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## Foreword

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## FOREWORD

JOHN PAUL STEVENS\*

Over the course of my legal career, my assessment of at least one stage of the jury process has changed as I have participated in the justice system from both sides of the bench. During my years as a practicing lawyer, I viewed the arbitrary right to exclude individual members of the venire from acting as jurors in particular trials as one of the litigant's fundamental procedural protections. History, tradition, and the adversary character of the trial process supported my view that the peremptory challenge had the status of an inalienable right.

During my years as a judge, I have increasingly viewed the peremptory challenge as an aspect of what Roscoe Pound described as the "sporting theory" of justice.<sup>1</sup> Shrewd decisions about peremptory challenges may give one adversary a tactical advantage that has nothing to do with the fair administration of justice. Over the years, my examination of a host of voir dire transcripts has persuaded me that the vast amounts of valuable court time routinely expended in questioning prospective jurors in order to decide whether or not to exercise a peremptory challenge produce minimal benefits at best. Moreover, there is a significant cost associated with peremptory challenges that is generally ignored.

When Abraham Lincoln referred to government "by the people" as a hallmark of democracy, we usually assume that he was referring to the people's exercise of governmental power in the polling booth. But Lincoln was both a great President and a great trial lawyer. He also might have been referring to the people's exercise of governmental power in the courthouse. For service on a jury is not merely a duty; it is also a privilege to play an official role in discharging the sovereign's responsibility for the administration of justice. A citizen should not be denied the opportunity to serve as a juror unless an impartial judge can state an acceptable reason for the denial. A

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1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404-05 (1906).

challenge for cause provides such a reason; a peremptory challenge does not.

Jury service is an enriching and rewarding experience that leaves a lasting impression on those who are privileged to serve. Unnecessary inconveniences, delays, and costs associated with jury duty make it a burden in many cases. It is crucial, not only to minimize those burdens, but also to make every effort to understand and improve the entire jury system from voir dire through to the deliberative process that takes place after the jury has retired. Scholarship devoted to that end has surpassing importance. Nancy Marder has already made significant contributions to that body of work, and this symposium promises important additional insights. I therefore urge the reader to peruse the commentary that follows with great care.