August 6, 2011

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

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Introduction: Jury Selection Reform and Rejuvenating the Texas Civil Jury

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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. 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. The civil jury stands as the conscience of the community and through factual findings allocates responsibility for harms suffered by individuals in our society. There is a real societal value to having a citizenry that directly participates in resolving civil disputes between members of society and this value is etched in the United States Constitution and the Texas Constitution.

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1 Some observers may disagree. See MARK TWAIN, ROUGHING IT 782 (Library of American 1984) (Twain called juries “the most ingenious and infallible agency for defeating justice that human wisdom could contrive.”).
2 U.S. CONST. amend. VII (1791) (“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 re-examined in any Court of the United States, than according to the rules of the common law.”); Tex. Const. art. I, § 15 (1876) (“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 (1876) (“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; but no jury shall be impaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.”).

The Republic of Texas Constitution and successive Texas State Constitutions fiercely protected the right to trial by jury. See Const. of the Republic of Texas, Declaration of Rights, Clause #9 (1836); Tex. Const. art. I, § 12
Civil jury trials take place in twenty-first century Texas less frequently than in prior eras—primarily due to increased use of pretrial motions that decide litigation, increased settlement of cases, and the rise of non-judicial forums for resolving private disputes such as arbitration. This is unfortunate. It is important that civil juries play a rejuvenated role in the Texas civil justice system.

Part of this rejuvenation should involve a re-evaluation of the current procedures for selecting civil juries and proposals for improving such procedures. While improved jury selection procedures will not in and of themselves rejuvenate the civil jury, they take a good step toward bolstering it. Jury selection procedure improvements that create fairer trials for litigants, increase efficiency in the system, honor the time-commitment of jury service, reduce games-playing by attorneys, improve jury decision-making, and increase the public’s belief in the fairness of the system should contribute to improving an institution that is a hallmark of the American experience. 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 this most democratic of public institutions. The civil jury in this country has taken some hits over the last several years.

(1845); Tex. Const. art. IV, § 16 (1845); Tex. Const. art. I, § 15 (1876); Tex. Const. art. V, § 10 (1876). Article I, Section 15 of the currently operating 1876 Constitution, the Bill of Rights Jury Article, protects the right to trial by jury in cases where the right existed at common law. The jury right under the Texas Constitution is broader than the right in most states because Article V, Section 10 of the 1876 Constitution, the Judiciary Article, extends the jury trial right to the “trial of all causes.” The Judiciary Jury Article was added to the Texas Constitution in 1845 because the Bill of Rights Article did not extend to equity causes of action. See Cockrill v. Cox, 65 Tex. 669, 672 (Tex. 1886); White v. White, 108 Tex. 570, 580-582 (Tex. 1917); State of Texas v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 291-293 (Tex. 1975). Equity causes were not tried by juries at common law. See Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830).

3 See Laura G. Dooley, National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation, 83 N.Y.U. L. REV. 411, 412-16 (2008) (stating that “the number of cases tried to juries is now quite low” and attributing that result in part due to the increased use of pretrial dispositive motions and settlement); 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-1980’s to the early 2000’s).

4 See generally VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 30 (1986) (describing how many European countries experimented with the jury in the 1700s and 1800s but subsequently abolished the practice or limited its use). Even in common law countries like England where the ancient right of jury trial thrived for several centuries, the use of juries has markedly declined, especially in civil cases. In England, civil jury trials take place in limited categories of cases, primarily defamation cases. See Sally Lloyd Bostock & Cheryl Thomas, Decline of the “Little Parliament”: Juries and Jury Reform in England and Wales, 62 LAW & CONTEMP. PROBS. 7, 13-14 (1999).

5 See Robert J. Grey, Jr., 2004-05 President, American Bar Association, Op-Ed: Sitting in Judgement: American Jury System Holds Verdict on our Democracy, March 21, 2005, available at 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 commissioned by the American Bar Association and conducted by Harris Interactive which found that “Americans overwhelmingly (seventy-five percent) prefer to have their cases tried by a jury rather than a judge.” Seventy-five percent of those polled do not feel that jury service is a burden to be avoided, and eighty-four percent of those polled believe it is a civic duty that should be fulfilled even if inconvenient). Detailed information on the July 2004 public opinion poll is available on the ABA website. See Press Release, New Poll Shows Strong Support for Jury System: Incoming ABA President Calls on Americans to Act on Their Beliefs, August 9, 2004, available at http://www.abanow.org/2004/08/new-poll-shows-strong-support-for-jury-system-incoming-aba-president-calls-on-americans-to-act-on-their-beliefs/.
but it still endures. The key is to make it better and more adaptive to the realities of modern litigation.

This Article conducts an evaluation of current jury selection procedures and suggests changes to the current system. The Article focuses on Texas jury selection procedures and suggests a few ways to improve Texas law as relates to such procedures. The Article addresses both Texas state law and the operation of federal law in Texas, but the proposal for change is directed at Texas state procedural law.

This Article contends that the primary flaw in Texas jury selection procedures is a one-size fits all approach to jury selection. No matter the dollar size of the case, the nature of the case, the claims asserted by the parties or other individual case-specific factors, the current jury selection process in Texas remains basically the same in allowing extensive peremptory challenges and refusing any type of merit-based jury selection. In short, there is random selection of a cross-section of the community to seat a venire panel and then extensive use of peremptory challenges to try and seat an “impartial” jury. The problem with this approach is that cookie-cutter cases are rare. Some cases would be best served by disallowing peremptory challenges completely. A small number of peremptory challenges may be preferred in other cases. Some cases should be decided by twelve citizens with no direct qualifications or experience to decide the case. Other cases would be better served through decision by a collection of individuals that are qualified and experienced to decide cases involving that subject matter. A tiered approach that outlaws peremptory challenges in some cases, provides some flexibility to trial judges regarding the use of peremptory challenges in other cases, and provides discretion to trial judges to use special juries is best. Like a skilled tailor who custom fits a piece of designer clothing to the client’s body, a trial judge should have some flexibility to fit the jury selection procedures to the case at hand. Such flexibility is currently lacking in the law.

Part I of the Article examines the competing values that undergird Texas civil jury selection procedures. These values have been mixed together in such a way to produce an end result of 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 II of the Article recalibrates the values that support random-selection procedures, procedures to preclude partial jurors from serving on a case, and merit-based selection procedures. It also discusses in detail special jury laws and the benefits of such laws. Part III of the Article sketches out a proposed rule change to the Texas Rules of Civil Procedure that provides a tiered system for jury selection procedures. The tiered system alters current law regarding the use of peremptory challenges and merit-based jury selection. The proposed rule requires some increase in procedures prior to trial for some cases, but such costs are outweighed by the benefits of a more flexible approach.

6 See, e.g., Dooley, supra note 3, at 412 (noting that some “media portrayals of jury verdicts in tort cases as disproportionate and inconsistent have revealed a crisis of legitimacy”); SEAN G. OVERLAND, THE JUROR FACTOR: RACE AND GENDER IN AMERICA’S CIVIL COURTS 2-4 (2009) [hereinafter THE JUROR FACTOR] (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).
7 See TEX. GOV’T CODE ANN. § 62.001 et seq. (West 2005) (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).
8 Id.
I
THE COMPETING VALUES THAT UNDERGIRD TEXAS JURY SELECTION PROCEDURES

Modern civil jury selection generally entails a random selection procedure to bring citizens into venire panels and then provides attorneys and judges with the right to extensively question potential jurors to discover whether such individuals are qualified and suited to fairly decide the case.\(^9\) This questioning of potential jurors is called voir dire.\(^10\) Before determining the potential changes to Texas jury selection procedures, one must work through the basics of the current system with special attention paid to peremptory challenges and the problems caused by the use of such challenges. 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, “good” decision-making by juries or on the fairness of the overall process to groups in society and individual jurors themselves?

A. CIVIL JURY SELECTION SYSTEMS IN TEXAS STATE AND FEDERAL COURTS

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

Every jury selection system establishes requirements for eligibility to serve as a juror in a civil trial. During the early part of Texas’ history, only select members of a local community were likely to be picked to serve as jurors because the local sheriff hand-picked potential jurors.\(^11\) The jury selection job later moved to local jury commissioners or court clerks but nonetheless focused on hand-picking of potential jurors.\(^12\) As recently as the 1960s, Texas federal courts employed a “key man” system of jury selection. The “key man” system means exactly what it says. Jury commissioners selected notable citizens to serve as jurors, typically men of recognized “intelligence and probity.”\(^13\) This tended to produce juries composed primarily of white men who owned property to the exclusion of women and racial minorities even though U.S. Supreme Court jurisprudence stated that intentionally preventing black citizens from serving on juries violated the Fourteenth Amendment.\(^14\) In 1968, Congress enacted the

\(^9\) See supra note 7.
\(^10\) Voir dire is a law term of middle French origin that literally means “to speak the truth.” It 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).
\(^13\) Davis, 268 S.W.3d at 529; JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99 (1994);
\(^14\) See Norris v. Alabama, 294 U.S. 587, 591-96 (1935) (explaining how the key man system used for selecting jurors resulted in no black citizens being chosen for jury service in a particular Alabama county within the memories of several witnesses who were life-long residents of the 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
Jury Selection and Service Act.\textsuperscript{15} The Act abolished the “key man” system in the federal courts.\textsuperscript{16} Similarly, the Texas civil state court jury selection process currently only permits random selection of venire panels for petit juries and provides no place for “blue ribbon” jury panels or “key man” systems in civil cases.\textsuperscript{17}

The current jury selection procedures for selecting petit jurors in Texas civil cases are more inclusive and democratic and produce more diverse jury panels than in prior generations for a variety of reasons. There are very few requirements to serve on a civil jury and so the vast majority of the adult population is eligible to serve. To serve as a petit juror in a civil case in Texas state court, a person must be: at least 18 years of age; a citizen of the state 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 to serve as a juror; of sound mind and good moral character; and able to read and write.\textsuperscript{18} A person must not be under indictment for a misdemeanor theft or a felony or have a conviction for misdemeanor theft or a felony.\textsuperscript{19} Finally, there is a requirement that a person not previously have served as a petit juror in the immediately preceding months prior to being called to jury service.\textsuperscript{20} Similar basic qualifications of citizenship, a minimum age requirement, literacy, and the absence of a felony criminal record are required for jury service in Texas federal district courts under the Jury Selection and Service Act.\textsuperscript{21}

Texas state and federal jury selection laws go beyond merely providing broad eligibility for citizens to serve as jurors in theory. They also work to try and achieve an actual practice of a diverse selection of jurors on jury panels.\textsuperscript{22} These statutory laws require court system officials 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.


\textsuperscript{16} See Davis v. United States, 411 U.S. 233, 235 n.2 (1973) (stating that the adoption of the Jury Selection and Service Act of 1968 precluded the further use of the “key man” system).

\textsuperscript{17} See TEX. GOV'T CODE ANN. § 62.001 et seq. (West 2005) (describing the jury selection rules and jury service requirements for petit juries in civil cases). Texas law still maintains a constitutional form of the “key man” system for selecting grand jurors in criminal cases. See TEX. CRIM. PROC. CODE ANN. art. 19.06 (West Supp. 2010) (“The jury commissioners shall selected 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.”); Castaneda v. Partida, 430 U.S. 482, 497 (1977) (Texas key-man system of selecting grand jurors is facially constitutional but subject to abuse as applied because it is highly subjective.).

\textsuperscript{18} See TEX. GOV'T CODE ANN. § 62.102(1)-(5) (West Supp. 2010).

\textsuperscript{19} Id. at § 62.102(7)-(8).

\textsuperscript{20} Id. at § 62.102(6).


\textsuperscript{22} In Taylor v. Louisiana, 419 U.S. 522 (1975), the U.S. Supreme Court held that the Sixth Amendment gives criminal defendants the right to a jury trial in which an impartial jury is drawn from a fair cross-section of the community. 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 therefore fail to be reasonably representative thereof.” Id. at 538. This fair-cross section concept has influenced jury selection in civil cases even though the Supreme Court has never specifically ruled that the fair-cross section concept as a constitutional requirement applies to the selection of jurors in civil cases. See Dooley, supra note 3, at 439 (noting the uncertainty
find a broad cross-section of such eligible jurors and place them in a pool of potential jurors from which the court officials can then randomly draw from to ultimately constitute a venire panel in a particular case. Under Texas state law, names of potential jurors are drawn from source lists, which include state voter registration rolls and state drivers’ license rolls. The names of all the persons drawn from these rolls constitute a jury wheel. Names of potential jurors are randomly chosen for jury service from the jury wheel or are selected for service based on an approved random selection plan that utilizes electronic or mechanical equipment such as computers. The prospective jurors selected under this random process are then summoned to appear at the applicable state or federal courthouse at a certain date and time. From the group of citizens that respond to the summons and show up for jury service, venire panels of prospective jurors are created for particular cases. A venire panel is seated in the courtroom for the case in which the panel is assigned. As the jury selection procedure makes its way from compilation of names about whether the fair cross-section requirement 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 the civil actions may suggest that there is no constitutional requirement in federal civil cases.”); Fleming v. Chi. Transit Auth., 397 Fed. Appx. 249 (7th Cir. 2010) (affirming that “the right to a [federal] jury trial in civil cases is based on the Seventh Amendment, not the Sixth, and the Supreme Court has not recognized a Constitutional mandate that jury pools in civil cases reflect a fair cross-section of the community.”). The fair cross-section requirement is legislatively required in federal and state courts in Texas. See infra note 23.

23 See 28 U.S.C. §§ 1861-1863 (2006) (requiring that all litigants in federal court that have 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 and providing that each United States district court shall devise and operate a written plan for random selection of petit jurors designed to achieve the fair cross-selection and anti-discrimination objectives). Because each federal district must devise its own jury plan, some differences may exist between jury selection procedures in the federal district courts in this country, even between districts within the same state. See United States District Court Northern District of Texas, Jury Plan, as amended June 2008, approved by the United States Court of Appeals for the Fifth Circuit on December 31, 2008, available at http://www.txnd.uscourts.gov/rules/misc_rules.html (Misc. Order 5); United States District Court Eastern District of Texas, Jury Plan, as amended March 2009, Appendix E to the Local Rules, available at http://www.txed.uscourts.gov/page1.shtml?location=rules. See also TEX. GOV’T CODE ANN. § 62.001-62.021 (West 2005 & Supp. 2010) (describing the general provisions for filling a jury wheel and drawing names from the jury wheel for petit jury service in Texas state civil courts).

24 See TEX. GOV’T CODE ANN. § 62.001 (West 2005).
25 Id. at §§ 62.001-.004 (West 2005 & Supp. 2010).
26 Id. at §§ 62.004 (West Supp. 2010) (drawing of names from jury wheel); § 62.011 (West 2005) (electronically or mechanically selecting names of persons for jury service instead of drawing names from a jury wheel).
27 Id. at §§ 62.012-.014 (West 2005) (describing the procedures for summoning jurors to jury service). A person summoned for jury service who does not comply with the summons procedures is subject to possible civil and criminal penalties. Id. at § 62.0141 (West Supp. 2010) (failure to comply with summons may result in contempt action punishable by a fine of no more than $1,000).
28 The assignment for service varies depending on the particular Texas county. Some Texas counties, typically the ones with larger populations, are governed by interchangeable jury panels. See TEX. GOV’T CODE ANN. §§ §§ 62.016 (West 2005), 62.017 (West 2005), 62.0175 (West Supp. 2010); TEX. R. CIV. P. 223. Under this system, prospective jurors summoned for jury service comprise a general panel for serving the various courts within the county such as district courts, county court, county courts at law, and justice courts in a given week. The prospective jurors may be sent to serve at a specific court, say for example the 72nd District Court in Lubbock, on a venire panel for a particular case in that court. After serving on the venire panel in that court and if not seated as a juror, the person may be sent back to the general panel (i.e., the central jury room) and, in some counties, could conceivably be sent to serve on another venire panel in another court. Id.; See also 8 WILLIAM V. DORSANEI III, TEXAS LITIGATION GUIDE §
from source lists to the seating of a venire panel, the pool of prospective jurors is further refined by an exemption system in which qualified jurors may elect not to serve as jurors if they are covered by certain statutorily defined categories. Some exemption categories under Texas state law include, but are not limited to, elderly individuals, students, primary caretakers of young children, and military members on active duty and deployed outside the member’s county of residence. Under Texas law, a prospective juror summoned to jury duty may appear for duty at the courthouse and attempt to establish an exemption or may use procedures to establish an exemption prior to appearing at the courthouse for jury service.

2. The Voir Dire

After exemptions are determined, a venire panel is seated in the courtroom for a particular civil case and voir dire commences for that case. Voir dire serves a variety of functions. The overt purpose is to elicit facts from venire panelists that will enable attorneys to ascertain whether prospective jurors should be stricken for cause and to exercise peremptory challenges in an intelligent manner. In reality, attorneys use this process to do a variety of things which may or may not be ethical, legal, or even preferable from a systemic perspective. They include things like emphasizing favorable law or facts, limiting the effect of unfavorable law or facts, trying to obtain commitments from prospective jurors, arguing the case itself, and trying to build rapport with prospective jurors. In essence, trial attorneys use this first impression before the prospective jury members (and before any evidence is actually introduced) to keep as many venire panelists that are good for that attorney’s client as possible on the jury panel and use whatever legal means necessary to convince the future jury members that they have the winning argument as to which party should win the case after the trial is completed. Once again, all of this takes place before one piece of evidence is introduced to the jury and before opening statements by the attorneys.

120.01[5][a] (2011). 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 panel for a particular case. TEX. R. CIV. P. 224.

30 Id.
31 Id. at §§ 62.0111(b)(2), 62.107(a) (West 2005). The Government Code permits authorized plans that allow prospective jurors summoned to jury service to provide exemption information to the appropriate court official handling the summoning of jurors which then allows the court to determine whether the prospective juror is exempt from jury service. Such information may be provided through computer, automated telephone system, or by providing a signed statement of the ground of the exemption with the court clerk prior to the date on which the prospective juror is summoned to appear. Id.

32 TEX. R. CIV. P. 223 (providing for the random selection of the general jury panel in counties governed as to juries by the laws providing for interchangeable juries).

33 See Johnson v. Reed, 464 S.W.2d 689, 691 (Tex. Civ. App.—Dallas 1971, writ ref’d n.r.e.), cert. denied, 405 U.S. 9181 (1972); David Crump, Attorneys’ Goals and Tactics in Voir Dire Examination, 43 TEX. B. J. 224 (1980).

34 See Crump, supra note 33. Two Texas Supreme Court cases go some distance toward limiting the effect of attorneys’ improper evidence preview during voir dire. See Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743 (Tex. 2006); Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87 (Tex. 2005). Controlling evidence preview is likely to be an issue regardless of the changes advocated in this article and it is worth considering whether current law does enough to address this problem, if it is perceived as a significant problem with the current system.
The voir dire procedures in Texas state civil trials may differ significantly from the procedures used in Texas federal civil trials. One key difference regards who questions the venire panel. Attorneys are generally given great freedom to question the venire panelists in Texas state courts. In contrast, the judge typically handles most of the questioning in federal civil trials with a short amount of time given to attorneys to question the panel. The specific voir dire procedures vary in federal court depending on the particular federal district court judge. 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 way in which the selected jurors view the case because they are generally given a greater opportunity and leeway to question the panel and more peremptory challenges in state court.

The voir dire process traditionally begins at the time that the judge or the attorneys first begin the oral examination of the collective venire panel in the courtroom and voir dire commences the trial. But even before oral questioning begins, the likelihood is that the attorneys have already spent time gathering and evaluating information about the prospective jurors on the venire panel and judging their suitability to serve as jurors in the case at hand. Under Texas law, persons summoned to jury service are provided with a written jury summons questionnaire which requires them to provide their biographical and demographic information to court personnel prior to or at the time they report for jury service. The judge assigned to hear the particular case, appropriate court personnel, and the litigants and the litigants’ attorneys in the case may review this juror information for the panelists that comprise the venire for that particular case.

35 See TEX. R. CIV. P. 226, Part I, ¶ 4 (“The parties through their attorneys have the right to direct questions to each of you [venire panelists] concerning your qualifications, background, experiences and attitudes.”) (emphasis added); infra note 36.

36 FED. R. CIV. P. 47(a) (“Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.”); Hicks v. Mickelson, 835 F.2d 721, 725 (8th Cir. 1987) (noting that “it is common practice in many [federal] district courts for voir dire to be conducted entirely by the court.”); O’CONNOR’S FEDERAL RULES – CIVIL TRIALS 597 (2010) (stating that the trial judge conducts the entire voir dire in most federal courts); Stephan Landsman, The Civil Jury in America, 62 LAW & CONTEMP. PROBS. 285, 293 (1999) (“Federal courts have exercised their rule-granted authority and in about seventy percent of cases conduct all voir dire alone.”).

37 See BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 6.03 (5th edition Sept. 2007) (“The Benchbook Committee recognizes 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.”); Ramsey v. Bowersox, 149 F.3d 749, 756 (8th Cir. 1998) (“trial judges have broad discretion to decide how to conduct voir dire . . .”); Labee v. Roadway Express, 469 F.2d 169, 172 (8th Cir. 1972) (a federal district court has broad discretion in fashioning the form and scope of voir dire in civil cases).

38 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. Historically, the only curtailment has been the court’s discretion in deciding how to place reasonable limitations on voir dire depending upon the type of case and the issues at hand.”).

39 See Mu’min v. Virginia, 500 U.S. 415, 419 (1991) (trial court ruled that voir dire commenced with collective questioning of the venire); United States v. Warren, 973 F.2d 1304, 1307 (trial commences when the voir dire begins).

40 See TEX. GOV’T CODE ANN. § 62.0132 (West 2005) (required biographical and demographic information includes information such as name, sex, race, age, residence address and mailing address, education level, occupation, place of employment, marital status, citizenship status and county of residency, and name, occupation, and place of employment of the person’s spouse).
Moreover, in addition to answers to the generic questionnaires, venire panelists often submit more detailed case-specific information to the litigants and their attorneys through the use of jury questionnaires prepared by attorneys for the litigants and tailored to the individual facts and circumstances of that particular case. Attorneys use the responses on these forms during the questioning of the panel and to aid in exercising peremptory challenges and making other strategic decisions during voir dire.

Under Texas law, prior to the commencement of voir dire, either party can request that the trial judge conduct a jury shuffle. In a jury shuffle, the names of the member of the venire panel are placed in a receptacle, shuffled, drawn, and transcribed in the order drawn. The venire panel is then re-seated according to the drawing. This procedure allows an attorney to literally view an entire venire panel and then make judgments about the composition of the panel. An attorney may decide that it benefits his or her client to shuffle the panel in hopes that preferred prospective jurors will move to the front of the panel (and hence have a better chance at serving on the jury) and less favored prospective jurors will move outside the projected strike zone (and hence less likely to serve on the jury). In short, if the original randomly selected panel appears less than optimum from the strategic perspective of a party, the party should ask the trial for a shuffle. The jury shuffle is apparently entirely unique to Texas. No other jurisdiction in the United States employs this procedure. As will be discussed later, the jury shuffle is extremely problematic because of the way counsel could use it to manipulate the racial/gender/socio-economic composition of the venire panel and therefore the jury panel.

Once the order of the venire panel is set and the panel seated, the oral questioning of the venire panelists begins by the judge and the attorneys. In Texas state courts, attorneys are

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41 Id. at § 62.1032(g) (West 2005). In some Texas state courts, attorneys do not get the juror information cards until the morning of the scheduled voir and it is therefore more difficult for attorneys to review the information on the jurors.

42 See Carr v. Smith, 22 S.W.3d 128, 134 (Tex. App.—Fort Worth 2000, pet. denied) (60 venire panel members filled out a 63-question confidential juror questionnaire prepared by civil defendant’s attorneys while in the central jury room prior to the seating of the venire panel in the courtroom and the oral questioning of the venire panel).

43 Id.

44 See supra note 39.

45 Id.

46 Id.

47 O’CONNOR’S TEXAS RULES – CIVIL TRIALS 618 (2011) (explaining the strategic use of the jury shuffle by noting that the “order in which the panelists are listed on the jury list is important because the first 12 (or six in county court) unchallenged panelists will sit on the jury.”).

48 WILLIAM V. DORSANEO III, DAVID CRUMP, ELAINE GRAFTON CARLSON, & ELIZABETH THORNBURG, TEXAS CIVIL PROCEDURE: TRIAL AND APPELLATE PRACTICE, 64 (2010-11 edition) [hereinafter TEXAS CIVIL PROCEDURE: TRIAL AND APPELLATE PRACTICE] (“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.”).


50 See supra note 39.
given wide latitude to question prospective jurors within the broad outlines of the issues that are relevant in the particular trial.\(^{51}\) Within these wide goal posts, the attorneys gather the information from prospective jurors needed to exercise challenges for cause and peremptory challenges.\(^{52}\) Texas law and federal law provide several grounds that disqualify a prospective juror for a particular case upon a challenge for cause.\(^{53}\) Disqualifying a prospective juror from serving if that prospective juror “has a bias or prejudice in favor of or against a party in the case” is the ground most difficult to judge in practice.\(^{54}\) The application of “bias” and “prejudice” concepts to individual prospective jurors based on information provided by those individuals is not a precise science, but it is an evaluating function that must be employed in any jury selection system.\(^{55}\) A party is entitled to unlimited challenges for cause.\(^{56}\)

3. **Challenges for Cause**

The trial judge establishes procedures for the attorneys to follow in exercising challenges for cause. Texas Rule of Civil Procedure 227 is interpreted to require that challenges for cause be made orally during the voir dire examination.\(^{57}\) Trial judges often wait until the entire examination of the venire panel is completed and then consider all challenges for cause by the attorneys at the bench outside the presence of the venire panel. This approach gives both sides the opportunity to try and “rehabilitate” veniremembers who expressed an apparent bias before the trial judge makes her ruling on a for-cause challenge.\(^{58}\) After the for-cause challenges

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\(^{52}\) See Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749-50 (Tex. 2006).

\(^{53}\) A Texas statutory provision states the various reasons for disqualifying individual jurors from serving in a civil trial in state court. See 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, as determined under Chapter 573, 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.”). FED. R. CIV. P. 47(a) addresses the examination of prospective jurors in federal civil trials. Under case law interpretation of the rule, challenges for cause in federal civil trials are confined to instances in which partiality arises from the relationships, pecuniary interest, or clear biases of a prospective juror. See 9 MOORE’S FEDERAL PRACTICE, § 47.20(1) (3d ed. 2010); STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN, & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK 993 (West 2011) (hereinafter FEDERAL CIVIL RULES HANDBOOK); Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1468 (10th Cir. 1994); Bailey v. Board of County Comm’rs of Alachua County, 956 F.2d 1112, 1128 (11th Cir. 1992); Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981).

\(^{54}\) See Photostat Corp. v. Ball, 338 F.2d 783, 785 (10th Cir. 1964) (noting that the United States Constitution does not provide any precise formula or procedures for ascertaining a prospective juror’s state of mind regarding whether the juror can be impartial but stating that statutory provisions and the common law have laid out certain safeguards for judging bias or prejudice).

\(^{55}\) Because of the imprecise nature of such a judgment, doubts about actual bias should be resolved against allowing the prospective juror to serve. See Bailey, 956 F.2d at 1128.

\(^{56}\) See FEDERAL CIVIL RULES HANDBOOK at 993 (“Parties can challenge the entire panel [for cause] or the selection process.”).

\(^{57}\) TEX. R. CIV. P. 227 (“A challenge to a particular juror is either a challenge for cause or a peremptory challenge. The court shall decide without delay any such challenge, and if sustained, the juror shall be discharged from the particular case. Either such challenge may be made orally on the formation of a jury to the case.”).

\(^{58}\) See, e.g., Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 91-92 (Tex. 2005) (overruling cases holding that once a veniremember has expressed “bias” further questioning is not permitted and the veniremember must be immediately excused from service).
procedure ends, the parties may exercise their peremptory challenges.59 Attorneys must follow a specialized error preservation procedure for trial court rulings on cause challenges in state civil courts.60

4. **Peremptory Challenges**

After the trial judge rules on the for-cause challenges, the remaining members of the panel that are not stricken are deemed fit to serve in the particular case.61 Both Texas law and federal law then give civil litigants the right to exercise a certain number of peremptory challenges—that is striking remaining prospective jurors from the venire panel without assignment of a reason.62 Each party in a civil case heard in federal court is entitled to three peremptory challenges.63 Under the Texas Rules of Civil Procedure, which applies in state civil cases, each party is entitled to three peremptory challenges in a civil case heard in a constitutional county court and six peremptory challenges in a civil case heard in district court.64

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59 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 counties, if there are insufficient jurors to comprise a strike zone, the entire trial starts over from scratch—a so-called “busted panel.”

60 See Cortez, 159 S.W.3d 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 court that a specific objectionable veniremember will remain on the jury list.” Any error is harmless if the opposing party strikes the objectionable veniremember and the objectionable veniremember does not serve on the jury.).

61 See supra note 53.

62 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.”) (emphasis added); Fed. R. Civ. P. 47(b) (“The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.”); 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.”); Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure: Civil 3d § 2483 at 54-55 (2008) (“No reason need be given for the use of a peremptory challenge.”).

63 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 between 6-12 jurors. A jury must begin with at least six and no more than twelve members. See Fed. R. Civ. P. 48(a). Unless the parties stipulate otherwise, the verdict must be unanimous and returned by a jury of at least six members. See Fed. R. Civ. P. 48(b).

64 The Texas Constitution requires that civil juries in Texas state courts be comprised of twelve persons in district court and six persons in a constitutional county court. See Tex. Const. art. V, § 13 (twelve-person juries in district courts); Tex. Const. art. V, § 17 (six-person members in constitutional county courts). See also Tex. Gov’t Code § 62.201 (West 2005) (“The jury in a district court case is composed of twelve persons, except that the parties may agree to try a particular case with fewer than 12 jurors.”); TEX. GOV’T CODE § 62.301 (West 2005) (“The jury in the county courts and in the justice courts is composed of six persons.”). The Texas Government Code provides that practices and procedures for the selection of jurors in the statutory county courts of law, which includes the number of jurors, is the same as the jury selection practices and procedures provided in the constitutional county courts. See TEX. GOV’T CODE § 25.0007 (West 2005); Act of June 29, 2011, 82nd Leg., S.S., ch. ?, § 4.04, 2011 Tex. Sess. Law Serv. ?, ? (West) (to be codified at Tex. Gov’t Code § 25.0007(a)-(b))). Accordingly, a party may be entitled to a six-member jury in a statutory county court of law. See In the Interest of G.C., 66 S.W.3d 517 (Tex. App.—Fort Worth 2002, no pet.). Under the Texas Rules of Civil Procedure, each party to a civil action is entitled to six peremptory challenges in a case tried in district court and three peremptory challenges in a case tried in a constitutional county court. See Tex. R. Civ. P. 233 (“Except as provided below, each party to a civil action is
In civil cases in state court where there are more than two parties involved in the case, a party may move the court to realign the parties based on interest and then equalize the number of peremptory challenges in such a way that no “side” gets a competitive advantage over another “side.” For example, a competitive advantage exists in a case in which one civil plaintiff sues four defendants in state district court and each party receives the same amount of strikes, at least if the defendants share common defenses, interests, and trial strategies. Without an equalization process, the defendants would have a total of 24 peremptory challenges and the plaintiff would have only 6 peremptory challenges to exercise. The defendants could effectively select the jury. An equalization process permits a more manageable ratio between plaintiffs’ peremptory challenges and defendants’ peremptory challenges that achieves some sense of rough justice. A similar process exists for multiple party cases tried in federal district courts.

The procedure for exercising peremptory challenges varies depending on whether parties are trying the civil case in Texas state or federal court and the preference of the individual judge trying the case. In Texas state civil trials, after the challenges for cause are decided, a strike zone of venire panelists is created for exercising the peremptory challenges. This strike zone includes the number of persons needed to fill out the jury plus the additional persons needed to allow the

65 See TEX. R. CIV. P. 233 (describing the procedure for determining whether aligned parties are antagonistic on any issues submitted to the jury and for allocating peremptory challenges so that no side is given an unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges); Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979) (describing the motion to realign the parties to exercise peremptory strikes procedure); Garcia v. Central Power & Light Co., 704 S.W.2d 734, 736 (Tex. 1986) (describing the procedure for determining antagonism vis-à-vis litigants on the same side of the case regarding jury-submitted issues); O’CONNOR’S TEXAS RULES – CIVIL TRIALS 624-25 (2011) (summarizing the procedure for a motion to realign the parties to equalize the peremptory strikes).

66 See Patterson Dental, 592 S.W.2d at 919-20 (4:1 ratio between sides violated TRCP 233; 2:1 ratio is typically the maximum discrepancy permitted).

67 Id.

68 See 28 U.S.C. § 1870 (2006) (“In civil cases, each party shall be entitled to three peremptory challenges. 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 Industries, Inc. v. Mobil Oil Corp., 475 F.2d 220, 225 (10th Cir. 1973), cert. denied, 414 U.S. 829 (1973) (trial court did not abuse its discretion in granting each plaintiff three peremptory challenges, making a total of six for the two plaintiffs, and granting each of the five defendant two peremptory challenges for a total of ten challenges for the defendants).
parties to exercise their full allotment of peremptory challenges. Consequently, in a two-party case in district court where a twelve-person jury is seated, at least twenty-four persons must remain on the venire panel after the parties have made their challenges for cause. A party makes its peremptory strikes on the venire panel list by drawing a line through the name of each prospective juror the party desires to exclude. The parties typically make their peremptory strikes simultaneously during a break in the proceedings and then turn those strikes in to the judge or clerk. In district court, the first twelve members of the venire panel that are not stricken by either party through peremptory challenges comprise the jury panel.

In Texas federal civil trials, each trial judge has discretion as to the procedural requirements for exercising peremptory challenges. Consequently, there are a variety of schemes and the judge uses the one that he or she prefers. One scheme directs counsel to exercise their peremptory challenges in writing and simultaneously. The jury panel is then comprised of the twelve lowest numbered unchallenged panelists. This is similar to what typically occurs in state court. Other federal judges use what is called a struck jury system where parties alternate exercising challenges among an initial group of panelists. Persons challenged from that group are then replaced by other panelists in the order of their selection. The struck jury system is really a variant of a peremptory challenges system and has more applicability to criminal cases where greater numbers of peremptory challenges are typically allowed. Some judges require counsel to exercise their challenges in alternation from amongst the entire venire panel.

70 TEX. GOV’T CODE ANN. § 62.201 (West 2005) (“The jury in a district court is composed of 12 persons, except that the parties may agree to try a particular case with fewer than 12 jurors.”);
71 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 a two-party case in a county court where a six-person jury is seated, at least twelve persons must remain on the venire panel after the for-cause challenges have been exercised. See TEX. R. CIV. P. 232; TEX. GOV’T CODE ANN. § 62.301 (West 2005) (“The jury in the county courts and in the justice courts is composed of six persons.”).
72 See MCDONALD, TEXAS CIVIL PRACTICE, supra note 69, at § 21.25.
73 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.”); MCDONALD, TEXAS CIVIL PRACTICE, supra note 69, at § 21.26 (after parties exercise their peremptory challenges, the lists are delivered to the clerk and the clerk compares the challenges of the parties).
74 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. 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. . . .”); Dunlap, 30 S.W.3d at 432 (“After receiving the lists with the parties’ peremptory challenges noted, the clerk shall, if the case is in district court, call off the first twelve names not discharged for cause or removed by peremptory challenge, and those whose names are called shall be the jury.”). In a civil case in a county court, the first six names not discharged for cause or removed by peremptory challenge shall be the jury. TEX. R. CIV. P. 234.
75 See BENCHBOOK FOR U.S. DISTRICT COURT JUDGES, supra note 37 at § 6.03.
76 See GORDON BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS, 16-18 (Federal Judicial Center 1982).
77 Id. at 18.
78 Id. at 16-17.
79 Id. at 17.
5. Instructing the Jury

After the challenges procedure is completed, the jury panel is finalized. The trial judge provides an additional set of instructions to the jury members and the clerk administers the juror oath. The parties subsequently proceed to make opening statements and introduce evidence.

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

A striking feature of the Texas federal and state civil jury selection procedure is the use of peremptory challenges to seat a jury. It is not intuitive that a peremptory challenges system aids in providing fairer civil juries. True believers in a peremptory challenges system contend that the procedure ultimately provides a seated jury panel comprised of fairer, more impartial jurors because prospective jurors on the extremes of both sides who survive the for-cause challenges process are stricken through peremptories. In other words, both parties’ attorneys will strike prospective jurors strategically and the end result is a fairer jury.

There are three defining characteristics of a pure peremptory challenges system: (1) no reason is given for the challenge; (2) the true reason for the challenge is immaterial; and (3) the true reason can be irrational or stereotypical. In short, an attorney is permitted to exercise peremptory challenges based entirely on “hunches” and “stereotypes” and such motivations are outside the court’s control. Taking away the right not to provide a reason for the challenge undercuts the original purpose of the peremptory challenges system in the first place. As the U.S. Supreme Court once observed in Lewis v. United States, “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.”

In 1986, the United Supreme Court decided the case of Batson v. Kentucky. In Batson, the Court held that a prosecutor’s exercising of race-based peremptory challenges in a criminal

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80 See Tex. R. Civ. P. 226a, Part II (The Texas Rules of Civil Procedure require that the trial judge, with appropriate limitations, give a generic set of oral and written instructions to jury members immediately after they are selected for the case); McDonald, Texas Civil Practice, supra note 69, at § 21.26 (explaining the process of swearing in the jury panel members and instructing the jury members immediately after they are chosen for the case). See also Bermant, supra note 76, at 20-21 (describing in a federal civil case how the judge makes additional comments and the clerk administers the final oath to the jury immediately after the jury is selected).
81 See V. Hale Starr & Mark McCormick, Jury Selection, § 2.13[A] (4th edition & Supp. 2010) (“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.”).
82 See, e.g., Texas Civil Procedure: Trial and Appellate Practice, supra note 48, at 169 (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).
83 See 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.”).
84 Id.
trial violated the Equal Protection Clause of the United States Constitution. The Court subsequently extended this holding to the use of race-based peremptory challenges in federal civil trials. The Court also extended Batson to cover other categories such as ethnicity and gender. The Texas Supreme Court later held that race-based peremptory challenges in state civil trials violate equal protection. Batson and its progeny have developed a set of procedures that attorneys must follow for challenging an opposing party’s alleged use of a peremptory challenge for prohibited reasons. Suffice it to say that Batson and its progeny impose a significant limitation on the right of peremptory challenge in Texas federal and state courts, a historic right that has been firmly entrenched in Texas for many years.

B. MODERN SYNTHESIS OF TEXAS JURY SELECTION VALUES

In examining the entirety of the jury selection procedures in Texas state and federal civil trials, three key values emerge: (1) democratization of civil juries produces fairer juries for litigants and society; (2) a purely random-selection process harms the rights of litigants; and (3) permitting the targeting of specific protected groups for exclusion from jury service harms the rights of litigants, prospective jurors, and society at large. There is considerable tension between these values, which helps to explain the law as it currently stands. The law initially promotes rules that make jury selection more democratic. But the law does not completely allow for a random selection process, which allows stereotyping and discrimination to creep into the process. These values are mixed together and weighed to produce law that applies in a one-size fits all fashion in state and federal court.

1. Democratization of Civil Juries

Up until the seating of the venire in a particular civil case, jury selection procedures focus on furthering the random-selection principle and the cross-section principle. Both state and federal systems are designed to randomly draw persons from various demographic groups, occupations, belief systems, education levels, and experience levels into jury service. The jury wheels are randomly drawn from voter registration lists and drivers’ license lists, which will catch a wide cross-section of citizens. Venire panels are created through random selection procedures. The general test questions asked of prospective citizens to serve as prospective jurors are few: Are you at least 18 years of age? Are you literate? If so, you’ll do.

87 Id. at 86.
90 See Powers v. Palacios, 813 S.W.2d 489, 491 (Tex. 1991).
91 A three-step process is utilized in resolving a Batson/Edmonson objection. The first step of the process requires the opponent of the peremptory challenge to establish a prima facie case of discrimination. 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. 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. See Goode v. Shoukfeh, 943 S.W.2d 441, 445-46 (Tex. 1997).
92 See supra Part I(A)(1).
93 See supra notes 18-21.
message is clear: most anyone can be a good civil juror. In summary, these initial procedures promote the belief that a jury comprised randomly of a cross-section of the community produces fairer, better jury decisions than a system that is less concerned with diversity in the jury panel and more concerned with matching an individual’s merit-based qualifications to service in a particular case.94

2. Lack of Trust in a Pure Random Selection Process

At the time of voir dire, the focus of the jury selection procedures shifts significantly. Texas law and federal law both back away from complete trust that a pure random-selection process produces better, fairer juror. Complete faith in a random-selection process would lead to a limited voir dire procedure that only permits for-cause strikes in narrow situations, completely disallows peremptory challenges, and nixes unusual procedures like the jury shuffle.

Reasonable people should agree that a purely random-selection process must have some mechanism for “causing out” prospective jurors due to bias. No one should want a system where a civil party’s mother, brother, sister, or close relative is allowed to serve on the jury that judges the party’s case, however unlikely that circumstance may be. But reasonable people should disagree about the extent to which certain alleged biases cause out prospective jurors. For example, in civil cases that have generated extensive pretrial publicity in the media, prospective jurors who have some knowledge of the basic facts of the case are often caused out because of their passing knowledge of the situation or the person involved. Frankly, this is bizarre. When prospective jurors are screened out for actually knowing what is going on in the world, juries are filled with some of the most ignorant, less informed members of society, which is not a good thing.95

Although a purely random selection process must have some mechanisms, for screening out prospective jurors who have an obvious bias, a purely random selection process is incompatible with the use of peremptory challenges in any form. Indeed, outside the United States, some common law jurisdictions that still use civil juries have abolished the peremptory challenge due in part to the recognition that peremptory challenges undermine cross-section and random-selection principles.96 The lack of faith in random selection is highlighted in Texas state

94 See Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with . . . civil proceedings, 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 the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. . . . Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society.”); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (“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 the pool.”).

95 See Associate United States Supreme Court Justice Sandra Day O’Connor, Juries: They May Be Broke, But We Can Fix Them, 44 FEDERAL LAWYER 22-23 (June 1997) (describing how in high-profile cases involving pretrial publicity courts are often forced to search high and low for jurors who never read newspapers, watch the news, or give much thought to issues of public importance and commenting that such procedure is nonsensical).

96 In 1988, England abolished the peremptory challenges right. See Criminal Justice Act of 1988, s.118(1). Scotland, Wales, and Northern Ireland have also abolished the use of peremptory challenges. See Justice and
law through the use of the jury shuffle and a large number of peremptory challenges for each side. Recall that each party in a civil case in state district court is entitled to six peremptory challenges.\(^97\) Federal law, to a lesser extent than Texas law, backs away from purely random selection by also allowing the use of peremptory challenges.\(^98\) The ultimate conclusion is that allowing litigants to use 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 in Texas. However, once peremptory challenges are brought into the mix like Texas law and federal law allow, opportunities inherently exist for parties to shape the jury based on characteristics like race, sex, ethnicity, disability, etc. \textit{Batson} tries to counteract this possibility by prohibiting race and gender-based peremptory challenges. It likely produces some prophylactic effect. But it seems unlikely that \textit{Batson} gets at the root of the problem. In reality, \textit{Batson} simply messes with the whole point of using peremptory challenges to begin with and does not solve the underlying problem of using race and gender in selecting a jury. The \textit{Batson} procedure appears ill-suited to discovering intentional discrimination and unconscious stereotyping.\(^99\)

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\(^97\) \textit{See Tex. R. Civ. P. 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. . .")}.

\(^98\) \textit{See 28 U.S.C. \S 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. \S 1870.""). The number of jurors in a federal civil jury trial ranges between 6-12 jurors. A jury must begin with at least six and no more than twelve members. \textit{See Fed. R. Civ. P. 48(a). Unless the parties stipulate otherwise, the verdict must be unanimous and returned by a jury of at least six members. \textit{See Fed. R. Civ. P. 48(b).}}

\(^99\) \textit{The real-life effect of \textit{Batson} is difficult to measure. There is little collected data on the frequency of and rulings on \textit{Batson} motions in civil cases. One way to try and gauge its effectiveness is to ask litigators who have had the most experience trying cases about how \textit{Batson} works in practice. In 2008, Starr Litigation Services, a trial consulting firm, conducted such a survey of 138 experienced lead trial attorneys, which included civil trial attorneys. \textit{See V. Hale Starr & Mark McCormick, Jury Selection, \S 17.08 Attorney Survey} (4th ed. \& Supp. 2010). The results were mixed. Interestingly, 83 percent of those surveyed reported having no experience with \textit{Batson} challenges at all. Of those who had made \textit{Batson} challenges, only two attorneys were successful in having the challenge affirmed by the judge. The survey indicated some concern among \textit{Batson}-experienced attorneys that the \textit{Batson} procedure is too complicated, requires too much proof, and takes too much time out of voir dire. Moreover, the results conveyed a sense that some attorneys may be reluctant to raise \textit{Batson} challenges to avoid angering the opposition or the judge or for other pragmatic reasons. A view was expressed that some judges may be reluctant to grant peremptory challenges for civility reasons. As one very experienced senior trial attorney explained it in a survey response, most judges “desire civility. It’s a tough thing to ask a judge to look into the mind of someone he sees in his Courtroom all the time and decide that the race-neutral reason just offered was pretense. It is much easier not to second-guess the peremptory challenge and therefore not to affirm the challenge.” \textit{Id. at \S 17.08[D]}. Legal commentators express a variety of views regarding the effectiveness of \textit{Batson}. See Albert W. Alschuler, \textit{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 probably will comply with [\textit{Batson}] in good faith.”); Anthony Page, \textit{Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge}, 85 B.U. L. Rev. 156, 178-235 (2005) (contending that psychological research indicates that attorneys will often be wrong about their motivations}
II
RECALIBRATING TEXAS JURY SELECTION VALUES

Texas state law and federal jury selection law exists in its present form because the aforementioned jury selection values are weighed in a certain way. The law’s calibration is off and should be recalibrated. In general, 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 qualifications standard different from the one that currently exists.

A. UNDERVALUING RANDOM SELECTION

The dominant jury selection value for the majority of Texas civil cases should be random selection of prospective jurors from a cross-section of the community. Greater trust should be placed in random selection. The balance should be tilted against the current use of peremptory challenges in federal and state courts. The use of the jury shuffle in Texas courts should be abolished. Both of these procedures destroy the random nature of the jury selection and lead to manipulation of the composition of the jury panel.

It is true that the peremptory challenge is nestled deep in the heart of Texas trial practice and most civil trial attorneys fiercely protect the right, perhaps because they overestimate their own strategic ability to use the peremptory challenges effectively. But trial attorney preferences and tradition, even the ancient tradition of the peremptory challenge, are not reasons in and of themselves to continue the practice unless it furthers the ends of justice. To the detriment of the civil justice systems in this country, the peremptory challenge has helped spawn a multi-million dollar industry of jury consulting. Jury consultants, often psychologists, offer so-called “scientific jury selection” services to attorneys and litigants as a means to aid attorneys in identifying favorable jurors, conducting voir dire, and exercising strikes. There is little firm evidence that these so-called scientific procedures actually produce better results than the hunches and folklore that attorneys have relied on in exercising strikes. Assuming for the

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100 See Davis, 268 S.W.3d at 530-31 (Brister, J., concurring) (stating that lawyers are “tenaciously protective” of peremptory challenges because they believe that they can use peremptory strikes to “mold a favorable jury” but arguing that studies show such belief is unfounded).

101 See Elaine Carlson, Batson, J.E.B., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process, 46 BAYLOR L. REV. 947, 951-54 (1994) (stating that some type of peremptory challenge format 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).

102 See Matthew Hutson, Unnatural Selection, PSYCHOLOGY TODAY, March/April 2007 at 90-95.

103 Id. at 92-93.

104 See JOEL LIEBERMAN & BRUCE SALES, SCIENTIFIC JURY SELECTION 150-51 (2007) (concluding after extensive research that demographics and personality indicators improve the ability to predict a prospective juror’s decision only by 10 to 15 percent on average); Davis, 268 S.W.3d at 531 n. 35 (citing academic literature findings that attorneys conducting voir dire and exercising challenges consistently produce low levels of accuracy in judging juror verdict preference prejudices). See also Reid Hastie, Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries, 40 AM. U. L. REV. 703, 722 (1991); Solomon M. Fulero & Steven D. Penrod, The
sake of argument that this “art” form does work in shaping the jury panel, what exactly does it say about our system of justice that the law permits this type of manipulation? It says that justice will go to the party who hires the smarter jury consultant or who hires the attorney that is more skilled at deciding which prospective jurors will be favorable for his or her client. The retort from proponents of the current system that the process is fair because both sides get to engage in it is unconvincing.105 Two wrongs do not make a right.

To reiterate, a strong point against the argument that peremptory challenges are vital to the civil trial system is the ineffectiveness of jury consultants. If a disconnect exists between perceived skill and actual advantage, the case for taking the advantage to wealthy litigants in selecting jurors out of the system is bolstered. If a connection exists between skill and advantage in the jury selection arena, this type of advantage should be thwarted because a level playing field as to selection of jurors is so critical from a systemic perspective. Of course, the connection between money and skill in the courtroom is a reality in many parts of the litigation and trial process. Some free market capitalists would argue that this is how the system is supposed to work. Whether or not this is best in a broader context of litigation, jury selection is one area where the playing field should be leveled for all parties.

Think about the additional ways that the extensive use of peremptory challenges harms a civil justice system. First, as previously explained, the procedure unevens the playing field for litigants and gives rise to the possibility of “stacked” juries. Second, the procedure is inefficient. More prospective jurors have to be summoned for jury service because the extensive number of peremptory challenges requires larger venire panels. Additional numbers of venire panelists require more time-consuming voir dire by attorneys because each panelist must be questioned in as much detail as possible given time constraints.106 Third, the procedure allows attorneys to strike excellent prospective jurors. This is unfair to the litigants, but also to the prospective jurors themselves and to society in general. Perfectly reasonable, fair prospective jurors—who would serve on the civil jury in the absence of peremptory challenges—are stricken on the thinnest of judgments about how they will view the case, simply based on something like demographics, personality characteristics, or specialized juror profiling techniques.107

It is problematic enough that excellent prospective jurors may be stricken for reasons having to do with demographic information like occupation. For example, consider as an

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105 See supra notes 81-82.
106 It is often quipped that a quiet venire panelist is a dangerous panelist because the attorneys are left with less information to judge in deciding whether to exercise a challenge on that panelist. Less information about a prospective juror provides less predictive power about how that individual will view the case. See Lisa A. Blue & Robert B. Hirschhorn, Goals and Practical Tips for Voir Dire, 26 AM. J. TRIAL ADVOC. 233, 238 (2002) (“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.”).
empirical matter how many attorneys ever serve on civil juries in jurisdictions where peremptory challenges are prevalent. It would seem that attorneys are rare birds in such jurisdictions. Attorneys frequently fear other attorneys serving on their jury because they believe they will over-think the case or have too much influence on other jurors. Even more pernicious than reliance on occupation or individualized attitudes of prospective jurors that are not bias-related, excellent prospective jurors are stricken on the basis of all types of reasons such as race, color, gender, religion, sexual orientation, and disability that one would hope have no place in our justice system but do. It is debatable exactly how often race, gender, and other group discrimination takes place in the exercising of strikes. *Batson/Edmonson* law has certainly had some effect in preventing challenges on prohibited bases. But it would be incredibly naïve to think that the type of group-based stereotyping, of the type that is prohibited under federal employment discrimination law, is not a substantial problem in Texas jury selection given the diversity of our state, the number of peremptory challenges that are available in a civil case, the pressures on attorneys to win civil cases, and human nature.

If group-based stereotyping is commonplace in the exercising of peremptory challenges, consider the damage done to the civil system from multiple angles, even in a system where *Batson/Edmonson* exists to ostensibly protect against race-based challenges. Specifically, imagine a hypothetical breach of contract case tried in a Texas state district court. The plaintiff, an African-American mechanic, sues his former employer for unpaid wages. During voir dire, the defendant-employer’s attorney peremptory strikes a 48-years old African-American teacher from the venire panel. The plaintiff’s attorney makes a *Batson/Edmonson* challenge to that strike. The following messages are sent to the following civil trial participants:

**Employer’s attorney:** “You are a racist and a liar. You use illegal methods to obtain a jury you think favors your case.”

**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.”

**Plaintiff:** “Your skin color matters in this case, not the facts of your claim for unpaid wages.”

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108 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 (“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.”)

109 See supra note 99.

110 See Davis, 268 S.W.3d at 530-31 (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 here [in Texas] than anywhere else. . . . More than any other state, we in Texas must consider whether peremptory strikes are worth the price they impose.").

111 The messages described in this part are based in large part on similar messages crafted in Starr & McCormick’s chapter in the fourth edition of the book *Jury Selection* entitled “A ‘Real World’ Look at *Batson*.” See STARR & MCCORMICK, JURY SELECTION, supra note 99, at § 17.07[C].
Venire Panel: “You are a participant in a trial that has racist overtones.”

Judge: “You must decide whether the employer’s attorney who has tried cases in your court on a consistent basis for the last 15 years and who has a good reputation as a good, hard-working trial lawyer is acting on the basis of race.”

Community: “The justice system is not fair to all.”

These currently sent-out messages are depressing. Changing the peremptory challenges system could reduce or eliminate these messages from the jury selection process. Indeed, the current system of extensive peremptory challenges with *Batson/Edmonson* as a backstop to prohibit race and gender-based discrimination is fundamentally flawed in its own right. The reasoning underlying *Batson/Edmonson* supports the extension of the doctrine to all sorts of groups or protected characteristics. Extending *Batson* even further than it currently exists would make the peremptory challenges process and voir dire even more cumbersome that it already is. Furthermore, the more *Batson/Edmonson* is extended to cover categories beyond race or sex, the further the peremptory challenges system strays from its historical and logical moorings. Trace the peremptory challenge back to its historical English roots through the Middle Ages and the eighteenth century. None other than Sir William Blackstone himself dubbed the peremptory challenge an arbitrary and capricious right. If the peremptory challenges right cannot be exercised in such a way, it fails of its purpose. The United States Supreme Court’s middle-ground approach to the peremptory challenge is doing no one any favors.

**B. UNDERVALUING MERIT**

The paradox of the current Texas jury selection system is that it undervalues merit at the same time that it undervalues random selection. In this context, “merit” refers to a prospective juror’s demonstrated experiences and abilities vis-à-vis the underlying nature of the case. With the abolition of any form of a “key man” system in Texas, there is no room in current law for any attempt to discern whether certain juror characteristics should be matched to particular cases based on the underlying factual nature of the case. Prospective jurors are screened out during

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112 *Id.*

113 See Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 139 (New York: Basic Books 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.”).

114 See Swain v. Alabama, 380 U.S. 202, 212-22 (1965) (describing the historical use of peremptories in England at common law and the importance of full freedom to exercise the right as being essential to the right and to trial by jury).


116 See Lewis v. United States, 146 U.S. 370, 378 (1892) (“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.”)
voir dire all the time based on their perceived “biases” or “prejudices.”117 But the system does not proactively match prospective jurors’ experiences and abilities to the underlying nature of the case other than haphazardly through the use of peremptory challenges.118 The Texas jury selection system should be modified to allow for some merit-based selection of jurors because a merit-based procedure would produce better jury decision-making and provide greater fairness to civil litigants.

There are a few key reasons why a merit-based approach to jury selection system in some civil cases makes sense. The basic premise is that some civil trials present extremely complex factual, legal, and technical issues that involve a considerable degree of sophistication to sort through and evaluate. For those types of cases, all things being equal, the civil justice system would be better off if the jurors sitting in judgment of the facts had a skill set that was tied to the underlying nature of the case.119 A random selection process, even one with extensive peremptory challenges, provides no guarantees that all jurors, or even a few jurors, have the technical background necessary to properly analyze a complex civil case. A special jury system that deliberately chooses jurors based on the jurors’ technical background is more apt to produce juries that are better equipped to properly analyze complex civil cases.120 Under current law, the inherent complexity in many civil cases is addressed through the use of expert witnesses. The notion is that expert witnesses can educate the lay jurors on the technical issues in the case. Expert witnesses are typically paid for by the parties. A special jury system that makes the jurors the “experts” would reduce the current system’s reliance on “hired gun” expert witness testimony, which would also benefit the trial procedure.

Consider a civil dispute between a power company and a tire manufacturer. The tire manufacturer’s power goes out for several days and adversely impacts the tire manufacturer’s production. The tire manufacture claims that the power company is at fault in failing to prevent the power outage. Assume the case raises complex issues involving electricity, engineering principles, and the distribution of electrical power. It is logical to believe that the law should prefer a jury panel composed of some individuals who have a technical background in engineering, electricity, or related fields such that they can make sense of the evidence presented, as opposed to random “Joe Blows” off the street who might not have any conception of the underlying technical principles that affect the case.

117 See supra note 53.
118 See supra notes 61-68.
119 The related 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 Jarod S. Gonzalez, SOX, Statutory Interpretation, and the Seventh Amendment, 9 U. PA. J. LAB. & EMP. L. 25, 79-81 (2006). Some commentators argue that there should be no right to civil jury trial before any form of jury in complex civil case. Id. at note 321 (collecting views). Other commentators believe that juries handle complex issues quite well and so there is no need for such an exception. Id. at note 325 (collecting views). This Article stops short of wading into the debate over the complexity 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 so that the civil jury does not become a legal dinosaur.
120 See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 209-12 (New York University Press 2006) (advocating for greater experiment with special juries because jurors who have special qualifications can aid the decision-making process of a jury).
Merit-based jury selection is best conceptualized through analogizing jury service selection in complex civil cases to the typical standards for judging whether a person is qualified for a job—education, experience, and demonstrated technical proficiency—in the private sector. Consider another example. Assume that Bill, a 28-years old high school graduate, applies for a job as an accountant. Bill has no experience in accounting or in any fields related to accounting. He has no technical proficiency in accounting other than that he took basic math classes in high school. He has worked as a custodian since he graduated from high school. All would agree that, absent some craziness in the hiring process, the company is not going to hire Bill for the accountant position. Now change the facts. Assume the same Bill with the same background is randomly selected to serve on a jury in a complex case involving alleged accounting fraud. The technical matters are extremely complex even for CPAs. If the goal of system is to produce the best decision-making the possible, the system is not going to “hire” Bill to serve on this civil jury. Bill might be a great choice to serve as juror on some other case, but he is not the best fit for the complex accounting case. Yet under the current jury selection system Bill could easily be “selected” to serve as a juror in such case because he can be “fair,” is over 18 years of age, and can read and write.121

Texas law currently has no procedure that would allow for intentional merit-based jury selection system. At most, the current system allows parties to incorporate such merit-based judgments of prospective jurors when they make peremptory challenges.122 But the peremptory challenges right is too arbitrary to directly further merit-based jury selection. Moreover, the random nature of the venire panel composition in the first place makes it unlikely that a panel of prospective jurors will necessarily have the requisite skill sets to best evaluate the case. Consequently, Texas law should look to history as a guide to add a merit-based approach.

There is historical precedent for incorporating merit-based selection procedures into the system. So-called “special juries” in some form or fashion have been used in Europe and America at various times in history with some success.123 Evaluating special juries through the space of the historical record, there appear to be several types of special juries of which the most prominent were: high social standing juries; struck juries; and expert juries.124 The special jury based on social standing is deliberately comprised of individuals of a higher social class than one

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121 An analogy to public service is also apt. Two main ways that this country asks its citizens to serve the nation is through military service and jury service. Citizens volunteer (or in times of war are conscripted) to serve the United States through military service. The United States military has selective service procedures aimed at enlisting the most qualified fighting force possible. Citizens are called to jury service. While military service and jury service are concededly different in many facets, the aim to enlist citizens that are suited for the call to duty is similar in both areas. It makes sense to conclude that the civil justice would benefit from increased qualification requirements for civil juries. 122 See supra notes 61-68.

123 In 1950, approximately half of American states had some form of a special jury statute on the books. See Alan Feigenbaum, Note, Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts, 24 CARDOZO L. REV. 1361, 1399 (2003); Dooley, supra note 3, at 438-39. Under the Uniform Code of Military Justice, a form of 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. See 10 U.S.C. § 825 (2006). The system traces back to 1950s.

124 See OLDHAM, supra note 120, at 127 (explaining the variety of “special juries” from the seventeenth century to the present).
would typically find through other selection methods. Blue-ribbon juries that either explicitly or implicitly drew from the higher class of society also existed in some American jurisdictions until the mid-twentieth century. The “struck jury” is formed through the use of large venire panels and allowing attorneys to alternate the striking of the venire panelists until the number of unstruck panelists needed to form the jury panel is reached. Several states and federal courts still maintain some form of the struck jury procedure in civil trials. Alabama is a good, modern example of a jurisdiction that relies heavily on the struck jury in both criminal and civil cases. Finally, a rich history exists of the type of merit-based jury selection process that this Article refers to through the use of a jury of experts. Expert juries attempted to align a prospective jurors’ knowledge, experience, and demonstrated technical proficiency to the underlying nature of the case.

The English historical record evidences the extensive use of “merchant juries” from the thirteenth century to nineteenth century. Merchants with a background in commercial enterprise often sat as jurors in English civil cases that touched on commercial disputes. The use of special juries, however, extended beyond strictly commercial disputes. On an as-needed basis, juries of experts in particular fields were impaneled to hear disputes in which technical expertise was considered to be useful to understanding and deciding the particular case at hand. As examples, where an individual was accused of selling bad food, the jury was

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125 Id. at 134-36, 193-96.
126 Id. at 134-36, 152-73.
127 Id. at 193-96 (noting blue ribbon jury selection procedures in New Jersey, Georgia, and New York); New York maintained a “blue ribbon” jury selection procedure in both civil and criminal cases from 1896 until 1965, although the procedure was used almost exclusively in criminal cases. See N.Y.L. 1896, c. 378, repealed by N.Y.L. 1901, c. 601, and simultaneously repealed and reestablished by N.Y.L. 1901, c. 602, former N.Y. JUDICIARY LAW § 749-aa, repealed by1965 New York Laws chapter 778, § 3. New York’s blue ribbon jury statute survived two constitutional challenges in the 1940s in the criminal context. See Fay v. New York, 332 U.S. 261 (1947); Moore v. New York, 333 U.S. 565 (1948). This Article does not contend that Texas law should start allowing for the fashioning of civil juries based on social class or standing.
128 See OLDHAM, supra note 120, at 178-85.
129 Id. at 179-85 (concluding that some form of the struck jury procedure remains valid by statute or procedural rule in Arizona, Virginia, Alabama, South Carolina, Indiana, Arkansas, Maryland, and West Virginia and that it is still “regarded as a significant part of the jury-trial heritage” in Virginia and Alabama). See ARIZ. R. CIV. P. 47(a) (alternating peremptory challenges in civil trials); Va. CODE ANN. § 19.2 -262(c) (struck jury); ALA. R. CIV. P. 47(b) (struck juries in civil trials); ALA CODE § 12-16-140 (struck juries in civil trials); S.C. CODE ANN. § 14-7-1050 (struck jury); IND. CODE ANN. § 34-36-2-3 (struck jury by consent); ARK. CODE ANN. § 16-33-203 (struck jury in civil trials); MD. R. CIV. P. 4-313(b)(2) (alternating challenges procedure); W. VA. CODE § 56-6-13(a) (special juries in civil trials). See also supra notes 76-79 (discussing various jury selection procedures used by federal district court judges in civil trials including the struck jury method).
130 See OLDHAM, supra note 120, at 182; ALA. R. CIV. P. 47(b) (struck juries in civil trials); ALA. CODE § 12-16-140 (struck juries in civil trials); ALA. R. CRIM. P. 18.4(f) (struck juries in criminal trials); ALA. CODE § 12-16-100 (struck juries in criminal trials).
131 See OLDHAM, supra note 120, at 140-42, 154-63.
132 Id. at 154-63. 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.
133 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. The King’s Bench is considered the
comprised of cooks and fishmongers; where attorneys were charged with the falsification of writs, attorneys and court clerks were impaneled to decide the dispute. 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 the 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.”

In America, the expert jury has also had its day in the sun. Perhaps owing to their coastal locations, 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. Save for Delaware, the special jury appears to have run out of gas throughout the United States. In 1987, Delaware enacted a statute stating that a special jury may be ordered “upon the application of any party in a complex case.” Even prior to the enactment, the institution of the special jury was uniquely “ensconced” in Delaware law and had been an important part of Delaware’s civil landscape for much of its history as a colony and a state.

The rich history of the English and American use of the jury of experts through the special jury is overshadowed by the fact that its current modern-day use is slim to none and slim might be walking out the door. It appears as though the Delaware special-jury statute is infrequently used and has been sharply criticized in some quarters. There are several explanations as to why juries of experts are rarely used in civil trials today, except in Delaware. First, expert juries could improperly screen out prospective jurors based on socioeconomic

leading common law court in eighteenth-century England. Professor Oldham’s review of the approximately six hundred special-jury cases that Mansfield conducted while on the bench indicated that around 31 percent involved noncommercial subjects such as trespass, nuisance, ejectment, libel, and perjury. Id. at 154.

134 Id. at 141.
135 Id. at 142, 153.
136 Id. at 196-98.
137 DEL. CODE ANN. tit. 10, § 4506, 66 Del. Laws ch. 5, § 1 (1987) (“The Court may order a special jury upon the application of any party in a complex civil case. The party applying for a special jury shall pay the expense incurred by having a special jury, which may be allowed as part of the costs of the case.”).
139 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 v. United Technologies Corp., 450 A.2d 1173, 1182 (Del. 1982) (upholding the precursor to the 1987 special-jury statute as constitutional); In Re: Asbestos Litigation, 551 A.2d 1296, 1300 (Del. Super. Ct. 1988) (1987 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 v. Carew Assoc., Inc., 1990 Del. Super. LEXIS 432 (Del. Super. Ct. New Castle Oct. 22, 1990) (negligence case alleging faulty construction of a bulkhead not suited to special jury); Bradley v. A.C. & S. Co., Inc., 1989 Del. Super. LEXIS 270 (Del. Super. Ct. New Castle May 23, 1989) (asbestos trials did not qualify as complex civil cases); Amoroso v. Joy Mfg. Co., 1987 Del. Super. LEXIS 1368 (Del. Super. Ct. New Castle Dec. 4, 1987) (personal injury case where plaintiff alleged air compressor that injured plaintiff should have been equipped with a handbrake and contained warnings regarding use not “complex” and therefore special jury inappropriate); but see McClain v. General Motors, 569 A.2d 579, 580 (Del. 1990) (stating that products liability case against car manufacturer was tried before a special jury).
status, race, gender, and other similar characteristics.\textsuperscript{140} In other words, the so-called “jury of peers” will not exist with special jury trials. Second, expert juries are not needed because civil litigants can hire expert witnesses to educate lay jurors on complex technical issues, thus obviating the need for jurors who have the requisite technical knowledge prior to the start of trial.\textsuperscript{141} Third, parties who desire adjudication from expert bodies can agree to arbitration or other types of adjudication where the fact finders will have a skill set better tied to the underlying nature of the case.\textsuperscript{142} Fourth, civil cases rarely involve one type of expertise. A case could cut across a variety of areas—engineering, health care, and technology, for example—that no one expert juror is trained or experienced enough to fully understand the interrelationship between the theories and methodologies. In those situations, a special jury procedure might struggle to find prospective jurors who are proficient in all of those areas or to decide how to mix into the jury panel individuals with the various areas of expertise. Fifth, a special jury might be slanted depending upon the methodological views of the expert. In many fields, experts use a variety of approaches to analyze and evaluate information. It could be that a special jury comprised of experts that employ only one philosophical view would unfairly prejudice one of the civil litigants.\textsuperscript{143} Finally, there is the practical problem of how to find these experts, collate them, and then disperse them to the appropriate civil trial in which their skill sets will be utilized all the while maintaining fairness to the parties.\textsuperscript{144}

A valid question arises as to why Texas law should add a jury selection procedure that has fallen out of favor in almost all jurisdictions and that has the potential for abuse. The answer is that the criticisms of a special jury provision, some of which are valid, may be overcome through placing limitations on the use of the practice and incorporating procedures that try to make the selection and distribution of experts to particular civil cases as fair as possible. No system is perfect. But Texas could benefit from some experimentation in jury selection procedures on the civil side of the fence, including re-thinking the extensive use of peremptory challenges and the non-use of merit-based procedures. The common-sense idea that jurors should have some experience, training, and demonstrated level of expertise that is tied to the underlying nature of the case is a good place to start. The contours of the merit-based jury selection procedure and the use of peremptory challenges will be discussed in Part III of this Article.

\textsuperscript{140} \textit{Haas}, 450 A.2d at 1180 (plaintiffs claimed that the special jury statute arbitrarily excluded women and young people from jury selection).
\textsuperscript{141} \textit{Bradley}, 1989 Del. Super. LEXIS 270, at *7-*9 (opining that expert witnesses are able to present scientific testimony in a way that is understood by regular jurors).
\textsuperscript{142} \textit{Noramco}, 1990 Del. Super. LEXIS 432, at *2-*3 (noting that [a]rbitrators 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.").
\textsuperscript{143} \textit{Bradley}, 1989 Del. Super. LEXIS 270, at *9 (criticizing special juries with expertise and concluding that use of experts as jurors could well produce “a more prejudiced system of justice than the traditional jury system” because many cases often involve more than one area of expertise and experts often do not subscribe to the same methodological approach, which could results in panels of experts that slant the decision toward a predetermined philosophy and not based on the evidence).
\textsuperscript{144} \textit{See OLDHAM}, supra note 120, at 199 (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.”).
III
TAILORING TEXAS JURY SELECTION PROCEDURES TO INDIVIDUAL CASES

The remainder of the 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 I and II of the Article. Part III describes the details of and explanations for the proposed law. Prior to outlining and explaining the proposal, a few words need be said about the spirit and focus of the proposal. First, the goal is not to argue unyieldingly for all of the exact details in the proposal. The motivation is to engage concerned individuals to consider the best way to reduce or eliminating peremptory challenges and provide a mechanism for merit-based jury selection. Second, the proposal focuses on changing Texas jury selection law for operation in Texas state courts and does not speak to federal jury selection laws in Texas. Third, the proposal is limited to civil trials. Different constitutional considerations and practical issues may apply in criminal trials and so the Article takes no position on whether it would be a good idea to make changes to Texas jury selection laws for criminal trials. Finally, the proposal is outlined in the form of a change to the Texas Rules of Civil Procedure. But it makes just as much sense to imagine that the change take place through legislative action.

At first blush, it may seem hard to reconcile how Texas law both undervalues random selection of jurors and merit-based jury selection at the same time. But a closer inspection reveals why that is the truth. Texas law undervalues them because it sets a one-size fits all approach to jury selection in all cases. The reality is that these values can coexist and even rise together if the law provides more flexibility to tailor jury selection to the needs of each case. Accordingly, the unique idea in this Article is the creation of a tiered system of jury selection procedures similar to the tiered system in place for discovery under the Texas Rules of Civil Procedure.

As all Texas civil practitioners know, discovery in Texas civil cases is governed by discovery control plan level. There are three levels of discovery. Level I discovery is for small damages cases—relatively speaking—that are stereotypically viewed as likely less complex than other higher value cases. Accordingly, more substantial limitations are placed on written discovery and deposition time in Level I than in the other levels. Level II discovery is the default level for most civil cases. Level II discovery provides more deposition time for the parties than Level I does but still maintains some important discovery limitations. Finally, Level III discovery is court-tailored discovery that gives the court and the parties in the case the

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145 See TEX. R. CIV. P. 190.2(a)(1)-(2) ("This subdivision [Level 1] applies to any suit in which all plaintiffs affirmatively plead that they seek only monetary relief aggregating $50,000 or less, excluding costs, pre-judgment interest and attorneys’ fees, and any suit for divorce not involving children in which a party pleads that the value of the marital estate is more than zero but not more than $50,000.").
146 See TEX. R. CIV. P. 190.2(c) (stating that in Level I the discovery period begins when suit is filed and ends 30 days before the trial date; each party is limited to six hours total to depose all witnesses; and any party may serve on the other party no more than 25 interrogatories).
147 See TEX. R. CIV. P. 190.3(b) (establishing the discovery period for Level II cases, limiting total deposition time of party-controlled witnesses to 50 hours per side, and limiting each party to serving 25 interrogatories on any other party).
freedom to align the amount of discovery to the complexity of the case. The basic idea is that Level III cases are special cases and should be treated as such by the parties and the court. The benefits of a discovery control plan level system are apparent. Some ability to tailor discovery to the needs of the case is built into the system, which promotes both efficiency and fairness to the parties. Similar benefits would be created if Texas jury selection law moved to a similar tiered system.

This Article proposes the basics of this new Texas jury selection system. The fundamental shift is the move from a one-size fits all approach to jury selection to three jury selection control plan levels. Level I cases are lower damages case that are stereotypically determined to be of the less complicated variety. In those cases, the primary jury selection value is pure random selection. Accordingly, in Level I cases, no jury shuffle is permitted at trial and no peremptory challenges are permitted. The voir dire procedure considers challenges for cause but after the cause challenges are decided the first six or twelve names in the box, depending on whether the trial is in a district court or county court, comprise the jury panel. In Level II, which is the default level, random selection is still considered to be important, but the value is not absolute. The jury shuffle is disallowed. There is a presumption that no peremptory challenges are permitted but either party can file a motion for peremptory challenges to try and convince the trial judge that the aspects of the individual case make peremptory challenges appropriate. The trial judge is given considerable discretion to make the peremptory challenges determination. But even if the trial judge grants the motion, the trial judge can award at maximum two challenges for each party. Consequently, even under Level II, peremptory challenges would have much less of an influence on jury selection than under current law. Level III is jury selection completely tailored to the needs of the case. The trial judge could allow a jury shuffle. The trial judge has broad discretion to allow a peremptory challenges procedure that is similar to Texas law as it now exists. The judge could provide any number of peremptory challenges to the parties as he or she desires. The trial judge could permit more of a “struck jury” procedure. Finally, the trial judge has discretion to create procedures that would seat an “expert jury” in a particular case. Level III recognizes and provides an outlet for merit-based jury selection in complex civil cases. The substance of the proposal is stated below.

A. THE RULES PROPOSAL

TRCP 233a – JURY SELECTION LEVELS

148 See TEX. R. CIV. P. 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. The parties may submit an agreed order to the court for its consideration. The court should act on a party’s motion or agreed order under this subdivision as promptly as reasonably possible.”).
149 TEX. R. CIV. P. 190.4(a)-(b) (Level III discovery control plans are “tailored to the circumstances of the specific suit” and must include a trial date or pretrial conference date to determine the trial setting, the discovery period, limits on the amount of discovery, a joinder deadline, an amended pleadings deadline, and a deadline to designate expert witnesses.).
150 For ease of understanding the main points in the proposal, the proposal is included as part of one new Texas Rule of Civil Procedure. It is understood that actual jury selection reform may need to be done through legislative enactment. Moreover, reform would require the modification or elimination of a few currently existing statutory provisions and rules of civil procedure.
(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, there shall not be a jury shuffle, and no special jury shall be allowed.

(b) **Level II Jury Selection.** In civil cases where the amount in controversy is greater than $200,000, there shall not be a jury shuffle and the presumption is that parties shall not be permitted to exercise peremptory challenges. But any party may file a motion with the trial judge prior to the trial date requesting a ruling from the trial judge that peremptory challenges be allowed 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, an evaluation of the claims and defenses asserted by the parties, and an analysis of 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 brought to his or her attention 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 challenge is granted in a county court at law that has jurisdiction to hear cases above $200,000, each party is limited to a maximum of one peremptory challenge. A special jury is not available in a Level II case.

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 where there are more than two parties, the trial judge, upon a motion of the parties or on his or her own motion, may equalize the number of peremptory challenges so that no party or side is given 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.** The trial judge may in its discretion order a special jury upon the motion of any party or on its own initiative in a complex civil case. Upon the order of a special jury, the trial judge has discretion to establish case-specific procedures for seating a venire panel of prospective jurors who have qualifications and experience related to the subject matter of the suit and for selecting jurors from among the venire panel. This includes broad discretion regarding the use of a struck-jury panel 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 they comply with the Texas Constitution and the United States Constitution.
Comments to change:

1. This rule establishes three tiers of jury selection plans. A case is in Level 1 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. If the amount of damages pleaded is less than $200,000, the case is in Level 1. A trial judge is also permitted to infer from the nature of the allegations in the petition that the plaintiff seeks more than $200,000 in damages. Under no circumstances do Level 1 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 for peremptory challenges or a special jury. A case is in Level II if the trial court grants a 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. The rule change does not modify the basic equalization principles that are well-established in current Texas law. See Garcia v. Central Power & Light Co., 704 S.W.2d 734 (Tex. 1986); Patterson Dental Co. v. Dunn, 592 S.W.2d 914 (Tex. 1979). A case is in Level III if the trial court grants a motion for special jury. The special jury rule allows the trial judge the discretion to tailor jury selection procedures to the needs of the individual case through the use of peremptory challenges of any number, struck jury systems, and expert juries similar to the types of merchant juries used at common law. The only limitation on this procedure is compliance with the Texas Constitution and United States Constitution.

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. The 1876 Texas Constitution protects the right of trial by jury in civil cases both under the Bill of Rights Jury Article and the Judiciary Jury Article. See Tex. Const. art. I, § 15 (1876); Tex. Const. art. V, § 10 (1876). It is well-established that the peremptory challenge is not a constitutionally protected right and may be taken away or modified without affecting the right to a fair and impartial trial. See Georgia v. McCollum, 505 U.S. 42, 57 (1992) (peremptory challenges are not federally “constitutionally protected fundamental rights”); Batson v. Kentucky, 476 U.S. 79, 91 (1986) (no federal Constitutional right to peremptory challenges); Davis v. Fisk Electric Co., 268 S.W.3d 508, 530 (Tex. 2008) (Brister, J., concurring) (peremptory challenges are created entirely from the Texas Rules of Civil Procedure and a majority of the Texas Supreme Court could curb peremptory strikes at any time); Tamburello v. Welch, 392 S.W.2d 114, 117 (Tex. 1965) (peremptory challenges are a creature of the rules of civil procedure). Special jury rules or statutes have also been upheld as constitutional under the state constitutions of other states and the United States Constitution. See Haas v. United Technologies Corp., 450 A.2d 1173 (Del. 1982) (Delaware civil special-jury statute did not violate jury-trial provision in the Delaware Constitution and did not violate Federal constitutional rights); Moore v. New York, 333 U.S. 565 (1948) (upholding the constitutionality of a state special jury statute in the criminal context); Fay v. New York, 332 U.S. 261 (1947) (same); Brown v. New Jersey, 175 U.S. 172 (1899) (same). A form of a keyman system currently operates in selecting grand jurors in Texas criminal cases. See TEX. CRIM. PROC. CODE ANN. art. 19.06 (West 2005) (describing the process of selecting grand jury commissioners and grand jurors).
3. The concept of a “complex civil case” is intended to focus on cases that are outside the norm of basic civil cases. There is no precise definition of what constitutes a “complex civil case.” The determination depends on a variety of factors, including the number of questions that jurors will likely have to decide at trial, the number of parties involved at trial, the complexity of the scientific or technical issues or information that are relevant at trial, the projected length of the trial, the complexity in the law contained 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 that are eligible for special jury selection, special juries will rarely, if ever, apply to basic negligence causes of action, libel and slander actions, and wrongful discharge claims.

4. It is recommended that each county establish procedures for soliciting the names and background information of individuals who are willing to serve as jurors in “expert jury” cases. This may include a marketing strategy to encourage citizens who are proficient in various specialized fields including law, medicine, banking, engineering, finance, accounting, construction, and all fields of scientific or technical discipline to apply to be placed in pools 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 pools. The trial judge has considerable discretion regarding constructing venire panels from these special jury pools. To the extent possible, the special jury pools and special jury panels of experts should represent a cross-section of the population of the county, considering the factors of race, sex, and age. Special jurors may be compensated for their time above and beyond the standard jury pay fees. The parties may agree to share in the cost of compensating expert jurors.

B. EXPLAINING THE RULES PROPOSAL

The rule change works on quite a few fronts. For the low damages cases that fit in Level I, the purely random selection process removes the peremptory challenges games that attorneys and jury consultants play and eliminates the use of racial, sexual, or other stereotypes in the jury selection process. It also makes the jury selection process much more efficient than current law does. Voir dire should take less time and venire panels should consist of a reduced number of prospective jurors in Level I cases, which should lower the costs of trials to the government and parties. The Level 1 procedure is consistent with the spirit of the Texas Legislature’s recent May 2011 enactment of House Bill 274, which requires the 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 is $100,000 or less. The $200,000 threshold is chosen as the cut-off for Level I because of the new $200,000 jurisdictional threshold to most county courts at law under House Bill 79. Because of the $200,000 jurisdictional threshold applicable to Texas

151 See Act of May 27, 2011, 82nd Leg., R.S., ch. 203, § 2.01, 2011 Tex. Sess. Law Serv. ___ (West) (to be codified at TEX. GOV’T CODE ANN. § 22.004(h)) (“The supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions. The rules shall apply to civil actions . . . in which the amount in controversy . . . does not exceed $100,000. The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system . . . .”).

152 See Act of June 29, 2011, 82nd Leg., S.S., ch. 3, § 4.02, 2011 Tex. Sess. Law Serv. ?, ? (West) (to be codified at Tex. Gov’t Code § 25.0003(c)(1)) (“In addition to other jurisdiction provided by law, 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
county courts at law, a consequence of the Level I procedure is the elimination of peremptory challenges for many civil cases tried in county courts at law. In the majority of counties that have county courts at law, cases filed in those statutory courts receive Level I treatment under this proposal.\textsuperscript{153} For Level II cases, some peremptory challenges games could be played if the trial judge allows, but not at the level of current law. If racial discrimination in jury selection occurs during the peremptory challenges stage, \textit{Batson} is there as the stopgap. For Level III cases, all possibilities are open for using a variety of jury selection processes depending on the individual factors of that case. To the extent that struck jury selection procedures or peremptory challenges are used in Level III cases, \textit{Batson} also serves as a mechanism for curbing race-based or gender-based strikes.

1. \textit{Peremptory Challenges}

There are bound to be objections to this proposal from various quarters, but they can be overcome. The reality is that the proposed modification to the use of peremptory challenges will face resistance from many attorneys and other interested individuals. Some will decry any change to the current use of peremptory challenges. But the proposal is a middle ground

\textsuperscript{153} The new general jurisdictional rule is that Texas county courts at law have jurisdiction over civil cases in which the amount in controversy exceeds $200 but does not exceed $200,000. \textit{See Act of June 29, 2011, 82nd Leg., S.S., ch. 3, § 4.02, 2011 Tex. Sess. Law Serv. ?, ? (West) (to be codified at Tex. Gov't C. CODE ANN. § 25.0003(c)(1)); TEX. GOV'T CODE ANN. § 26.042(a).} Prior to the enactment of House Bill 79, the general upper limit on a statutory county court’s jurisdiction was $100,000. \textit{See TEX. GOV'T CODE ANN. § 25.0003(c)(1) (West Supp. 2010).} Even after House Bill 79’s enactment, the exact jurisdiction of a county court at law is still determined by the specific statute that created the court. 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. \textit{See TEX. GOV'T CODE ANN. § 25.0592(a) (West 2005) (“In addition to the jurisdiction provided by Section 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); TEX. GOV'T CODE ANN. § 25.2292(a) (West Supp. 2010) (“In addition to the jurisdiction provided by Section 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 \textit{but does not exceed $250,000.”}) (emphasis added). For those county courts at law whose jurisdictional threshold exceeds $200,000, peremptory challenges could still be utilized in cases that exceed $200,000 under the proposal and existing law. However, the maximum peremptory challenge amount is modified to reflect the fact county courts at law have 6-person juries in contrast to 12-person juries in district court. 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 is one.

There is no certainty that this overlapping jurisdiction between the district courts and some county courts at law will continue forever. House Bill 79 charges the Office of Court Administration of the Texas Judicial System with studying whether it is a good idea to continue permitting overlapping civil jurisdiction in civil cases between district courts and the applicable county courts at law where the amount in controversy is more than $200,000. The study “must determine the feasibility, efficiency, and potential cost of converting to district courts those statutory courts with jurisdiction in civil cases in which the amount in controversy is more than $200,000.” \textit{See Act of June 29, 2011, 82nd Leg., S.S., ch. 3, art. 10, § 10.02(a), 2011 Tex. Sess. Law Serv. ?, ? (West).} Accordingly, under the proposal, future legislative action that sets $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.
approach that falls short of the complete abolition of peremptory challenges, which may ameliorate some concerns.

For some commentators, the reduction or elimination of peremptory challenges is problematic because it does not allow attorneys to strike prospective jurors that are on the borderline of being caused out because of some indirect interest in the case. From that perspective, the middle ground of relationships where jurors have a “community” relationship with a party—little league coach of a party, former teacher of a party, former co-worker of a party—is the heart and soul of why extensive peremptory challenges are needed in our civil justice system. While that is a fair point, it is not a good enough reason in and of itself to preclude lowering the amount of peremptory challenges or reducing them altogether in some cases. Even under the modified approach, trial judges can continue to exercise their good sense in causing out prospective jurors who have some indirect connection to the case if there appears to be the possibility of bias even when prospective jurors will not admit to bias. Because of reversible error review standards, trial judges will have considerable flexibility to strike prospective jurors for cause who have some sort of unfair connection to the case.

Existing procedural law also works in conjunction with changes to the peremptory challenges rules. The current Texas jury verdict system is well-suited to reducing the scope and number of peremptory challenges because civil verdicts do not have to be unanimous.154 The one or two fractious jurors who might otherwise have been stricken with a peremptory challenge but end up on the jury because peremptory challenges are disallowed or reduced in number cannot squash the verdict of the supermajority. Finally, a reduced number of peremptory challenges would still be available in some civil cases with the prospect of large numbers of peremptory challenges or strikes available in complex cases.

Critics may object 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 for judges depending on a judges’ view of peremptory challenges. These are fair points but are not convincing. Procedural rules that provide trial judges considerable discretion to make important procedural decision are commonplace in Texas civil practice and making peremptory challenges discretionary in some categories of civil cases hardly seems beyond the pale. Trial judges are given considerable discretion to make important rulings regarding evidentiary issues and the granting of new trials.155 The discretion given to peremptory challenges rulings fits within this ilk of court decision-making. Increased forum shopping is a possibility under this proposal. But it seems unlikely that the peremptory challenges issue in and of itself would drive filing decisions. A multiplicity of factors tends to be at work when litigants decide where to file a case. The forum shopping issue as regards to

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154 See Tex. R. Civ. P. 292(a) (“[A] verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten or more members of an original jury of twelve or of the same five or more members of an original jury of six.”).

155 See National Liab. & Fire Ins. Co. v. Allen, 15 S.W.3d 525, 527-28 (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.”); Director, State Employees’ 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.”).
peremptory challenges merely fits within the broader litigant practice of judicial profiling on all types of issues, which litigants always strategically engage in when factoring in the best locale to file suit.

2. Constitutional Challenges to the Tiered System

Another matter of concern may be the constitutionality of the proposed peremptory challenges and special-jury statute procedures. Both procedures look to be on solid constitutional footing. As explained in the comment to the proposal, whether to permit or deny peremptory challenges has not been viewed as a federal or state constitutional right.\textsuperscript{156} It is simply a policy choice left to the discretion of the jurisdiction. With respect to special juries, some may criticize the special jury procedure on the basis that it has the potential to exclude certain demographic groups from representation on special jury panels in a manner that violates the state or federal constitutions. Initially, it is not entirely clear whether the fair cross-section concept is a state or federal constitutional requirement in civil cases.\textsuperscript{157} The United States Supreme Court has never held as such.\textsuperscript{158} Regardless, special jury pools can be constructed in such a way as to lessen the concern of exclusion of segments of the population. The proposed Texas special jury pools and panels will not systematically exclude any identifiable demographic segments of the community. 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. For each area of expertise, selection guidelines would be established to decrease the risk that minority groups will be discriminated against based on race, sex, age, etc. Furthermore, court officials and litigants would have the flexibility to fashion special jury panels from the special jury pools so that various demographic groupings like race, age, and sex are represented in as fair a manner as possible.\textsuperscript{159} In sum, the broad demographic diversity in Texas would still be reflected within special jury pools of experts both fairly and constitutionally.

Another constitutional matter relates to panel size for special juries of experts. From a pragmatic perspective, it would seem to be a good idea to allow for judicial experimentation regarding the size of the panel. The proposal imagines that special juries will be impaneled in state district courts. In some of these district courts, especially rural areas, experts could be hard to come by and so panels of six members or perhaps even three members could make sense from

\textsuperscript{156} See supra Part III.A., Comment 2 to Rule Proposal.
\textsuperscript{157} See Dooley, supra note 3, at 439 (“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.”); Nordenberg & Luneberg, supra note 22, at 424 (“[The U.S. 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.”); Feigenbaum, supra note 122, at 1406 (“[T]he Supreme Court has not had occasion to address the fair cross-section requirement in civil cases.”). And in military criminal cases, it has even been held that defendants are not entitled to court “members” (jurors) constituting a fair cross-section of the military community. See U.S. v. Lewis, 46 M.J. 338, 341 (U.S. Ct. App. Armed Forces, 1997).
\textsuperscript{158} Id.
\textsuperscript{159} See supra Part III.A., Comment 4 to Rule Proposal.
a resource and efficiency perspective. The impediment to this experimentation is the Texas Constitutional requirement of twelve-person juries in the district courts.160

3. Special Juries of Experts

Sharp challenges to the special jury provision likely center around two main issues: the definition of a complex civil case and the procedures for impaneling a special jury. These points are admittedly challenging to work through and the choices made in the proposal are certainly up for debate. 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 constitutes a complex civil case from a normal civil case. Yet, the law also needs to provide flexibility to trial judges to make distinctions between complex civil cases and normal civil cases. 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 as to whether the nature of the claims asserted in and of themselves dictate whether a case is complex, but does state that negligence, libel and slander, and wrongful termination cases, will rarely, if ever, satisfy the “complex civil case” criterion. The proposal seems like the right starting place. Case law development could further help to 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. As to this point, the focal point is on procedures for impaneling juries of experts. Under the proposal, a special jury could be used in a variety of ways. One type of special jury would be no different than the current jury selection approach. Use the random selection procedures currently in place to construct jury pools and venire panels and then allow for either extensive peremptory challenges or a struck jury system that alternates challenges. Trial judges already know how to utilize such procedures and so no guidance on those types of special juries are needed. The special jury of experts is an entirely different animal, which judges lack familiarity with, and so some guidance is needed as to this procedure. This proposal imagines two variants for selecting expert juries for special jury trials: a party-directed method and a court-directed method.

Under the party-directed method, the parties in the case take the initiative to locate the prospective expert jurors, evaluate the prospective experts’ qualifications vis-à-vis the case at hand, and challenge the jurors for lack of qualifications. 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 that there is a diverse mix of experts from different demographic groups. The court makes rulings on the

160 See Tex. Const. art. V, § 13 (“Grand and petit juries in the District Courts shall be composed of twelve persons, except that petit juries in a criminal case below the grade of felony shall be composed of six persons; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disable from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict.”).
qualifications of the particular juror as appropriate. A system of peremptory challenges could also be used as part of the party-directed method.

The court-directed method is similar to the party-directed method. The distinguishing feature of this 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 pools from which a venire panel of special jurors can be created and ultimately a panel of experts seated.161 Perhaps each county could utilize a marketing campaign that would encourage citizens to voluntarily submit their basic educational and work-related expertise to the clerk’s office of the district courts and county courts. Citizens would voluntarily provide such information—like a resume—to the appropriate entity. That information would then be evaluated and the special jury pools would be created for different types of cases. So, for example, a county might have 150 names of qualified individuals to sit as expert jurors in a complex commercial dispute case. The venire panel would be culled from this special jury pool of “modern-day” merchants. Similar to what goes on in the Texas criminal grand jury selection procedure, special jury commissioners could also be appointed to locate qualified applicants.162 The exact structure of the expert selection process can be fine-tuned over time, but the big picture is the establishment of a qualification process that is akin to a professional hiring procedure one would find in the workplace. As part of the hiring procedure, it may be a good idea to incorporate a significant expert jury remuneration policy that would go beyond existing law because such a policy would facilitate the applications of qualified experts.163

A concern could arise that any case-specific shaping of jury selection procedures in complex civil cases is cost-prohibitive and therefore not worth permitting. There are two responses to this line of argument. First, many special juries could be formed without undue expense. Second, with regard to proposed special jury selection procedures that do entail considerable expense, there is an outlet for obtaining additional resources to fund case-specific special jury selection needs. Allocating additional monies to pay for expert jury selection procedures fit within the current trend in Texas civil practice to pull additional resources for complex civil cases. House Bill 79 recently established a mechanism to allocate resources for such expenses.164 Under the new law, not later than May 1, 2012, the Texas Supreme Court is

161 See Ramada Inns, Inc. v. Dow Jones & Co., 1987 WL 28311 (Del. Super. Ct. New Castle Oct. 22, 1987) (establishing a procedure for the selection of jurors in a special jury case whereby the trial court directed the prothonotary, 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 panel).

162 See TEX. CRIM. PROC. CODE ANN. art. 19.01 (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, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear.”); TEX. CRIM. PROC. CODE ANN. art. 19.06 (West Supp. 2010) (“The jury commissioners shall selected 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.”).

163 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. See TEX. GOV’T CODE ANN. § 61.001(a) (West Supp. 2010).

required to adopt rules under which judicial actors may determine whether a civil case is special enough to require “additional resources to ensure efficient judicial management of the case.”

The law states considerations for judging whether a case deserves such “additional resources,”

establishes a procedural mechanism for making such decisions,

and forecloses appellate review of such determinations.

The law provides a source of state funds to pay for the cost of additional resources and grant money is available to counties for initiatives that will carry out the purposes of the “additional resources” law.

House Bill 79’s “additional resources” provision is an excellent, ready-made source of potential funding for case-specific experimentation of special juries in complex civil cases.

Jury decision-making is currently predicated on a model where expert witnesses explain complicated scientific and technical issues to lay jurors and newly-educated jurors then make good decisions.

This model has been ingrained in the law for quite a while. But it is high time to consider whether this approach is truly best for complex civil cases in Texas. Better decision-making is more likely to occur if the model is flipped and the experts have the opportunity to serve as adjudicators of the facts in certain cases. Special juries can properly be

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165 See Act of June 29, 2011, 82nd Leg., S.S., ch. 3, §§ 7.05-06, 2011 Tex. Sess. Law Serv. ?, ? (West) (stating that a task force shall provide recommendations on the rules to the Texas Supreme Court not later than March 1, 2012 and the Texas Supreme Court shall adopt the rules required by Section 74.252 of the Government Code not later than May 1, 2012); Id. at § 74.252(a) (“The supreme court shall adopt rules under which courts, presiding judges of the administrative judicial regions, and the judicial committee for additional resources may determine whether a case requires additional resources to ensure efficient judicial management of the case.”)

166 Id. at § 74.252(b) (“In developing the rules, the supreme court shall include considerations regarding whether a case involves or is likely to involve: (1) a large number of parties who are separately represented by counsel; (2) coordination with related actions pending in one or more courts in other counties of this state or in one or more United States district courts; (3) numerous pretrial motions that present difficult or novel legal issues that will be time-consuming to resolve; (4) a large number of witnesses or substantial documentary evidence; (5) substantial post-judgment supervision; (6) a trial that will last more than four weeks; and (7) a substantial additional burden on the trial court’s docket and the resources available to the trial court to hear the case.”).

167 Id. at §§ 74.253-254. Requests for additional resources are submitted to the trial judge by the parties or on the trial judge’s own motion. If the trial judge agrees with a request for additional resources, the presiding judge of the administrative judge may allocate additional resources from previously allotted funds or can move the judicial committee on additional resources for the allocation of funds.

168 Id. at § 74.257 (“APPELLATE REVIEW. A determination made by a trial court judge, the presiding judge of an administrative judicial region, or the judicial committee for additional resources under this chapter is not appealable or subject to review by mandamus.”).

169 Id. at § 74.255 (“COST OF ADDITIONAL RESOURCES. 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.”).


171 Bradley, 1989 Del. Super. LEXIS 270, at *8-9 (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.”).

172 Id. 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 the understanding of the issues or otherwise result in injustice.”).
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 that relate to the subject matter of the case has the potential to invigorate the civil jury system in Texas. Expert juries would provide similar expertise to what sometimes exists when civil claims bypass the court system and go to arbitration. But unlike private arbitration, expert juries will provide a public record of decision-making and accountability that is needed in the Texas civil justice system. Judgments flowing from a special jury verdict are reviewable on appeal; whereas arbitration decisions are generally not reviewable by courts. The appellate review of expert jury verdicts is an excellent benefit for the parties and justice system as a whole.

4. Summary of The Rules 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 damages cases, defined as $200,000 or less, are not subject to any forms of peremptory challenges, jury shuffle, or special juries. 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 motion. The maximum number of allowable peremptory challenges is considerably less than current Texas law. 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. Special jury safeguards—professional selection procedures—are established to ensure that special juries of qualified experts are constructed in a fair, reasonable manner and compose diverse viewpoints and backgrounds.

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 the same for all Texas civil cases. A better design is to stitch those values together into case-specific patterns within the three-tiered framework articulated in this article. Carefully tailoring Texas civil jury selection procedures to individual civil cases should produce fairer, more efficient civil jury trials and reinvigorate the civil jury trial—a beautiful part of the Texas civil justice system that needs alteration. The time has come to custom-fit Texas jury selection procedures to tiers of civil cases.