding the use of peremptory challenges on account of race violates the Constitution).

169. *See* V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 17.07[C] (4th ed. 2009) (providing the basis for the messages in the proposed hypothetical).

170. *Id.*

171. *Id.*

> Judge: "You must decide whether the employer's attorney who has tried cases in your court on a consistent basis for the last fifteen years, and who has a good reputation as a decent, hardworking trial lawyer, is acting on the basis of race."
>
> Community: "We have a system of justice that is not fair to all."[173]

The messages are depressing. Changing the peremptory challenge system would reduce or eliminate these messages from the jury selection process. Indeed, the current system of extensive peremptory challenges with *Batson/Edmonson* as a backstop is fundamentally flawed.[174] The reasoning underlying *Batson/Edmonson* supports an extension of the doctrine to all groups or protected characteristics.[175] However, extending *Batson/Edmonson* further would make voir dire and the peremptory challenge process even more cumbersome. The more *Batson/Edmonson* is extended to cover categories beyond race or gender, the further the peremptory challenge system strays from its historical and logical moorings.[176] Even Sir William Blackstone himself dubbed the peremptory challenge an arbitrary and capricious right.[177] If the right to peremptory challenges cannot be exercised with full freedom, the right fails its intended purpose.[178] The United States Supreme Court's middle-ground approach to the peremptory challenge favors no one.

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172. *Id.*

173. *Id.*

174. *See* Batson v. Kentucky, 476 U.S. 79, 139 (1986) (mandating that peremptory strikes based on race violate the Equal Protection Clause); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994) (applying *Batson* to gender issues); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629–31 (1991) (applying the *Batson* holding to civil cases).

175. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 139 (1994) ("Having taken the first step of prohibiting race and sex as grounds for peremptory challenges, the Supreme Court has little logical choice but to take the second and decisive step of banning all uses of peremptory challenges that target specific groups for exclusion from the jury.").

176. *See* Swain v. Alabama, 380 U.S. 202, 212–22 (1965) (describing the historical use of peremptory challenges in England at common law and the importance of full freedom to exercise the challenges to the practice and to trial by jury), *overruled on other grounds by Batson*, 476 U.S. 79.

177. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *353.

178. *See* Lewis v. United States, 146 U.S. 370, 378 (1892) ("[T]he right of peremptory challenge . . . [is] an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose." (quoting Lamb v. State, 36 Wis. 424, 427 (1886))).

B. *Undervaluing Merit*

The paradox of the current Texas jury selection system is that it undervalues merit while also undervaluing random selection.[179] With the abolishment of the key-man system in Texas, current law leaves no opportunity to discern whether certain juror characteristics should be matched to particular cases.[180] Despite the ability to screen out prospective jurors during voir dire based on perceived biases or prejudices,[181] the system does not proactively match prospective jurors' experiences and abilities to the case, other than haphazardly through the use of peremptory challenges.[182] The Texas jury selection system should be modified to allow for merit-based selection of jurors because a merit-based procedure would improve jury decision making and provide greater fairness to civil litigants.

A merit-based approach is based on the premise that civil trials with extremely complex factual, legal, and technical issues require a considerable degree of sophistication to understand and evaluate.[183] For complex cases, the civil justice system would benefit if the jurors sitting in judgment of the facts had a skill set tied to the underlying nature of the case.[184] A random selection

179. *See generally* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 209 (2006) (stating that jurors with exceptional qualifications facilitated comprehension of the dispute in question).

180. *See* Davis v. United States, 411 U.S. 233, 235 n.2 (1973) (stating that use of the key-man system has been precluded by legislation).

181. *See* TEX. GOV'T CODE ANN. § 62.105 (West 2005) (listing bias or prejudice as a reason for disqualification); 9 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 47.20[1] (3d ed. 2010) (finding disqualification for impartiality due to clear bias); *see also* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749 (Tex. 2006) (indicating that the legislature has found bias or prejudice as a reason for disqualification).

182. *See generally* TEX. R. CIV. P. 221–236 (describing the jury selection process).

183. *See generally* Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 79 (2006) (outlining elements to consider in determining whether a case is "too complex to be heard by a jury").

184. The idea that juries by their very nature are ill-equipped to handle complex civil cases is not new. Considerable litigation and commentary has arisen over whether federal courts should recognize a complexity exception to the Seventh Amendment right to jury trial. *See id.* at 79–80 nn.321–25 (discussing views and providing articles related to the relationship between juries and complex cases). Some commentators argue for no right to civil jury trial in complex civil cases. *Id.* at 79 n.321 (listing commentaries arguing for the elimination of the jury trial in complex cases). Other commentators believe that juries handle complex issues quite well, leaving no need for such an exception. *Id.* at 80 n.325 (collecting views). This Article stops short of wading into the debate over the complexity

process, even one with extensive peremptory challenges, provides no guarantees that any of the jurors have the technical background necessary to properly analyze a complex civil case.[185] Therefore, a special jury system that deliberately selects jurors based on the jurors' background would be preferable.[186] Under current law, inherent complexity in many civil cases is addressed by the use of an expert witness to educate the lay jurors on the technical issues.[187] A special jury system that makes the jurors the "experts" would reduce the current system's reliance on "hired gun" expert witness testimony, benefiting the entire trial procedure.[188]

Consider a hypothetical civil dispute between a power company and a tire manufacturer. The tire manufacturer's power goes out for several days and adversely impacts production. The tire manufacturer claims that the power company is at fault for failing to prevent the power outage. The case raises complex issues involving electricity, engineering principles, and the distribution of electrical power. Logically, the law should prefer a jury panel composed of a few individuals with a technical background in engineering, electricity, or a related field so that the evidence presented is understood, as opposed to random laypersons without any concept of the underlying technical principles affecting the case.[189]

Merit-based jury selection is best conceptualized through analogizing jury selection in complex civil cases to the typical standards used to determine whether a person is qualified for a job in the private sector—education, experience, and demonstrated

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exception, but the reasoning behind the key arguments in this Article support the view that a clear and present need exists to experiment with and modify jury selection procedures.

185. *See generally* TEX. R. CIV. P. 221–236 (outlining the jury selection process).

186. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 209 (2006) (advocating for greater experimentation with special juries because jurors with special qualifications can aid the decision-making process of a jury).

187. *See generally* Alvarado v. State, 912 S.W.2d 199, 215–16 (Tex. Crim. App. 1995) (admitting expert testimony if the testimony will assist the fact finder).

188. Expert witnesses are typically paid for by the parties. *See* FED. R. CIV. P. 26(b)(4)(C) (describing payment of experts during discovery).

189. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 193 (2006) ("It is not radical to hope to fill juries with capable people.").

technical proficiency.[190] Consider another example: Assume that Bill, a twenty-eight-year-old high school graduate, applies for a job as an accountant. Bill has no experience in, or related to, accounting, and he has no technical proficiency in accounting other than the basic math classes he took in high school. Bill has worked as a custodian since he graduated high school. Agreeably, absent some unknown factor in the hiring process, the company is not going to hire Bill for the accountant position.

Now assume Bill is randomly selected to serve on a jury for a complex civil case involving alleged accounting fraud. The technical matters are extremely complex even for certified public accountants. If the goal of the selection system is to produce the best decision-making body possible, the system is not going to "hire" Bill to serve on the jury.[191] Bill might be a great choice to serve as a juror on another case, but he is not the best fit for a complex accounting case. Yet, under the current jury selection system, Bill could easily be selected to serve as a juror in such a complex case because he can be "fair," is over eighteen years of age, and can read and write.[192]

Texas law currently lacks a procedure that would allow for an intentional merit-based jury selection system.[193] At most, the current system allows parties to incorporate merit-based judgments of prospective jurors into the exercise of making peremptory challenges.[194] But, the right to use peremptory

190. *See generally id.* at 128 (listing the selective factors considered in jury selection at English common law).

191. *See id.* at 209 (stating the rationale behind special juries is to "improve the decision-making process").

192. *See* 28 U.S.C. § 1865(b) (2006) (providing the qualifications to serve on a jury); TEX. GOV'T CODE ANN. § 62.102 (West Supp. 2011) (listing qualifications for jury service). An analogy to public service is also apt. Citizens are asked to serve this country through military service and jury service. *See* Casarez v. State, 913 S.W.2d 468, 505 n.14 (Tex. Crim. App. 1994) (opining that jury service is "the most powerful function an ordinary citizen will perform"). The United States military has selective service procedures aimed at enlisting the most qualified fighting force possible. 50 U.S.C. app. § 460 (2006). Citizens are also called upon for jury service. *See* 28 U.S.C § 1866 (2006 & Supp. IV 2011) (promulgating selection and summons of jurors); GOV'T § 62.001 (West 2005) (proscribing how potential jurors are summoned in Texas). While military service and jury service concededly differ in many facets, the goal of enlisting citizens suited for the call to duty is similar in both areas. Logically, civil justice would benefit from increased qualification requirements for civil juries.

193. *See generally* GOV'T §§ 62.001–.501 (West 2005 & Supp. 2011) (providing the current procedures for selecting civil juries in Texas).

194. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (explaining that peremptory

challenges is too arbitrary to directly promote merit-based jury selection.[195] Moreover, the random nature of venire composition makes it unlikely that a panel of prospective jurors will necessarily have the requisite skill set to understand and evaluate the case.[196] Consequently, Texas should look to the history of the jury selection process as a guide for adding a merit-based approach.

Historical precedent supports the incorporation of merit-based selection procedures into the jury selection system. Some forms of "special juries" have been used in Europe and the United States during various times in history with a degree of success.[197] Based on an evaluation of special juries over the course of history, several types of special juries were prominent: high social standing juries, struck juries, and expert juries.[198]

A special jury based on social standing is deliberately comprised of individuals from a higher social class than would typically serve through other selection methods.[199] Until the nineteenth century, English law maintained distinctions in jury service based on social class.[200] Blue-ribbon juries that were explicitly or implicitly drawn from the higher class of society also existed in American

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challenges may be made for any reason "concerning the outcome of the case to be tried"). *See generally* 28 U.S.C. § 1870 (2006) (entitling each party to peremptory challenges); FED. R. CIV. P. 47(b) (emphasizing the allowance of peremptory challenges); TEX. R. CIV. P. 232 (establishing when peremptory challenges are made).

195. *Cf.* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 177–78 (2006) (discussing the use of peremptory challenges as compared to special jury use).

196. *See generally* GOV'T § 62.001 (proscribing a randomized selection process for potential jurors).

197. In 1950, nearly half of American states had some form of a special jury statute. Alan Feigenbaum, Note, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 CARDOZO L. REV. 1361, 1399 (2003); *accord* Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 438–39 (2008) ("More than half of American states had statutes authorizing the use of special juries during the first half of the twentieth century."). Under the Uniform Code of Military Justice, which can be traced back to the 1950s, a form of the special jury system is still used whereby military officers and enlisted members are chosen by the convening authority to serve as court members (jurors) on criminal courts-martial proceedings. 10 U.S.C. § 825 (2006).

198. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 127 (2006) (explaining the variety of special juries from the seventeenth century to the present).

199. *Id.* at 134–36, 193–96 (describing juries for specific types of cases as made up wholly or partially of "men of quality").

200. *Id.* at 134–36, 152–73 (expounding on the different types of juries based on social class, which include juries of merchants).

jurisdictions until the mid-twentieth century.[201] The struck jury is formed with large venires, allowing attorneys to alternate in striking panelists until the number of members needed to form a jury panel is reached.[202] Several state and federal courts still maintain some form of a struck jury procedure in civil trials.[203] For example, Alabama relies heavily on the struck jury in both criminal and civil cases.[204] Finally, a merit-based jury selection process for expert juries, as this Article refers, attempts to align prospective jurors' knowledge, experience, and demonstrated technical proficiency to the underlying nature of a particular case.

English history also shows evidence of "merchant juries" from

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201. *See id.* at 194 (noting blue-ribbon jury selection procedures in New Jersey, Georgia, and New York). New York maintained blue-ribbon jury selection in both civil and criminal cases from 1896 until 1965, although the procedure was used almost exclusively in criminal cases. *See* Law of Apr. 23, 1896, ch. 378, § 7, 1896 N.Y. Laws 355, 357 (repealed 1965) (outlining the qualification of a special juror). New York's blue-ribbon jury statute survived two constitutional challenges in the 1940s in the criminal context. Fay v. New York, 332 U.S. 261, 270 (1947); *accord* Moore v. New York, 333 U.S. 565, 569 (1948) (finding that the use of a special jury produces no proof of a violation of constitutional rights). This Article does *not* contend that Texas law should start allowing the fashioning of civil juries based on social class or standing.

202. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 180–82 (2006) (discussing the struck jury process).

203. *See id.* (concluding that a version of the struck jury procedure remains valid by statute or procedural rule in Alabama, Arizona, Arkansas, Indiana, Maryland, South Carolina, Virginia, and West Virginia); James Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623, 633 (1998) (opining that the struck jury is still "regarded as a significant part of the jury trial heritage" in Virginia and Alabama); *see also* ALA. CODE § 12-16-140 (LexisNexis 2005) (allowing struck juries in civil trials); ARK. CODE ANN. § 16-33-203 (2011) (providing for a struck jury in civil trials); IND. CODE ANN. § 34-36-2-3 (LexisNexis 2008) (approving the use of a struck jury by consent); S.C. CODE ANN. § 14-7-1060 (Supp. 2011) (allowing struck juries); VA. CODE ANN. § 19.2-262(c) (2008) (providing for struck juries); W. VA. CODE § 56-6-13(a) (LexisNexis 2005) (creating the authority for the court to allow special juries in civil trials); ALA. R. CIV. P. 47(b) (granting struck juries in civil trials); ARIZ. R. CIV. P. 47(a)(3) (alternating peremptory challenges in civil trials); MD. R. 4-313(b)(2) (alternating challenges procedure); Cortez v. HCCI–San Antonio, Inc., 159 S.W.3d 87, 90–91 (Tex. 2005) (referencing various jury selection procedures used by federal district judges in civil trials, including the struck jury method).

204. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 182 (2006); *see also* ALA. CODE § 12-16-100 (LexisNexis 2005) (describing the use of struck juries in criminal trials); *id.* § 12-16-140 (allowing parties to demand struck juries in civil trials); ALA. R. CIV. P. 47(b) (outlining the struck juries in civil trials); ALA. R. CRIM. P. 18.4(f) (providing for struck juries in criminal trials).

the thirteenth century through the nineteenth century.[205] Merchants with a background in commercial enterprise often sat as jurors in English civil cases dealing with commercial disputes.[206] The use of special juries, however, extended beyond strictly commercial disputes; experts in particular fields were impaneled to hear disputes when technical expertise was useful in understanding and deciding the particular case at hand.[207] Examples include a jury comprised of cooks and fishmongers for a case in which an individual was charged with selling bad food, and a jury comprised of attorneys and court clerks impaneled to decide the dispute for a case in which lawyers were charged with the falsification of writs.[208] According to Professor James Oldham, a law professor, author, and commentator who has extensively studied the history of the jury trial in England and America, "expert juries of inquiry became a regular part of the administration of the Court of Common Pleas in the fifteenth, sixteenth, and seventeenth centuries," and merchant juries were used extensively during the 1770s and 1780s to help shape "a coherent body of commercial law."[209]

The expert jury also has a place in American history. South Carolina, Louisiana, and New York used merchant juries in the eighteenth and nineteenth centuries, but the special jury in these jurisdictions ultimately fell out of favor.[210] Except for Delaware, the special jury appears to have dissipated throughout the United

205. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 141, 154 (2006) (discussing the historical use of merchant juries).

206. *Id.* at 196. Special juries heard cases involving such commercial subjects as insurance, bills of exchange and promissory notes, debts, special contracts, patents, goods delivered and sold, work and labor performed, money had and received, and bankruptcy. *Id.* at 154.

207. Lord Mansfield, a Chief Justice of the Court of the King's Bench during the latter part of the eighteenth century, conducted trials involving special juries in at least six hundred cases. *Id.* A review of the approximately six hundred special jury cases conducted under Mansfield while on the bench indicates that approximately 31% involved noncommercial subjects such as trespass, nuisance, ejectment, libel, and perjury. *Id.*

208. *See id.* at 141 (describing how merchant juries were selected to directly correspond with the nature of the disputed issue in each case).

209. *Id.* at 142, 153.

210. *See id.* at 196–98 (summarizing how South Carolina, Louisiana, and New York implemented the special jury system).

States.[211] In 1987, Delaware enacted a statute stating that a special jury may be ordered "upon the application of any party in a complex civil case."[212] Even prior to the enactment of the statute, the institution of the special jury was uniquely ensconced in Delaware law and played an important part in Delaware's historic civil landscape.[213]

The rich history of the English and American use of the expert jury is overshadowed by the fact that its current modern-day use is dwindling and may soon disappear completely.[214] Even Delaware's special jury statute is infrequently used and has been sharply criticized by parts of the legal community.[215] Several explanations address why juries of experts are rarely used in civil trials today. First, expert juries potentially result from the improper screening of prospective jurors based on socioeconomic status, race, gender, and other similar characteristics.[216] In other

211. *See id.* at 196–98 (discussing the decline of the use of special juries in New York, South Carolina, and Louisiana).

212. Act of Jan. 13, 1987, ch. 5, § 1, 66 Del. Laws 11, 11 (codified as amended at DEL. CODE ANN. tit. 10, § 4506).

213. *See* Haas v. United Techs. Corp., 450 A.2d 1173, 1182 (Del. 1982) (explaining the history of Delaware's use of special juries).

214. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 199 (2006) (describing the growing distaste for special juries and listing cases which find special juries unnecessary).

215. The Delaware Supreme Court has upheld the constitutionality of the special jury statute, finding that the statute does not violate the Due Process and Equal Protection clauses of the United States and Delaware Constitutions. *See Haas*, 450 A.2d at 1182 (upholding the special jury statute as constitutional); *In re* Asbestos Litig., 551 A.2d 1296, 1300 (Del. Super. Ct. 1988) (holding that the special jury statute that provides judicial discretion to order or deny a special jury is constitutionally sound). In several reported cases, Delaware Superior Court judges have denied motions for a special jury on the ground that the cases were not too complex to be heard by regular jurors. *See* Noramco, Inc. v. Carew Assoc., No. 85C-MY-54, 1990 Del. Super. LEXIS 432, at *2–4 (Del. Super. Ct. Oct. 22, 1990) (summarizing a negligence case alleging faulty construction of a bulkhead not suited to special jury); Bradley v. A.C. & S. Co., Nos. 84C-MY-145 & 85C-FE-10, 1989 Del. Super. LEXIS 270, at *10 (Del. Super. Ct. May 23, 1989) (concluding that asbestos trials did not qualify as complex civil cases); Amoroso v. Joy Mfg. Co., No. 86C-MY-189, 1987 Del. Super. LEXIS 1368, at *8 (Del. Super. Ct. Dec. 4, 1987) (outlining a personal injury case where the plaintiff alleged injury by an air compressor that should have been equipped with a handbrake, yet the court found the issue not complex enough to warrant a special jury). *But see* McClain v. Gen. Motors, 569 A.2d 579, 580 (Del. 1990) (allowing the use of a special jury in a products liability case against a car manufacturer).

216. *See Haas*, 450 A.2d at 1180 (discussing the plaintiff's claim that the special jury statute arbitrarily excluded women and young people from jury selection).

words, a "jury of peers" will not exist with special jury trials.[217] Second, expert juries are not needed because civil litigants can hire expert witnesses to educate lay jurors on complex technical issues; thus, the need for jurors to have requisite technical knowledge was obviated.[218] Third, parties who desire adjudication from a body of experts frequently agree to alternative dispute resolution techniques where the fact finder will have a skill set equipped to handle the underlying nature of the case.[219] Fourth, civil cases rarely involve one type of expertise. A case could cover a variety of areas such as engineering, health care, and technology, which no one expert juror is experienced enough to fully understand the interrelationship between the theories and methodologies.[220] In a complex case involving merged areas of expertise, a special jury procedure may struggle to find prospective jurors proficient in all areas of the case, or to find the appropriate mix of jurors with the various areas of expertise. Fifth, a special jury might be biased depending on the methodological views of the expert juror compared to the litigant. In many fields, experts use a variety of approaches to analyze and evaluate information.[221] A special jury comprised of experts who employ one philosophical view may unfairly develop a prejudice against a litigant for having a conflicting view.[222] Finally, implementation of a special jury system presents the practical problem of how to find experts, assemble them, and then assign them to the appropriate civil trial

217. *See id.* at 1182–83 (reiterating the potential dangers of special juries since the selected members may "not represent a fair cross section of the community").

218. *See Bradley*, 1989 Del. Super. LEXIS 270, at *7 (opining that expert witnesses are able to present scientific testimony in a way that is understood by regular jurors).

219. *See Noramco*, 1990 Del. Super. LEXIS 432, at *2–3 ("Arbitrators are usually selected for their expertise in a given field. The application for a special jury . . . may result in having 'expertise' the parties did not freely contract for.").

220. *See id.* at *2–4 (listing categories from medical malpractice to construction cases which are posed with potential disagreements of experts in the same field); *Bradley*, 1989 Del. Super. LEXIS 270, at *9 (indicating difficulties associated with cases requiring multiple areas of expertise).

221. *See Bradley*, 1989 Del. Super. LEXIS 270, at *10 (identifying the difficulties presented when experts have differing philosophies within the same specialty area).

222. *See id.* at *9 (criticizing expert special juries and concluding that the use of experts as jurors "could well produce a more prejudiced system of justice than does the traditional jury system" because cases often involve multiple areas of expertise, and experts often do not subscribe to the same methodological approach, which could result in panels of experts who slant the decision toward a predetermined philosophy).

for the jurors' skill set, while maintaining fairness to the parties.[223]

A valid question arises as to why Texas should permit a jury selection procedure that is disfavored in nearly all jurisdictions and poses potential for abuse. However, the valid criticisms of a special jury provision may be overcome by placing limitations on the use of the practice, and by incorporating procedures that make the selection and distribution of experts to particular civil cases fair.[224] No system is perfect, but Texas could benefit from experimentation with the jury selection procedures in civil disputes, including re-thinking the extensive use of peremptory challenges and the nonuse of merit-based procedures. The common sense idea that jurors need some experience, training, and demonstrated level of expertise regarding the underlying nature of the case is a reasonable starting point.

IV. TAILORING TEXAS JURY SELECTION PROCEDURES TO INDIVIDUAL CASES

The remainder of this Article outlines a proposal to alter existing Texas law regarding peremptory challenges, the jury shuffle, and the special jury. The philosophical grounds for changing Texas law have been outlined in Parts II and III. Part IV describes the details and explanations for the proposed law. The goal is not to argue unyieldingly for all of the exact details in the proposal. Instead, the motivation is to encourage concerned individuals to consider the ideal way to reduce or eliminate peremptory challenges, and to provide a mechanism for merit-based jury selection. The proposal focuses on changing Texas jury selection law as used in Texas courts and does not address the federal jury selection system. Also, the proposal is limited to civil trials because of the different constitutional and practical considerations applied to criminal trials. Finally, the proposal is outlined in the form of a change to the Texas Rules of Civil Procedure, but a change through legislative action is equally feasible.

223. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 199 (2006) (noting the absence of guidance from the Delaware Legislature as to "how special jurors are to be selected whenever a special jury is ordered in such a case").

224. *See id.* at 196 (suggesting that a revival of the special jury system is possible through expanding the use of special juries to effectively address complex issues).

At first blush, the proposition that Texas law simultaneously undervalues both random selection and merit-based jury selection seems difficult to reconcile.[225] However, closer inspection reveals that Texas law undervalues both selection processes with a detrimental one-size-fits-all approach to jury selection. In reality, random and merit-based values can coexist if the law provides more flexibility to tailor jury selection to the needs of each case.[226] Accordingly, this Article proposes the unique idea of creating a tiered system for jury selection, similar to the tiered system used for discovery under the Texas Rules of Civil Procedure.[227]

As Texas civil practitioners know, discovery in Texas civil cases is governed by levels in a discovery control plan.[228] Level I discovery is for relatively small damage cases, stereotypically viewed as less complex than higher value cases.[229] Substantial limitations are placed on written discovery and the time allowed for depositions.[230] Level II discovery is the default level for most civil cases. Accordingly, Level II discovery provides more deposition time for the parties than in Level I, but still maintains several important discovery limitations.[231] Finally, Level III discovery is court-tailored to give the court and the parties the freedom to align the amount of discovery with the complexity of the case.[232] Basically, Level III cases are special and should be treated with care by the parties and the court.[233] The benefits of a

225. *See generally* TEX. R. CIV. P. 216–236 (outlining general processes for jury selection and mandating rules of conduct).

226. *See id.* R. 190.5 (providing flexibility to the courts through the power to "modify a discovery control plan at any time" and when required in the "interest of justice").

227. *See generally id.* R. 190.2–.4 (identifying three different levels of discovery plans used in Texas).

228. *Id.* R. 190.1.

229. *See id.* R. 190.2(a)(1)–(2) (identifying Level I as applying to suits in which the relief sought is an aggregate of $50,000 or less).

230. *Id.* R. 190.2(c).

231. *Compare id.* R. 190.3(b)(1) (directing the discovery period to last up to thirty days before the trial or nine months after the first oral deposition), *and id.* R. 190.3(b)(2)–(3) (allowing no more than fifty hours of depositions and maximum of twenty-five interrogatories), *with id.* R. 190.2(c)(1) (stating that in Level I, the discovery period starts at the time the suit is filed and ends thirty days before the trial date), *and id.* R. 190.2(c)(2)–(3) (limiting each party to six hours total to depose all witnesses and no more than twenty-five interrogatories).

232. *See id.* R. 190.4(a) ("The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit.").

233. *See id.* R. 190.4(a)–(b) (describing Level III discovery control plans as "tailored

discovery control plan system are apparent; the ability to tailor discovery to the needs of the case is built into the system, which promotes both efficiency and fairness to the parties.[234] Similar benefits would result from changing the Texas jury selection law to a tiered system.

In creating a new tiered jury selection system in Texas, the fundamental shift would be to move from the current one-size-fits-all approach to a control plan with three levels.[235] Level I would cover the stereotypically less complicated small damage cases.[236] The primary jury selection value would be pure random selection. Accordingly, in Level I cases, no jury shuffle would be permitted and peremptory challenges would not be allowed.[237] The voir dire procedure would consider challenges for cause, but after the cause challenges are decided, the first six or twelve names, depending on the court, would comprise the jury.[238]

In Level II, the default level, random selection would still be considered important, but the value would not be absolute.[239] The jury shuffle would be disallowed, and the presumption would be that no peremptory challenges are permitted; however, either party could file a motion for peremptory challenges and attempt to convince the trial judge that the aspects of the case make peremptory challenges appropriate.[240] The judge would have

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to the circumstances of the specific suit[,]" and the plan must include a trial date or pretrial conference to determine important elements of the trial).

234. *Id.* R. 190.5.

235. *Compare id.* R. 216–236 (setting forth the various rules for jury selection in Texas), *with id.* R. 190.2–.4 (showing a three-tiered discovery control plan system).

236. *Cf. id.* R. 190.2 (outlining the entry-level discovery control plan for basic claims of less than $50,000). Proposed jury selection Level I is similar in principle to Level I of the discovery control plan as both are designed for less complex cases.

237. *But see id.* R. 233 (authorizing the use of a set number of peremptory challenges). Proposed jury selection Level I also departs from TEX. R. CIV. P. 223. *See id.* R. 223 (permitting the court at its discretion and on a party's request to order the shuffle of the veniremembers' names).

238. Proposed jury selection Level I is inconsistent with TEX. R. CIV. P. 231. *Cf. id.* R. 231 (permitting the court to order that additional jurors be drawn from the venire if for-cause challenges reduce the number of jurors to an amount that leaves no room for peremptory challenge strikes).

239. *Cf. id.* R. 223 (maintaining the random selection of jurors); *id.* R. 231 (requiring a minimum of twenty-four potential jurors in district court or twelve in county court).

240. *Contra id.* R. 223 (allowing for one jury shuffle by the trial judge). Proposed jury selection Level II provides for a different peremptory challenge process than provided in TEX. R. CIV. P. 233. *Cf. id.* R. 233 (allotting six peremptory challenges to each party in district court and three in county court).

considerable discretion to make the peremptory challenge determination.[241] But, even if the judge granted the motion, the judge could only award a maximum of two challenges for each party. Consequently, even under Level II, peremptory challenges would have less of an influence on jury selection than under current law.

Level III jury selection would be completely tailored to the needs of the case.[242] The trial judge could allow a jury shuffle and would have broad discretion to allow peremptory challenges, similar to current Texas law.[243] The judge could provide any number of peremptory challenges to the parties and could permit a struck jury procedure.[244] Finally, the trial judge would have the discretion to seat an expert jury for a particular case.[245] Level III would recognize and provide a source for merit-based jury selection in complex civil cases.[246] The substance of the proposal is stated below.[247]

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241. *But see id.* R. 233 (setting forth peremptory challenges in the rule).

242. *Cf. id.* R. 190.4 (providing the trial judge the ability to tailor a discovery control plan to the specific circumstances of a case).

243. *See id.* R. 233 (allowing the trial judge leeway in granting peremptory challenges to either side in the interest of equity).

244. *Cf. id.* R. 224–234 (detailing how jury lists are made and the use of challenges for cause and peremptory challenges to determine the final jury list).

245. *See generally* James Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623, 628 (1998) (contending "that our history justifies continued experimentation with jury composition, including the special jury"); D. Alan White, Comment, *The Doctrine of Equivalents: Fairness and Uncertainty in an Era of Biologic Pharmaceuticals*, 60 EMORY L.J. 751, 787 (2011) (advocating the use of expert juries to try cases involving highly technical information).

246. *See generally* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 196 (2006) (suggesting that a revival of the special jury system is possible through expanding the use of special juries to effectively address complex issues).

247. For ease of understanding the main points in the proposal, the proposal is constructed as a new rule for the Texas Rules of Civil Procedure. Understandably, actual jury selection reform may need to be done through legislative enactment. TEX. CONST. art. I, § 15. Moreover, reform would require the modification or elimination of a few currently existing statutory provisions and rules of civil procedure. *See* TEX. R. CIV. P. 216–236 (detailing how jury lists are made, how for-cause and peremptory challenges may be used, and how the final list is determined).

A. *The Rule Proposal*

Texas Rule of Civil Procedure 233a–Jury Selection Levels

(a) *Level I Jury Selection.* In civil cases where the amount in controversy is less than $200,000, parties shall not, under any circumstances, be permitted to exercise peremptory challenges, be granted a jury shuffle, or be allowed to employ a special jury.

(b) *Level II Jury Selection.* In civil cases where the amount in controversy is greater than $200,000, parties shall not be granted a jury shuffle or be allowed to employ a special jury. The presumption is that parties shall not be permitted to exercise peremptory challenges. However, any party may file a motion with the trial judge prior to the trial date requesting a ruling from the judge allowing peremptory challenges in the trial of said cause. The trial judge may grant a motion for peremptory challenges for good cause shown based on an evaluation of the nature of the case, the claims and defenses asserted by the parties, and whether the benefits of permitting peremptory challenges outweigh the benefits of a purely random selection process in the case at hand. In determining whether to grant the motion, the trial judge shall consider any matter concerning the ends of justice and the provision of a fair trial. If a motion for peremptory challenges is granted in state district court, each party is limited to a maximum of two peremptory challenges, subject to subsection (b)(2). If a motion for peremptory challenges is granted in a county court at law with jurisdiction to hear cases above $200,000, each party is limited to a maximum of one peremptory challenge.

(1) *Appellate Review.* A court's ruling or decision to grant or deny a motion for peremptory challenges under subsection (b) is not grounds for mandamus relief, but is subject to appeal under an abuse of discretion standard. A ruling that provides each party with more than two peremptory challenges is reviewable on appeal and constitutes reversible error, subject to subsection (b)(2).

(2) *Equalization.* If a motion for peremptory challenges is granted in cases involving more than two parties, the trial judge, on the motion of any party or on the judge's own motion, may equalize the number of peremptory challenges so that no party or side is given an unfair advantage as a result of the alignment of the parties and the award of peremptory challenges. The trial judge's ruling on the motion to realign

the parties and equalize the peremptory challenges is subject to review on appeal for abuse of discretion.

(c) *Level III Jury Selection.* In a complex civil case, the trial judge has the discretion to order a special jury rule on the motion of any party or on the judge's own initiative. Upon the order of a special jury, the trial judge has discretion to establish case-specific procedures for seating a venire of prospective jurors who have qualifications and experience related to the subject matter of the suit, and for selecting jurors from among the venire. This includes broad discretion regarding the use of a struck jury selection system, a system of extensive peremptory challenges, or a jury of experts. The case-specific jury selection procedures utilized by the trial judge for special juries are permissible so long as the procedures comply with the United States and Texas Constitutions.

Comments to change:

1. This rule establishes three tiers of the jury selection plan. A case is Level I if the amount pleaded by the plaintiff is less than $200,000. If the plaintiff does not plead a damages amount, the defendant, through special exception, can require the plaintiff to state whether the amount of damages in the case exceeds $200,000. A trial judge is permitted to infer, based on the nature of the allegations in the petition, that the plaintiff seeks more than $200,000 in damages. Under no circumstances do Level I cases receive peremptory challenges or a special jury. For cases where the amount in controversy is $200,000 or greater, the parties may move the court for consideration of whether to allow peremptory challenges or a special jury rule. A case is Level II if the trial court grants the motion for peremptory challenges. Upon the granting of such a motion, each party is limited to two peremptory challenges, subject to the equalization procedure available in multiple party cases.[248] A case is Level III if the trial court grants a motion for a special jury rule. The special jury rule provides the

248. The rule change does not modify the basic equalization principles that are well established in current Texas law. *See* TEX. R. CIV. P. 233 ("In multiple party cases, . . . it shall be the duty of the trial judge to equalize the number of peremptory challenges . . . ."); *see also* Garcia v. Cent. Power & Light Co., 704 S.W.2d 734, 736 (Tex. 1986) (contending that each side must have "the same number of strikes"); Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 920 (Tex. 1979) (explaining the purpose of equalizing peremptory challenges).

trial judge with the discretion to tailor the jury selection procedures to the needs of the individual case through the use of any number of peremptory challenges, a struck jury system, or an expert jury, similar to merchant juries used at common law.[249] The only limitation on this procedure is compliance with the United States and Texas Constitutions.

2. This rule places limitations on the use of peremptory challenges and provides a procedure for seating a special jury of experts. These changes to Texas jury selection practice comply with the United States and Texas Constitutions.[250]

3. The concept of a complex civil case is intended to focus on disputes that are outside the norm of basic civil cases. A complex civil case is not precisely defined. The determination depends on a variety of factors: the number of questions expected from jurors in an effort to understand and decide the dispute; the number of parties involved in the trial; the complexity of the relevant scientific or technical issues; the projected length of the trial; the complexity in the law put forth in the court's charge to the jury; and the overall nature of the underlying case. While there are no categorical rules regarding types of cases eligible for special jury selection, special juries will rarely, if ever, apply to basic

249. *See generally* Kellogg v. Clinton, 28 La. Ann. 674, 675–76 (1876) (explaining the purpose of using a special merchant jury).

250. The United States Constitution establishes the right to trial by jury, but makes no mention of a right to peremptory challenges. U.S. CONST. amend. VII. The Texas Constitution protects the right to trial by jury in civil cases under the Bill of Rights Jury Article and the Judiciary Jury Article. *See* TEX. CONST. art. I, § 15 (addressing the right of a jury trial); *id.* art. V, § 10 (applying the right to trial by jury to all causes). The peremptory challenge is not a constitutionally protected right and may be modified without affecting the right to a fair and impartial trial. *See* Georgia v. McCollum, 505 U.S. 42, 57 (1992) (asserting that "peremptory challenges are not constitutionally protected fundamental rights"); Batson v. Kentucky, 476 U.S. 79, 91 (1986) (stating that no federal constitutional right to peremptory challenges exists); Davis v. Fisk Elec. Co., 268 S.W.3d 508, 530 (Tex. 2008) (Brister, J., concurring) ("A majority of this Court could curb peremptory strikes today, as they stem entirely from our Rules of Civil Procedure."); Tamburello v. Welch, 392 S.W.2d 114, 117 (Tex. 1965) (describing peremptory challenges as a creature of the rules of civil procedure). Special jury rules or statutes have also been upheld as constitutional. *See* Haas v. United Techs. Corp., 450 A.2d 1173, 1182 (Del. 1982) (finding that the Delaware civil special jury statute did not violate the Delaware Constitution); *see also* Moore v. New York, 333 U.S. 565, 566 (1948) (upholding the constitutionality of a state special jury statute in the criminal context). A version of the key-man system currently operates in selecting grand jurors in Texas criminal cases. TEX. CODE CRIM. PROC. ANN. art. 19.06 (West Supp. 2011).

negligence, libel, and slander causes of action, or to wrongful discharge claims.

4. Each county is encouraged to establish procedures for soliciting the names and background information of individuals willing to serve as jurors in expert jury cases. Solicitation methods may include a marketing strategy to encourage citizens who are proficient in various specialized fields, including law, medicine, banking, engineering, finance, accounting, construction, and other fields of scientific or technical discipline, to apply for placement in a pool of potential special jurors. Parties in individual cases are also permitted to suggest the names of qualified individuals to be placed in the special jury pool. The trial judge has considerable discretion regarding constructing venires from the special jury pool. To the extent possible, the special jury pool and special jury panels of experts should represent a cross section of the county's population, considering the factors of race, sex, and age. Special jurors may be compensated for their time above the standard jury pay fees. The parties may agree to share the cost of compensating expert jurors.

B. *Explanation of the Rule Proposal*

The change to the jury selection rule works on several fronts. For the low-damage cases that fit into Level I, the purely random selection process removes the ability of attorneys and jury consultants to play games with peremptory challenges, and eliminates the use of stereotypes in the jury selection process.[251] The jury selection process in Level I will also be more efficient; voir dire will take less time, and venires will consist of fewer prospective jurors, reducing the cost of trial.[252] The Level I procedure is consistent with the spirit of the 82nd Texas Legislature's enactment of House Bill 274, which requires the

251. *See Batson*, 476 U.S. at 79–80 (listing examples of how prosecutors have attempted to use race in peremptory challenges); *see also* William V. Dorsaneo III et al., *Texas Civil Procedure: Trial and Appellate Practice* § 2.03(7) (2010) (asserting that an attorney's goal in jury selection is not to select a fair jury, but to select a jury partial to the client).

252. Melissa Swindle, Note, *Retreating from* Batson*: The Equal Protection Clause Does Not Require that Race-Neutral Reasons for Peremptory Challenges Be Objectively Verifiable:* Yarborough v. State, *947 S.W.2d 892 (Tex. Crim. App. 1997)*, 29 TEX. TECH L. REV. 925, 946 (1997) (citing William T. Pizzi, Batson v. Kentucky*: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 145 (1987)).

Texas Supreme Court to adopt rules that "promote the prompt, efficient, and cost-effective resolution of civil actions" for cases "in which the amount in controversy . . . does not exceed $100,000."[253] The $200,000 cutoff for Level I was chosen as a result of the new jurisdictional threshold for most county courts at law under House Bill 79.[254] Because of the $200,000 jurisdictional threshold, the Level I procedure would eliminate peremptory challenges for many civil cases tried in county courts at law.[255] In the majority of counties with county courts at law, cases filed in the statutory courts would also receive Level I treatment under this proposal.[256]

253. Act of May 27, 2011, 82d Leg., R.S., ch. 203, § 2.01, 2011 Tex. Sess. Law Serv. 758, 758–59 (West) (current version at TEX. GOV'T CODE ANN. § 22.004(h) (West Supp. 2011)).

254. *See* Act of June 29, 2011, 82d Leg., 1st C.S., ch. 3, § 4.02, 2011 Tex. Sess. Law Serv. 116, 121–22 (West) (current version at GOV'T § 25.0003(c)(1) (West Supp. 2011)) ("[A] statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in . . . civil cases in which the matter in controversy exceeds $500 but does not exceed $200,000 . . . .").

255. *See id.* (defining the jurisdictional threshold for statutory county courts).

256. *See id.* (delineating the jurisdiction of a statutory county court). Prior to the enactment of House Bill 79, the general upper limit on a statutory county court's jurisdiction was $100,000. GOV'T § 25.0003(c)(1). Even after the enactment of House Bill 79, the exact jurisdiction of a county court at law is still determined by the specific statute that created the court. *See id.* §§ 25.0041–.2512 (West 2004 & Supp. 2011) (providing additional jurisdictional requirements for different county courts at law). Some county courts at law maintain jurisdictional parameters that exceed the $200,000 threshold and, thus, allow for overlapping jurisdiction between the district court and applicable statutory county court at law. *See id.* § 25.0592(a) ("In addition to the jurisdiction provided by [s]ection 25.0003 and other law, a county court at law in Dallas County has concurrent jurisdiction with the district court in civil cases *regardless of the amount in controversy*." (emphasis added)); *id.* § 25.2292(a) ("In addition to the jurisdiction provided by [s]ection 25.0003 and other law, a county court at law in Travis County has concurrent jurisdiction with the district court in civil cases in which the matter in controversy exceeds $500 *but does not exceed $250,000* . . . ." (emphasis added)). For those county courts at law with a jurisdictional threshold exceeding $200,000, peremptory challenges could still be utilized in cases that exceed $200,000 under the proposal and existing law. *See supra* Part IV(A), Proposed R. (b) (allowing the trial judge to grant peremptory challenges for good cause as found in the proposed rule); *see also* TEX. R. CIV. P. 232–233 (describing the existing rules for peremptory challenges in district and county courts). However, under the proposal, the maximum peremptory challenge amount would be modified to reflect that county courts at law have six-person juries in contrast to twelve-person juries in district court. *See supra* Part IV(A), Proposed R. (b) (providing flexibility to the trial judge in granting peremptory challenges); *see also* TEX. CONST. art. V, §§ 13, 17 (stating jury sizes for county and district courts). If a case that exceeds $200,000 is filed in a county court at law whose jurisdictional threshold exceeds $200,000, the maximum peremptory challenge allowed for each party would be one. *Cf.* TEX. R. CIV. P. 233 (granting fewer peremptory challenges to county courts). House Bill 79 tasked the Office of Court Administration of

For Level II cases, some games may be played with peremptory challenges if the trial judge allows, but not to the extreme allowed under current law. If racial discrimination in jury selection occurs during the peremptory challenge stage, *Batson/Edmonson* is the stopgap.[257] For Level III cases, a variety of jury selection processes are available depending on the individual factors of the case. To the extent that struck jury selection procedures or peremptory challenges are used in Level III cases, *Batson/ Edmonson* also serves as a mechanism for curbing race- or gender-based strikes.[258]

1. Peremptory Challenges

The reality is that the proposed modification to the use of peremptory challenges will face resistance from many attorneys and other interested individuals, but the resistance is not insurmountable. Opponents will decry any change to the current use of peremptory challenges.[259] Conversely, the proposal is a middle-ground approach that falls short of complete abolishment of peremptory challenges, which may ameliorate concerns.

According to some commentators, the reduction or elimination

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the Texas Judicial System with studying whether it is beneficial to have overlapping civil jurisdiction in district courts and applicable county courts at law where the amount in controversy is more than $200,000. Act of June 29, 2011, 82d Leg., 1st C.S., ch. 3, § 4.02, 2011 Tex. Sess. Law Serv. 116, 121–22 (West) (current version at GOV'T § 25.0003(c)(1)). "The study must determine the feasibility, efficiency, and potential cost of converting to district courts those statutory county courts with jurisdiction in civil cases in which the amount in controversy is more than $200,000." *Id.* Accordingly, under the proposal, future legislative action setting $200,000 as the jurisdictional threshold for statutory county courts would lead to the complete elimination of peremptory challenges for civil cases tried in constitutional county courts and county courts at law.

257. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629–31 (1991) (applying the *Batson* holding to civil cases); Batson v. Kentucky, 476 U.S. 79, 139 (1986) (holding the use of peremptory challenges on account of race violates the Constitution).

258. *See Edmonson*, 500 U.S. at 629–31 (concluding that *Batson* applies to civil cases); *Batson*, 476 U.S. at 139 (holding that it is a constitutional violation to permit peremptory challenges on account of race); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994) (applying *Batson* to gender issues).

259. *See* Stephen R. Diprima, Note, *Selecting a Jury in Federal Criminal Trials After* Batson *and* McCollum, 95 COLUM. L. REV. 888, 892–93 (1995) (asserting that "neither Congress nor the Supreme Court appears willing to abolish the peremptory challenge"); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1689–90 (2006) (citing A.B.A. & BROOKINGS INSTITUTION, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 31–32 (1992)) (noting that a conference charged with jury reform rejected any change to peremptory challenges).

of peremptory challenges is problematic because attorneys are not allowed to strike prospective jurors who are on the edge of being caused out due to some indirect interest in the case.[260] From that perspective, the grey area of a "community" relationship between the jurors and a party—little league coach, former teacher, former co-worker—is the heart and soul of why extensive peremptory challenges are needed in our civil justice system.[261] While the argument is a fair point, the justification for peremptory challenges is not strong enough to preclude lowering the number of challenges or prohibiting the use altogether in some cases. Even under the modified approach, trial judges may continue to exercise discretion in causing out prospective jurors who have an indirect connection to the case if possible bias appears.[262] Because of reversible error review standards, trial judges have considerable flexibility to strike, for cause, prospective jurors who have an unfair connection to the case.[263]

Existing procedural law also works in conjunction with changes to the peremptory challenge rules. Considering that civil verdicts are not required to be unanimous, the current Texas jury verdict system is well-suited to reducing the scope and number of peremptory challenges.[264] The one or two fractious jurors who could end up on the jury as a result of prohibited or reduced peremptory challenges cannot squash the verdict found by the supermajority.[265] Finally, a reduced number of peremptory challenges would still be available in certain civil cases, with the

260. *See* Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 356 (1982) ("Peremptory challenges serve to remove those jurors whose neutrality parties suspect, when the parties cannot prove partiality with enough certainty to justify a challenge for cause.").

261. *See* Hayes v. Missouri, 120 U.S. 68, 70 (1887) (illustrating that a juror may be unfit based on his "habits and associations," and that the peremptory challenge addresses such situations).

262. *See generally* TEX. R. CIV. P. 228 (stating that a judge may render a person unfit for the jury based not only on his answers, but also on other evidence).

263. *See* City of Hawkins v. E.B. Germany & Sons, 425 S.W.2d 23, 26 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) ("It has long been the established rule in this state that even though the challenge for cause was improperly sustained, no reversible error is presented unless appellant can show he was denied a trial by a fair and impartial jury.").

264. TEX. R. CIV. P. 292(a).

265. *See generally id.* (allowing a concurrence of the jury members to make a decision, even if one or two disagree).

prospect of a large number of strikes available in complex cases.[266]

Critics may claim, unconvincingly, that the considerable discretion given to judges to decide whether to allow peremptory challenges in Level II cases will lead to inconsistent results for litigants and forum shopping.[267] Rules that provide trial judges with ample discretion to make important procedural decisions are commonplace in Texas civil practice, and making peremptory challenges discretionary in defined categories of civil cases is hardly outside the bounds.[268] Trial judges have the authority to make important rulings regarding evidentiary issues and to grant new trials.[269] The discretion given to peremptory challenge rulings fits within the court's decision-making authority. Under this proposal, increased forum shopping is a possibility.[270] However, it seems unlikely that the peremptory challenge issue would drive filing decisions considering a multitude of factors are measured when litigants decide where to file a case.[271] The forum shopping issue, with regard to peremptory challenges, merely fits within the broader litigant practice of judicial profiling, which is

266. *See supra* Part IV(A), Proposed R. (b)(1) (referencing three tiers of the jury selection plan).

267. *See* Walker v. Packer, 827 S.W.2d 833, 849 n.3 (Tex. 1992) (Doggett, J., dissenting) (identifying some of the potential consequences that occur when trial courts have broad discretion, including inconsistency and forum shopping).

268. *See* TEX. R. EVID. 104(a) (giving judges the discretion to determine the admissibility of evidence).

269. *See* Nat'l Liab. & Fire Ins. Co. v. Allen, 15 S.W.3d 525, 527 (Tex. 2000) ("Whether to admit or exclude evidence is within the trial court's sound discretion."); City of Brownsville v. Alvarado, 897 S.W.2d 750, 753 (Tex. 1995) ("The admission and exclusion of evidence is committed to the trial court's sound discretion."); Dir., State Emps. Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 268 (Tex. 1994) ("A motion for new trial is addressed to the trial court's discretion and the court's ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion.").

270. *See, e.g.*, Presidio Indep. Sch. Dist. v. Scott, 309 S.W.3d 927, 932 (Tex. 2010) ("Generally, forum[]shopping occurs when a party attempts to obtain a perceived advantage over its adversary by choosing the most favorable venue.").

271. *See* Megan Woodhouse, Note, *Shop 'til You Drop: Implementing Federal Rules of Patent Litigation Procedure to Wear out Forum Shopping Patent Plaintiffs*, 99 GEO. L.J. 227, 234 (2010) (listing factors that influence forum shopping, including "speed of adjudication, special procedural rules . . . , and how the court disposes of a case"); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1678–80 (1990) (discussing factors that play a role in choosing a particular forum, including the judge, jury selection, substantive law, and procedural rules).

strategically engaged in by litigants when deciding the best locale to file suit.[272]

2. Constitutional Challenges to the Tiered System

Another concern may be the constitutionality of the proposed procedures for peremptory challenges and special juries.[273] As explained in the comments to the proposal, the permission or denial to employ peremptory challenges has not been held as a federal or state constitutional right.[274] The use of peremptory challenges is simply a policy choice left to the discretion of the jurisdiction.[275] With respect to the formation of special juries, opponents may criticize the procedure as having the potential to exclude certain demographic groups from representation on special jury panels in a manner that violates federal or state constitutions.[276] The United States Supreme Court has never answered the question of whether, in civil cases, the fair cross section concept is a constitutional requirement.[277] Regardless,

272. *See* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (claiming forum shopping is an element of the legal process). *But see In re* Boehme, 256 S.W.3d 878, 882 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("Texas courts have recognized an important public policy against forum shopping.").

273. *See* Wamget v. State, 67 S.W.3d 851, 860 n.1 (Tex. Crim. App. 2001) (Meyers, J., concurring) (describing the constitutionality of peremptory challenges as worthy of analysis); *cf.* Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155, 1160–61 (1980) (illustrating how the special jury meets the constitutional requirements of the Fifth and Seventh Amendments).

274. Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (affirming that peremptory challenges are not a constitutional right).

275. *See* Georgia v. McCollum, 505 U.S. 42, 57 (1992) ("[P]eremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial.").

276. *See* Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575, 593 (arguing that use of special juries runs the risk of disproportionately excluding certain cognizable groups from the jury).

277. *See* Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 439 (2008) ("There is some question about whether the fair cross-section requirement, which emanates from the Sixth Amendment's guarantee of an impartial jury, applies in civil cases as a constitutional matter."); Mark A. Nordenberg & William V. Luneberg, *Decisionmaking in Complex Federal Civil Cases: Two Alternatives to the Traditional Jury*, 65 JUDICATURE 420, 424 (1982) ("[The United States Supreme Court's] relative silence with respect to civil actions may suggest that there is no constitutional cross section requirement in federal civil cases and that Congress is free to modify civil jury selection as it sees fit."); Alan Feigenbaum, Note, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 CARDOZO L. REV. 1361, 1406 (2003) ("[T]he Supreme Court has not had occasion to

special jury pools can be constructed in such a way as to lessen the concern of excluding any identifiable demographic segments of the population.[278] To the contrary, special juror applications would be solicited from all qualified individuals, regardless of demographic grouping, and affirmative action efforts would be utilized to discover experts from various demographic groups.[279] For each area of expertise, selection guidelines would be established to decrease the risk of minority groups being discriminated against based on race, gender, age, and other immutable characteristics. Furthermore, court officials and litigants would have the flexibility to fashion special jury panels from various demographic groups, including race, age, and gender, to represent the community in the fairest manner possible.[280] In sum, the broad demographic diversity in Texas would still be reflected within a special jury pool of experts, both equitably and constitutionally.

The panel size for special juries of experts may also implicate a constitutional issue.[281] From a pragmatic perspective, allowing for judicial experimentation regarding the size of the panel seems to be a good idea. The proposal imagines that special juries will be impaneled in state district courts. In some of these courts, especially rural areas, experts may be hard to find, and thus panels of six members, or perhaps even three, are sensible from a resource and efficiency perspective.[282] The impediment to

address the fair cross-section requirement in civil cases."). In military criminal cases, defendants are "not entitled to a panel that represents a cross[]section of the eligible military population." United States v. Lewis, 46 M.J. 338, 341 (C.A.A.F. 1997).

278. William V. Luneberg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 949–50 (1981) (outlining federal legislation that provides guidance for constructing a jury pool with proportionate representation of identifiable segments).

279. *See supra* Part IV(A), cmt. 4.

280. *See id.*

281. *See* Colgrove v. Battin, 413 U.S. 149, 159 n.15 (1973) (acknowledging competing arguments on the effectiveness of juries comprised of six and twelve members).

282. *See* Adam M. Chud & Michael L. Berman, *Six-Member Juries: Does Size Really Matter?*, 67 TENN. L. REV. 743, 750 (2000) ("[S]mall juries render sufficiently reliable and just verdicts."); *see also* Rickee N. Arntz, Comment, *Competency of Medical Expert Witnesses: Standards and Qualifications*, 24 CREIGHTON L. REV. 1359, 1377 (1991) (citing Bartimus v. Paxton Cmty. Hosp., 458 N.E.2d 1072, 1077 (Ill. App. Ct. 1983)) (arguing that expert witnesses "in remote areas or small, rural communities could not meet the national standard because of the poor quality or availability of resources in the community").

experimenting with jury size is the Texas constitutional requirement of twelve-person juries in the district courts.[283]

3. Special Juries of Experts

Sharp challenges to the special jury provision revolve around two main issues: the definition of a complex civil case and the procedures for impaneling a special jury.[284] These points are admittedly challenging to work through, so the choices made in the proposal are certainly debatable. At the outset, certain fundamental building blocks of the debate should be constructed. The first building block is that the law must give guidance to trial judges as to what differentiates a complex civil case from a normal civil case.[285] Yet, the law also needs to provide flexibility to trial judges in making the distinction between cases.[286] The proposal opts in favor of a multi-factor balancing test that guides trial judges in the exercise of their discretion as to what constitutes a complex case. The proposal shies away from categorical determinations where the nature of the claims asserted dictate whether a case is complex, but does state that negligence, libel, slander, and wrongful termination cases—all causes of action with traditional procedural rules—will rarely, if ever, satisfy the "complex civil case" criterion.[287] The proposal has the right starting point. Case law development could help to further flesh out the definition of a complex case.

The second building block is that the law must give guidance as to the methodology for impaneling the special jury, specifically the expert jury.[288] Under the proposal, a special jury could be formed

283. TEX. CONST. art. V, § 13.

284. *See supra* Part IV(A), cmt. 3. *See generally* Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 786 (1998) (defining complexity as constituting a multitude of traits made up by the "differing notions . . . held by the legal community"); Lisa S. Meyer, Note, *Taking the "Complexity" out of Complex Litigation: Preserving the Constitutional Right to a Civil Jury Trial*, 28 VAL. U. L. REV. 337, 367 (1993) (proposing that for complex litigation cases, the Seventh Amendment mandates that judges "retain the important characteristics of the civil jury right by impaneling special juries").

285. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.11 (2004).

286. *See* Lisa S. Meyer, Note, *Taking the Complexity out of Complex Litigation: Preserving the Constitutional Right to a Civil Jury Trial*, 28 VAL. U. L. REV. 337, 368 n.207 (1998) ("Deciding whether a case is complex is a matter within the judge's discretion . . . .").

287. *See supra* Part IV(A), cmt. 3.

288. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 12.4 (2004) (recognizing

in a variety of ways. One type of special jury would be formed similar to the current jury selection approach: use the random selection procedures currently in place to construct jury pools and venires, and then allow for either extensive peremptory challenges or a struck jury system that alternates challenges.[289] Trial judges are already instructed to utilize such procedures; therefore, no guidance is needed. The special jury of experts is an entirely different animal, which most judges lack familiarity with, so some guidance is needed as to the selection procedure. This proposal imagines two variants for selecting expert juries: a party-directed method and a court-directed method.[290]

Under the party-directed method, the parties in the case take the initiative to locate the prospective expert jurors, evaluate the prospective experts' qualifications as related to the case at hand, and assess whether the jurors meet the requisite qualifications.[291] Of course, even though the burden is on the parties to locate and vet the prospective jurors, the procedure is overseen by the trial court. The trial court must act to ensure that the proposed experts are qualified and a diverse mix of demographic groups is present.[292] The court will make rulings on the qualifications of a particular juror, as appropriate. A system of peremptory challenges could also be used as an element of the party-directed method.[293]

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that impaneling a jury for a complex case is a heavy responsibility for the judge).

289. *See* TEX. R. CIV. P. 223 (providing for random selection of the general jury panel); *id.* R. 233 (granting peremptory challenges in civil actions and authorizing a judge to equalize the peremptory challenges).

290. *See supra* Part IV(A), cmt. 4. *See generally* Beth Z. Shaw, *Judging Juries: Evaluating Renewed Proposals for Specialized Juries from a Public Choice Perspective*, 2006 UCLA J.L. & TECH. 3, 3 (outlining several proposals for special jury formation, including "letting the parties or the judge select the jurors").

291. *See* James Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623, 628 (1998) (describing a party-directed method to selecting special jury, which is also called a struck jury).

292. *Cf. id.* at 668 (asserting a struck jury system may make discrimination easier to camouflage). *See generally* Smith v. Texas, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.").

293. *See generally* James Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623, 668 (1998)

The court-directed method is similar to the party-directed method. The distinguishing feature of the court-directed method is that the burden is on the trial court, or the court clerk as directed by the trial court, to compile the prospective expert jury pool from which a venire panel of special jurors may be created, and ultimately a panel of experts seated.[294] Perhaps each county could utilize a marketing campaign that would encourage citizens to voluntarily submit basic educational and work-related expertise to the clerk's office of the district and county courts.[295] The voluntarily-provided information would then be evaluated and the special jury pool created for different types of cases. For example, a county might have 150 names of qualified individuals to sit as expert jurors in a complex commercial dispute. The venire would be culled from this special jury pool of "modern-day" merchants. Similar to the Texas criminal grand jury selection procedure, special jury commissioners could also be appointed to locate qualified applicants.[296] The exact structure of the expert selection process may be fine-tuned over time, but the big picture is the establishment of a qualification process that is akin to the hiring procedure found in the average workplace. As part of the hiring procedure, incorporating a significant expert jury remuneration policy that goes beyond existing law would be beneficial because such a policy would facilitate the applications of qualified experts.[297]

(using the same restrictions that apply to peremptory challenges to prevent discrimination in special juries).

294. *See* Ramada Inns, Inc. v. Dow Jones & Co., 1987 WL 28311, at *1 (Del. Super. Ct. Oct. 22, 1987) (establishing a procedure for the selection of jurors in a special jury case whereby the trial court directed the court clerk to identify potential special jurors, send the potential special jurors a special jury questionnaire, and select 100 qualified persons from the list to comprise the special jury venire).

295. *See supra* Part IV(A), cmt. 4.

296. *See* TEX. CODE CRIM. PROC. ANN. art. 19.01(a) (West 2005) ("The district judge, at or during any term of court, shall appoint not less than three, nor more than five persons to perform the duties of jury commissioners . . . ."); *id.* art. 19.06 (West Supp. 2011) ("The jury commissioners shall select not less than 15 nor more than 40 persons from the citizens of the county to be summoned as grand jurors for the next term of court . . . . The commissioners shall, to the extent possible, select grand jurors who the commissioners determine represent a broad cross-section of the population of the county, considering the factors of race, sex, and age.").

297. Under current law, "a person who reports for jury service" is entitled to "not less than $6 for the first day" of attendance in court and "not less than $40 for each day" thereafter as reimbursement for travel and other expenses. TEX. GOV'T CODE ANN. § 61.001(a) (West Supp. 2011).

Concern could arise that case-specific shaping of jury selection procedures in complex civil cases is cost-prohibitive and, therefore, not worth implementing.[298] However, many special juries could be formed without undue expense. With regard to proposed special jury selection procedures that do entail considerable expense, House Bill 79 recently established a mechanism to allocate resources, following the current trend in Texas civil practice of pulling additional funds for complex civil cases.[299] Under the new law, the Texas Supreme Court is required to adopt rules for judicial actors to determine whether a civil case is special enough to require "additional resources to ensure efficient judicial management of the case."[300] The law states considerations for determining whether a case deserves such additional resources,[301] establishes a procedural mechanism for making these decisions,[302] and forecloses appellate review of such determinations.[303] The statute provides a source of state funding to pay for the cost of additional resources,[304] and grant money is available to counties for initiatives that will carry out the purposes of the additional resources provision.[305] House Bill 79's additional resources provision is an excellent, ready-made source of potential funding for case-specific experimentation with special juries in complex civil cases.

Jury decision making is currently predicated on a model where expert witnesses explain complicated scientific and technical issues

298. *See* Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1060 (1995) (arguing that the costs of using an expert jury outweigh any benefits).

299. Act of June 29, 2011, 82d Leg., 1st C.S., ch. 3, § 7.04, 2011 Tex. Sess. Law Serv. 116, 154–56 (West) (current version at GOV'T §§ 74.251–.257 (West Supp. 2011)).

300. *Id.* at 155 (current version at GOV'T § 74.252(a)).

301. *Id.* (current version at GOV'T § 74.252(b)).

302. *Id.* (current version at GOV'T § 74.253(a)). Requests for additional resources are submitted to the trial judge by the parties or on the trial judge's own motion. *Id.* (current version at GOV'T § 74.253(c)). If the trial judge agrees with a request for additional resources, the presiding judge may allocate additional resources from previously allotted funds or can move the judicial committee for the allocation of funds. *Id.* at 154–56 (current version at GOV'T §§ 74.251–.257).

303. *Id.* at 156 (current version at GOV'T § 74.257).

304. *See id.* (current version at GOV'T § 74.255) ("The cost of additional resources provided for a case under this subchapter shall be paid by the state and may not be taxed against any party in the case for which the resources are provided or against the county in which the case is pending.").

305. *See id.* at 157 (current version at GOV'T § 72.029 (West Supp. 2011)) (describing the grant program's procedures).

to lay jurors, and newly-educated jurors then make good decisions.[306] This model has been ingrained in the law for decades.[307] The time has come to consider whether the historic approach is truly beneficial for complex civil cases in Texas. Better decision making will result if the model is flipped and experts have the opportunity to serve as adjudicators of the facts in certain cases.[308] Special juries can properly be constructed to provide a deep, diverse level of expertise that is tailored to the factual and legal disputes in the case. The creation of multi-disciplinary expert panels comprised of members who have different methodological perspectives related to the subject matter of the case has the potential to invigorate the civil jury system in Texas.[309]

Expert juries would provide similar expertise to what exists in alternative dispute resolution methods.[310] But unlike private arbitration, expert juries will provide a public record of decision making and produce the accountability needed in the Texas civil

306. *See* Bradley v. A.C. & S. Co., Nos. 84C-MY-145 & 85C-FE-10, 1989 Del. Super. LEXIS 270, at *8–9 (Del. Super. Ct. May 23, 1989) (articulating that under "the traditional premise of the jury system[,] justice is best served by having cases decided by laymen of ordinary experience and intelligence whose function is to hear testimony from those who are specially trained and whose testimony is usually controverted by other witnesses of comparable experience and training whose opinions differ. Through a process of applying common sense and experience to the evidence, the jury resolves the different opinions of the experts and arrives at an appropriate verdict.").

307. *See* Taylor v. Louisiana, 419 U.S. 522, 527–28 (1975) (reiterating that protecting the right to a jury trial includes ensuring the jury "reasonably reflects a cross[]section of the population suitable in character and intelligence for that civic duty" (quoting Brown v. Allen, 344 U.S. 443, 474 (1953) (internal quotation marks omitted)); *see also Bradley*, 1989 Del. Super. LEXIS 270, at *10 ("The system of selecting jurors without applying specific education or experience standards is utilized in the federal courts and in many states in trying [complex] cases . . . and it has not been found to lead to jury confusion or lack of understanding of the issues or otherwise result in injustice.").

308. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 212 (2006) ("The rationale behind the typical special jury has always been to improve the decision-making process.").

309. *See generally id.* at 209 (indicating that other methods of jury formulation, "especially those shaped to achieve fair and intelligent verdicts in specific cases, have achieved historical legitimacy and should be allowed a reasonable coexistence").

310. The American Arbitration Association claims that "arbitrators possess years of industry-specific knowledge and experience." AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/sp.asp?id=28749 (last visited Nov. 7, 2011). Parties to an arbitration agreement often contract for arbitrators with technical expertise and knowledge appropriate to the subject matter of the dispute. *See* Weekley Homes, Inc. v. Jennings, 936 S.W.2d 16, 17–18 (Tex. App.—San Antonio 1996, writ denied) (per curiam) (illustrating an arbitration agreement).

justice system.[311] Judgments flowing from special jury verdicts are reviewable on appeal; however, arbitration decisions are generally not reviewable by courts.[312] The appellate review of expert jury verdicts is an excellent benefit for the parties and the justice system as a whole.

4. Summary of the Rule Proposal

The tiered approach outlined in this Article is designed to provide trial judges with greater flexibility regarding certain jury selection procedures, and yet, still impose some defined limitations. Low damage cases, defined as claims for $200,000 or less, are not subject to any form of peremptory challenges, jury shuffles, or special juries under the proposal. Cases in which the amount in controversy exceeds $200,000 are presumed not to receive peremptory challenges, but a small number of challenges may be permitted on a case-specific basis through a motion submitted to the judge.[313] The maximum number of allowable peremptory challenges is considerably less than current Texas law.[314] Finally, the special jury procedure is available if exceptional circumstances warrant. Special juries can be formed without the limitations that exist in the other two tiers.[315] Special jury safeguards are established to ensure that special juries of qualified experts are constructed in a fair, reasonable manner, and are composed of individuals with diverse viewpoints and backgrounds.[316]

311. *Cf.* Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 416 (2008) (asserting that the increasing use of alternative dispute resolution is resulting in declining confidence in the jury).

312. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West 2011) ("A written agreement to arbitrate is valid and enforceable .... A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.").

313. *See supra* Part IV(A), Proposed R. (b). *But see* TEX. R. CIV. P. 233 (addressing peremptory challenges).

314. *Cf.* TEX. R. CIV. P. 233 (allowing six peremptory challenges in district court and three in county court).

315. *See supra* Part IV(A), Proposed R. (c).

316. *See* Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) (stating that the jury is intended to be representative of the entire community).

V. CONCLUSION: INNOVATING CIVIL JURY SELECTION PROCEDURES THE TEXAS WAY

A variety of values shape current Texas civil jury selection procedures. Those values are currently sewn together to produce a jury selection pattern that is applied to all Texas civil cases. The improved design is intended to stitch those values with case-specific patterns in the three-tiered framework articulated in this Article. Carefully tailoring Texas civil jury selection procedures to individual cases will produce fairer, more efficient civil jury trials while reinvigorating the civil jury—an essential part of the Texas civil justice system. The time has come to custom fit Texas jury selection procedures to tiers of civil cases based on complexity.