Chicago-Kent Law Review

Volume 98 | Issue 1 Article 6

2-20-2024

Introduction

Nancy S. Marder

Shari S. Diamond

Valarie P. Hans

Mar Jimeno-Bulnes

INTRODUCTION

NANCY S. MARDER, SHARI SEIDMAN DIAMOND, VALERIE P. HANS, MAR JIMENO-BULNES, SANJA KUTNJAK IVKOVIĆ & MARY R. ROSE*

This Symposium on "Juries in a Time of Crisis and Change" had its roots in the 2022 Global Meeting of the Law and Society Association (LSA), which was no ordinary meeting. Members of the LSA had not been able to meet in person since 2019.[1] The COVID-19 pandemic affected everyone and everything, and jury scholars and the jury were no exception. We wanted to bring our experiences during those three years, which included the pandemic, the racial protests, and the loss of in-person gatherings, to our study of the jury.

We met in Lisbon, Portugal for the 2022 Global Meeting. We were thrilled to meet in person once again, but the pandemic was not fully behind us yet. Not all members could attend the in-person gathering, so we attempted a hybrid meeting. In this limbo state–with some of us meeting in person and others joining on Zoom–we were grateful to be together even though we were not fully together. We met to discuss the jury and other institutions of lay legal decision-making, but we never lost sight of how these institutions had been profoundly affected by recent events. One theme that emerged from the Lisbon gathering is that times of crisis can lead to change, as they did with juries during the pandemic, but they can also underscore the resilience of institutions, such as the jury and other forms of lay participation. The Articles in this Symposium demonstrate some of the ways in which the institution of the jury has the capacity to be both resilient and adaptable.

The contributors to this Symposium are part of the Collaborative Research Network (CRN) on Lay Participation in Legal Systems, and the International Research Collaborative (IRC) on Lay Participation in Law around the Globe, which are groups, formed under the auspices of the LSA,

* Nancy S. Marder, Professor of Law and Director of the Justice John Paul Stevens Jury Center, Chicago-Kent College of Law; Shari Seidman Diamond, Howard J. Trienens Professor of Law, Northwestern University Pritzker School of Law and Research Professor, American Bar Foundation; Valerie P. Hans, Charles F. Rechlin Professor of Law, Cornell Law School; Mar Jimeno-Bulnes, Professor of Procedural Law, University of Burgos, Spain; Sanja Kutnjak Ivković, Professor of Criminal Justice, Michigan State University; Mary R. Rose, Professor of Sociology and Law, University of Texas at Austin.

1. We gratefully acknowledge the financial support provided by NSF grant SES-2043400, Research Collaborations and Mentorship of Sociolegal Scholars, to the Law and Society Association, which funded international travel for several of our research collaborators to the Lisbon Global Meeting.

whose members focus on lay participation in legal decision-making.[2] The CRN was founded by Valerie Hans, Sanja Kutnjak Ivković, and Mary Rose (three of the co-editors of this Symposium), who recognized the need for a network of jury scholars who are drawn from various disciplines, come from countries around the world, and would meet annually at LSA to share their insights and report on jury developments worldwide. This CRN network, one of the earliest to be organized, has been augmented by new international members and new joint activities through the IRC developed as part of international meetings hosted by the LSA. This expanded network of scholars of lay participation in law has remained active and vibrant in part because of the collaborative projects undertaken by the group and in part because of the longstanding friendships among its members. Our ongoing collaborative projects and camaraderie kept us engaged and connected even when we were kept apart by the pandemic.

When we were able to gather for the first time in three years in Lisbon, we presented work that examined some of the changes to the jury during the several years that we could not meet in person. Although we had met for brief online presentations during the pandemic, it was not the same experience as an in-person exchange. The gathering in Lisbon allowed us to share our early post-pandemic work with each other. This Symposium provided a wonderful opportunity to develop and transform those presentations and early draft papers into published Articles.[3]The Articles in this Symposium are organized under three broad headings: (1) race and the jury; (2) new developments in lay participation; and (3) new technologies and the jury. The Articles on race and the jury reflect the ways in which states in the United States are grappling with how to make juries more representative and inclusive and how to ensure that all citizens summoned to serve are treated fairly. The Articles on new developments in lay participation show the resilience of the jury and other forms of lay participation as countries around the world continue to strive for greater lay participation in legal decision making. The Article on new technologies and the jury looks to the future and imagines what online courts, complete with online jury trials, might look like. Part I of this Introduction briefly describes each of the Articles and Part II suggests future directions for jury research in each of these three broad areas.

2. The web page for the CRN on Lay Participation in Legal Systems is available at https://www.lawandsociety.org/crn04/; the web page for the IRC on Lay Participation in Law around the Globe is available at https://www.lawandsociety.org/lsairc42/.

3. We thank Editor-in-Chief Benjamin Levine and the members of the *Chicago-Kent Law Review* for their assistance in helping us to prepare these Articles for publication in this Symposium.

I. A BRIEF DESCRIPTION OF THE ARTICLES IN THIS SYMPOSIUM

A. Race and the Jury

In times of crisis, tensions in a society are likely to become even more pronounced. Race in American society has long been a source of tension and the search for juries that "look like America" has long been an elusive goal.[4] The Articles in this part examine the interplay between race and jury selection. The first identifies some of the methodological challenges that state courts face in collecting reliable data to determine whether their jury pools are representative of the racial and gender composition of their districts. The second describes the different paths that Washington, California, and Arizona took as they tried to eliminate discriminatory peremptory challenges in their state courts. The third juxtaposes two high-profile criminal jury trials involving race. It compares the two trial judges' practices during voir dire and identifies which ones might encourage prospective jurors to be candid in their responses about race.

In *How Can You Tell if There Is a Crisis? Data and Measurement Challenges in Assessing Jury Representation*, Mary R. Rose and Marc A. Musick point out the value of having access to data about juries because such information is necessary to determine whether an institution such as the jury is in crisis or not.[5] Rose and Musick participated in a project for New Jersey courts. The courts had collected data to learn who served on juries in the state and whether the large number of peremptory challenges available to lawyers in criminal cases possibly contributed to the juries' failure to reflect the racial and gender composition of the districts from which prospective jurors were drawn. The project revealed that the problem of representation started earlier than the exercise of peremptory challenges; rather, it began with who responded to their summons for jury duty in New Jersey courts. The project also raised important methodological issues about the data, including how to ensure that they are reliable; how to appropriately categorize people who identify as multiracial; and what to do with data about groups with few

4. The scholarship documenting both of these claims is extensive. The problematic role of race from the very beginnings of the country is presented in DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 3–9 (2009) (describing the pervasiveness of slavery in the U.S. Constitution). For discussions of continuing tensions associated with race in U.S. society, see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); MARGARET L. ANDERSEN, RACE IN SOCIETY: THE ENDURING AMERICAN DILEMMA (2d ed. 2021); DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (2004). For documentation of the longstanding difficulty of achieving racially representative juries, see generally HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 18 (1977).

5. Mary R. Rose & Marc A. Musick, *How Can You Tell if There Is a Crisis? Data and Measurement Challenges in Assessing Jury Representation*, 98 CHI.-KENT L. REV. 35 (2023).

members. The Article describes how the authors addressed these methodological issues in their work for the New Jersey courts. As a result, other states that want to study their jury pools' representativeness do not have to reinvent the wheel.

The New Jersey project also raises interesting questions about designing questionnaires from which other states could learn. One such question arises from the fact that people's identities do not always fit neatly into one category. For example, some prospective jurors may want to describe themselves as "multiracial." However, existing laws on representativeness may not recognize this group as "distinctive"; further, they might end up being in a group that is too small to be analyzed on its own.[6] Similarly, if people want to indicate that they are "nonbinary," which New Jersey law recognizes as a gender category, they are likely to be part of a group that is too small for analyses.[7] In these ways, those designing questionnaires may aim to be more inclusive and detailed, but may risk excluding people from the study entirely because the resulting categories contain too few members for reliable analysis.

Nancy S. Marder's *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, provides lessons for states interested in addressing the problem of peremptory challenges.[8] Peremptory challenges are the challenges with which lawyers can remove a certain number of prospective jurors without having to give a reason, except in limited circumstances. The problem is that some lawyers exercise their peremptory challenges based on prospective jurors' race, ethnicity, or gender even though the U.S. Supreme Court held in *Batson v. Kentucky*,[9] and the cases that extended its reach,[10] that peremptory challenges cannot be exercised on these grounds. In *Batson*, the Court devised a test that proved easy to evade; thus, discriminatory peremptory challenges persist. One harm from discriminatory peremptory challenges is that they are exercised in the courtroom and are visible to everyone who is present; the discrimination is witnessed but not corrected. Another harm is that this discriminatory practice calls into question the integrity of the rest of the trial.

Several states, including Washington, California, and Arizona, have tried to address the problem posed by discriminatory peremptory challenges in their state courts. In all three states, the state supreme court created a task

6. *Id.* at 54–60.

7. *Id.* at 60–62.

8. Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 CHI.-KENT L. REV. 65 (2023).

9. 476 U.S. 79, 89 (1986).

10. *See* Marder, *supra* note 8, at 69 n.17.

force to examine jury selection in their state. In Washington, the Washington Supreme Court made a rule change that tried to strengthen the *Batson* test. The new rule, known as General Rule 37 ("GR37"),[11] requires trial judges to view the "totality of the circumstances" and to consider, from an "objective observer's" viewpoint, whether the peremptory challenge was discriminatory.[12] In California, the legislature passed legislation that also tried to strengthen the *Batson* test in ways similar to Washington's rule change. In contrast, in Arizona, the Arizona Supreme Court acted before the task force completed its report and Arizona became the first state in the United States to eliminate peremptory challenges. Although it is too soon to know how the responses by Arizona and California are working, there are several cases from Washington that show that the rule change has made a difference in about one-third of the *Batson* challenge cases that have been decided since the rule change went into effect in 2018.[13]

These three states' approaches to the problem of discriminatory peremptory challenges provide other states with several different ways to proceed. Indeed, Connecticut and New Jersey recently followed the approach taken by Washington.[14] Although Washington, California, and Arizona took different approaches to discriminatory peremptory challenges in the end, all three began with their state supreme court creating a task force and authorizing it to study the problem and to produce a report. Other states interested in addressing the problem of discriminatory peremptory challenges could take these steps as their starting point and then figure out which of the three approaches—or some other approach—might gain greater acceptance by the legal community in their state.

Race, as Barbara O'Brien and Catherine M. Grosso explain in *Judges, Lawyers, and Willing Jurors: A Tale of Two Jury Selections*, is a critical issue for juries not only because of who shows up to serve and who is removed through peremptory or for cause challenges, but also because of how the judge in each case conducts the questioning of prospective jurors during voir dire.[15] O'Brien and Grosso explore this issue by comparing two high-profile jury trials involving race. By focusing on how the judges in these two cases handled voir dire questions, O'Brien and Grosso identify steps that judges can take to reduce racial bias during voir dire. Judges in other states can learn

11. WASH. SUP. CT. R. 37 (2018).
12. *Id.* at 37(e).
13. *See* Marder, *supra* note 8, at 85.
14. *Id.* at 67 & nn.9-10.
15. Barbara O'Brien & Catherine M. Grosso, *Judges, Lawyers, and Willing Jurors: A Tale of Two Jury Selections*, 98 CHI.-KENT L. REV. 107 (2023).

from O'Brien and Grosso's analysis and try to adopt these practices in their own courtrooms.

O'Brien and Grosso, watching the recorded broadcasts of jury selection in these two high-profile cases, observed how each judge handled voir dire. They noted that even though the results were the same in both cases–the juries convicted all the criminal defendants–the jury selection processes differed dramatically. In the case of Derek Chauvin, a white former police officer charged with killing George Floyd, a Black man, Judge Peter A. Cahill permitted the attorneys to engage in rigorous questioning of the prospective jurors, and the jury that was seated consisted of six Black or multiracial jurors and six white jurors, even though the county has a white majority.[16] In contrast, in the case of Travis McMichael, Gregory McMichael, and William Bryan, three white men charged with killing Ahmaud Arbery, a Black man, Judge Timothy Walmsley used a hybrid system in which prospective jurors were questioned as a group and as individuals.[17] In the end, the defense removed eleven of the twelve Black prospective jurors with peremptory challenges. The prosecutors raised *Batson* challenges, but the judge did not find any *Batson* violations. Sixteen jurors were selected (including four alternates) and only one was Black, even though the county is twenty-six percent Black, and the initial venire was twenty-five percent Black.[18]

O'Brien and Grosso analyze the voir dire using several categories. These include rushed versus deliberative questioning; willingness to explore difficult topics (such as race) versus attempts to constrain these topics; and cooperation versus contentiousness between the judge and the attorneys. Based on their assessments, O'Brien and Grosso suggest that trial judges use a written questionnaire carefully tailored for the case and prepared in advance of the trial that allows for an understanding of prospective jurors' thoughts on race and racism. Trial judges can also include an individual voir dire of prospective jurors to elicit more candid responses, particularly on difficult subjects such as race.

O'Brien and Grosso's study of voir dire takes seriously the need for a careful and comprehensive voir dire consistent with the voir dire Nancy Gertner envisions in her *Foreword* to this Symposium.[19] Gertner, drawing from her years as a federal district court judge, urges judges to take the time

16. *Id.* at 113–14.

17. *Id.* at 115–16.

18. *Id.* at 117.

19. Nancy Gertner, *Foreword – A View from the Bench – Toward a Better Voir Dire: One Case at a Time*, 98 CHI.-KENT L. REV. 3 (2023).

necessary to question and to listen to prospective jurors during voir dire, particularly when difficult subjects such as race are at issue.[20]

B. New Developments in Lay Participation

Even in times of crisis, when institutions such as the jury are under pressure to change, there can still be developments that point to the resilience of juries and even their expansion into new places. It might require a wider lens to see these new developments, and thus, the Articles in this section look to lay participation in countries beyond the United States and consider not only jury systems but also other forms of lay participation, such as mixed courts (consisting of lay and professional judges), magistrates, and justices of the peace.[21] This section begins with the broadest view of lay participation worldwide, and then focuses on juries and other forms of lay participation in specific countries, including Argentina, Colombia, England and Wales (which share a legal system), and China.

In *Beacons of Democracy? A Worldwide Exploration of the Relationship Between Democracy and Lay Participation in Criminal Cases*, Sanja Kutnjak Ivković and Valerie P. Hans examine the connection between lay citizen participation in legal decision making and democracy.[22] Their Article also contrasts the links between democracy and lay participation for two forms of lay legal decision-making: juries and mixed courts.

To test empirically the potential link between the level of democracy and the presence of lay participation in criminal trials, Kutnjak Ivković and Hans rely on and expand their earlier work in developing a global lay participation database.[23] In the database, they found that 125 out of 195 (or 64%) of countries use lay people as decision makers in criminal cases.[24] Juries are used in fifty-six countries and mixed courts are used in seventy-one countries.[25]

To assess the relationship between a country's lay participation practices and its political characteristics, they draw on many measures related to democracy. They include the Polity5 score (which measures

20. *Id.* at 5–6.

21. Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy S. Marder, *Introduction* to JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE 1–2 (Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy S. Marder eds., 2021).

22. Sanja Kutnjak Ivković & Valerie P. Hans, *Beacons of Democracy? A Worldwide Exploration of the Relationship Between Democracy and Lay Participation in Criminal Cases*, 98 CHI.-KENT L. REV. 131 (2023).

23. Sanja Kutnjak Ivković & Valerie P. Hans, *A Worldwide Perspective on Lay Participation*, *in* JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 21, at 323, 324.

24. *Id.* at 334.

25. *Id.* at 358.

political regime characteristics) of each country and the Democracy Index (which provides a snapshot of the state of democracy for 165 independent states and two territories), as well as measures for judicial independence, political rights and civil liberties, indicators of voice and accountability, freedom of the press, rule of law, governmental political stability, and public-sector corruption. Although previous research was unclear about whether a systematic link exists between a country's democracy level and the presence of lay participation in the country, Kutnjak Ivković and Hans demonstrate that lay participation and democratization are related.[26] Countries exhibiting characteristics associated with a greater degree of democratization are more likely to have lay participation in their legal systems than countries with a lesser degree of democratization. They also found that, compared to mixed tribunals, juries seem to be more strongly and consistently associated with the existence of democratic regimes.[27] However, the authors caution that their work cannot address whether the relationship between democracy and legal decision making is causal.

In *The Arrival of the Civil Jury in Argentina: The Case of Chaco*, Shari Seidman Diamond, Valerie P. Hans, Natali Chizik and Andrés Harfuch describe a new development in Chaco, a province in Argentina, which passed a law providing for jury trials in civil and commercial cases.[28] The introduction of civil jury trials in Chaco arose at a time when lawmakers raised serious concerns about the lack of balance and fairness in the civil justice system. Chaco introduced criminal jury trials in 2019, but now it is the first province in contemporary Argentina to turn to juries to decide civil cases.

The jury statute in Chaco is an effort to provide transparency and efficiency in the resolution of civil disputes. The hope is that it will provide transparency because jury trials require public oral proceedings, and it will provide efficiency because jury trials can resolve disputes quickly compared to the lengthy civil dispute procedures that Chaco traditionally relied upon.

The legislature in Chaco, in drafting its Civil Jury Statute,[29] borrowed some elements from U.S. civil jury trials but also introduced elements that are tailored to its own needs, and which could, in turn, serve as models for the United States. For example, civil juries in Chaco consist of twelve members,[30] whereas in the United States only about two-thirds of the states

26. Kutnjak Ivković & Hans, *supra* note 22, at 157–58, 160.

27. *Id.* at 151 tbl.3 (showing more consistent relationships between democracy measures and jury trials than between democracy measures and mixed tribunals).

28. Shari Seidman Diamond, Valerie P. Hans, Natali Chizik & Andrés Harfuch, *The Arrival of the Civil Jury in Argentina: The Case of Chaco*, 98 CHI.-KENT L. REV. 163 (2023).

29. *Id.* at app. (providing excerpts of the statute in English).

30. *Id.* (Art. 6).

require twelve-member juries in at least some of their civil cases.[31] Chaco has gone a step further than the United States because the composition of the civil jury in Chaco requires gender parity (i.e., six male and six female jurors).[32] In addition, Chaco's jury statute requires that if one of the parties is an indigenous person, then half the jury must be selected from members of that indigenous community; if both parties are members of that indigenous community, then the entire jury must come from that community.[33] Chaco's civil juries, like its criminal juries, have to reach unanimous verdicts.[34] If a civil jury in Chaco has difficulty reaching an agreement, then it can send a note to the judge indicating the point on which it would like additional argument, evidence, or instructions. If a jury trial does end with a hung jury, then Chaco permits only one new trial,[35] unlike the United States, which does not impose any limitation on the potential number of new trials. Although it remains to be seen how Chaco's innovations will work in practice, they could serve as models for civil jury trials in the United States.

Turning to lay courts, another institution that depends on lay participants to decide cases, Jérémy Boulanger-Bonnelly, in *The Hybridization of Lay Courts: From Colombia to England and Wales*, provides a comparative study of justices of the peace in Colombia and lay magistrates in England and Wales.[36] He considers how these two different institutions, conceived of as non-professional and relying solely on lay people, have become more professional over time. He considers whether this process, which he labels "hybridization," enables the two institutions to remain competent and legitimate, or whether it undermines their unique contribution to lay justice.

Boulanger-Bonnelly notes that both lay magistrates and justices of the peace, whose positions had not traditionally entailed any significant legal training or experience in the past, have become more professional over time. Boulanger-Bonnelly discerned that they now undergo continuous training, have long terms of tenure, and are provided with legal support.[37] He explains that lay magistrates in England and Wales and justices of peace in Colombia have some features in common: the judges are local lay volunteers; they work on a part-time basis; and their task is to adjudicate disputes.[38] However,

31. *Id.* at 174.
32. *Id.* at app. (Art. 6).
33. *Id.* (Art. 7).
34. *Id.* (Art. 55).
35. *Id.*
36. Jérémy Boulanger-Bonnelly, *The Hybridization of Lay Courts: From Colombia to England and Wales*, 98 CHI.-KENT L. REV. 191 (2023).
37. *Id.* at 203–06.
38. *Id.* at 200.

they also have some differences: the lay magistracy has existed as an institution in England and Wales for centuries, and lay magistrates are volunteers who are appointed by local committees and sit on panels to hear criminal cases and some civil ones; in contrast, justices of the peace in Colombia are of more recent vintage than the lay magistracy of England and Wales and they are elected by the local populace to decide a range of criminal and civil matters.[39]

Boulanger-Bonnelly focuses on the ways in which both lay magistrates in England and Wales and justices of the peace in Colombia, who were selected as lay people untrained in the law, are now receiving some training, legal support, and lengthier terms of tenure, which, in his view, makes them a cross between professionals and lay people. To use his term, they are an example of hybridization. In addition, their institutions have become more fully integrated into the professional judicial systems, thus reinforcing their hybrid status. In spite of hybridization, however, Boulanger-Bonnelly suggests that this development, at least thus far, has left lay magistrates and justices of the peace still connected to their local communities and serving in roles that involve ordinary citizens in the administration of justice. He suggests that they still serve the fundamental goal of making the judicial process more welcoming and understandable to ordinary people.

Zhiyuan Guo, in *Lay Participation Reform in China: Opportunities and Challenges*, describes the ways in which lay participation by lay assessors, sitting with professional judges on mixed tribunals that hear civil, criminal, or administrative cases for trial, has become more meaningful in China since the amendment of the People's Assessor Law in 2018.[40] Although there had been sporadic inclusion of lay participation in the past, the 2018 amendment, followed by further interpretation of it in 2019, made several significant changes: lay assessors' minimum age to serve was increased so that they had greater experience and maturity; their required educational level was lowered to make the position open to more people in China; some (but not all lay assessors) are to be selected randomly by several different bodies; those who are selected must not have any prior legal training; and lay assessors typically serve for a five-year term and hear a limited number of cases and that number is made public.[41] The amendment also tried to make the contributions of lay assessors more meaningful by providing them with some training, as well as basic information about the case they are about to hear, including access to the case file. The goal was for lay assessors to be

39. *Id.*

40. Zhiyuan Guo, *Lay Participation Reform in China: Opportunities and Challenges*, 98 CHI.-KENT L. REV. 217, 217–18 (2023).

41. *Id.* at 231–36.

active participants during the trial as well as during the deliberations with the professional judges. To encourage lay assessors to give their views during the deliberations, the presiding judge, who is usually the only professional judge, is supposed to speak last.

Although there is little empirical data yet on how the changes for lay assessors are faring, Zhiyuan Guo raises several concerns. One potential problem is that the educational requirement of a high school diploma might still be too high because only thirty percent of the population on mainland China has achieved this level of education.[42] Another concern is that on seven-member grand mixed tribunals (consisting of four lay assessors and three professional judges), the lay assessors are supposed to vote only on factual issues,[43] but it is difficult to distinguish between factual and legal issues. Although this division of roles exists for seven-member panels, it is not the same for three-member panels, where lay assessors and the professional judge have shared responsibility to determine the facts and apply the law.[44] Whether these new seven-member panels will enhance lay participation in China remains an open question.

C. New Technologies and the Jury

When courts opted to conduct jury trials during the pandemic, they had to experiment with new technologies. In some courts, this meant convening in person in the courtroom (or courtrooms) and using a combination of social distancing, masks, and plastic barriers to try to keep everyone safe. In other courts, it meant going online to conduct jury trials in whole or in part.[45] Courts' experimentation with online proceedings required trial participants to gain experience with new technologies, such as Zoom. Judges, who are usually resistant to change but also attentive to their docket, had to reexamine their conception of a jury trial and which parts had to be in person and which did not.

In *Virtual Technology and the Changing Rituals of Courtroom Justice*, Meredith Rossner and David Tait consider more than the merely short-term technological fixes to the constraints the pandemic imposed. The authors travel to the courtroom of the future, which could be fully virtual, where participants are unaware of their actual surroundings.[46] Rossner and Tait

42. *Id.* at 244.

43. *Id.* at 245–46.

44. *Id.* at 246–47.

45. Valerie P. Hans, *Virtual Juries*, 71 DEPAUL L. REV. 301, 304–06 (2022) (describing different approaches that courts took to jury trials during the pandemic).

46. Meredith Rossner & David Tait, *Virtual Technology and the Changing Rituals of Courtroom Justice*, 98 CHI.-KENT L. REV. 251 (2023).

explain that there are three technological settings for court hearings: video-enabled hearings, where most of the participants are in the courtroom but an expert or witness might testify remotely, a type of procedure that has been used for the past twenty years; virtual hearings, in which a judge is in a physical courtroom and other trial participants appear online, or alternatively, all of the trial participants appear online (as sometimes happened during the pandemic); and an immersive virtual hearing in which a courtroom is recreated online and participants could "appear" as a hologram or an avatar and have eye contact with each other.

Rossner and Tait describe several studies that they conducted that provide some insights about virtual hearings. In one study, which they conducted in 2009, they used mock jurors to study remote witness testimony in different environments, including an expert testifying from a remote, small, windowless room, and an expert testifying from a larger, furnished meeting room, who appeared on a larger screen in the courtroom.[47] They also varied the rituals, such as starting the questioning immediately versus having an officer explain the proceedings and thank the witness for his or her testimony. In a 2017 study, they varied the conditions for how a criminal defendant was seen by mock jurors, including seated next to his counsel, in the dock, appearing on a screen, appearing on a screen along with multiple trial participants, and appearing on a screen with all participants except the judge who appeared in the courtroom.[48] In yet another study, they were able to test some of the features of an immersive virtual courtroom, such as allowing each participant to make eye contact with the other three participants.[49] Finally, Rossner, in her role as an evaluator of the U.K. Ministry of Justice's first pilot of fully virtual hearings, was able to collect data from actual participants in virtual settings in hearings at the Tax Tribunal and Civil and Family Court.[50]

Drawing on the findings from their three experimental studies and their data from select real-world virtual hearings, Rossner and Tait consider ways in which virtual hearings are useful or provide challenges. They learned that people could feel as if they are present with each other even when they are not physically present in the same brick-and-mortar courtroom. In other words, they can experience "presence," but this is distinct from "immersion," in which people forget their immediate surroundings.[51] These two terms, drawn from the gaming and information technology literatures, can also be

47. *Id.* at 257.
48. *Id.* at 258–59.
49. *Id.* at 259.
50. *Id.* at 259–60.
51. *Id.* at 260–62.

used to describe how participants focus on a virtual hearing. The people need to be focused on the hearing, but still aware of their local surroundings so that they can be aware of who is in the room with them, where their documents are, and how to adjust the settings on their computer.

One challenge with virtual hearings is that there are no clear spatial cues, hierarchies, or designated positions. The U.K. virtual hearings pilot program incorporated some design cues, such as clicking through a series of pages that brought the participant to a waiting room prior to the hearing, thus helping participants to distinguish the online hearing from everyday online activities. Judges who participated in this pilot program received judicial training on how to adapt to a virtual hearing setting, such as by using the parties' names, ensuring that the parties know whose turn it is to speak, speaking slowly, and being attuned to technical difficulties as soon as they occur.

Another challenge is that participants might experience more or less empathy using different technologies. The virtual hearing setting and the immersive setting seemed to result in participants having less empathy for one of the litigants. There is also the challenge of making sure that the judge is viewed as an authority figure, even when he or she appears at a virtual hearing, such as the U.K. virtual hearings pilot program. Even when judges reminded participants that the virtual hearing was a formal proceeding, judges worried that the virtual hearing would be seen as less legitimate by participants. Finally, Rossner and Tait present evidence suggesting that people who are actively engaged in a virtual space experience it differently from passive observers of a virtual space and this could have implications for future studies.

II. DIRECTIONS FOR FUTURE JURY RESEARCH

The three broad topics explored in this Symposium—race and the jury, new developments in lay participation, and new technologies and the jury—suggest directions for future jury research. There is a need not only for research but also for courses that will attract and develop the next generation of jury scholars.

A. A Research Agenda

1. Race and the jury

The intersection of race and the jury raises many questions in need of research. As Rose and Musick's work indicates, state courts need to collect data about who is showing up for jury duty and who is actually serving on juries, and they need to do so in a methodologically sound way. States can

do what New Jersey did and seek help from jury scholars trained in the data sciences who are able to make administrative data usable for analyses. Ideally, state courts would borrow methods from other state courts to create some consistency in measurement and data collection practices, which would allow for cross-state comparisons.

State courts can also learn from each other's experiences in how to address discriminatory peremptory challenges. Discriminatory peremptory challenges remain a persistent problem and because the U.S. Supreme Court has declined to reexamine its *Batson* test, it remains up to the states to take action against discrimination. When each state supreme court or state legislature decides to address discriminatory peremptory challenges, there is a need for jury scholars to see which approaches work and which ones do not. So far, only a few states have acted, but there might eventually be fifty "laboratories" for jury scholars to study if the states follow Justice Brandeis's advice and engage in state experimentation.[52]

Peremptory challenges are not the only juncture during a jury trial when racial discrimination is an issue. O'Brien and Grosso's work also points to the challenge that judges face in conducting voir dire and figuring out the best way to question prospective jurors so that they are willing to reveal their biases to the extent that they are aware of them. Of course, one problem is that implicit biases are biases that people are not aware of, and they affect everybody, albeit in different ways; thus, no actor in the courtroom is immune to them.[53]

One area in need of further exploration is the role of implicit bias in the courtroom and how best to address it. Although there is a growing literature on implicit bias,[54] more research needs to be done. Some researchers have looked at judges and implicit bias,[55] and some courts have responded by providing judges with judicial training on implicit bias.[56]

Courts also need to consider how best to help prospective jurors learn about implicit bias. Jurors, unlike judges, serve only briefly, yet they need to understand how implicit bias might affect their decision making as jurors. To date, some courts have responded by providing an orientation video or

52. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

53. *See, e.g.*, Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (describing the research on implicit bias and its applications to the courtroom).

54. *See, e.g.*, *id.*; Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017).

55. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

56. *See, e.g.*, NANCY S. MARDER, THE POWER OF THE JURY: TRANSFORMING CITIZENS INTO JURORS 39 n.108 (2022).

jury instructions on implicit bias. For example, courts in New York State and the Western District of Washington show prospective jurors an orientation video on implicit bias as they wait in the Jury Assembly Room.[57] Some judges in these and other states also give jury instructions about implicit bias.[58] However, the results of empirical studies attempting to assess whether jury instructions on implicit bias are effective have been mixed.[59] Thus, there is a need for more empirical testing. It might be that instructions about implicit bias can be more effective depending on their length, how they are presented, and whether jurors can ask questions. There is also a need for other ways to teach jurors about implicit bias. One retired judge, Mark Bennett, recommended that judges take a holistic approach to teaching jurors about implicit bias. He tried to take such an approach in his own courtroom when he was a federal district court judge.[60] Lawyers and court staff also need to learn about implicit bias and how it might shape their behavior in the courtroom.[61]

Since everyone has implicit biases, the question is how to become more aware of them. The challenge is particularly acute in settings such as the courtroom where judge and jury participate in decision making that has serious consequences—sometimes life or death—for the parties.

2. New Developments in Lay Participation

As countries around the world introduce or expand the use of lay participation within their borders, there is a growing need for jury scholars to study these new developments and assess how they are working, and if these new efforts are successful, to suggest how they can be introduced in other countries with similar needs.

57. *See Understanding the Effects of Unconscious Bias*, W. DIST. OF WASH., http://www.wawd.uscourts.gov/jury/unconscious-bias [https://perma.cc/3UWX-BMXW]; *Jury Service and Fairness: Understanding the Challenge of Implicit Bias*, N.Y. STATE UNIFIED CT. SYS., http://wowza.nycourts.gov/vod/vod.php?source=ucs&video=2021-JuryServiceFairness.mp4 [https://perma.cc/3XJF-Q2TS].

58. *See, e.g.*, ILL. SUP. CT. COMM. ON JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS – CIVIL § 1.08 (2019-2020 ed.) (instructing jurors to "help each other to resist[] any urge to reach a verdict that is influenced by bias for or against any party or witness"); W. DIST. OF WASH., CRIMINAL JURY INSTRUCTIONS – IMPLICIT BIAS, https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf [https://perma.cc/7CWL-537Q].

59. *See, e.g.*, Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 CT. REV. 116 (2015); Jennifer K. Elek & Paula Hannaford-Agor, *First Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190 (2013).

60. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010).

61. *See, e.g.*, NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 25, 62-63, 92 (2016).

Although there has been ongoing and rigorous study of the growth of juries in provinces in Argentina by a team made up of Argentine and American jury scholars and jury advocates, there is a need for further study with each new development. For example, the introduction of the civil jury in Chaco—the first province to implement a civil jury in contemporary Argentina—might serve as a model for other countries, such as Japan. Japan has *saiban-in seido* (lay citizens working with professional judges to decide verdicts and sentencing in criminal cases).[62] Okinawa, for example, might benefit from the introduction of a civil version of the *saiban-in*.[63] Jury scholars can examine what works in one country and see if it might work in other countries. Jury scholars can also observe features that are tailored to one locale, such as an equal number of men and women on civil juries in Chaco, and suggest that states in the United States experiment with such an adaptation, though what works in one place might not always work in another.

There is also an ongoing need to know about new developments in lay participation around the world. Kutnjak Ivković and Hans spent ten years building their database. They did an extensive outreach on their own to learn about the different forms of lay participation in countries around the world. At the same time, they also made use of the work that had been done by earlier scholars of lay participation who had undertaken surveys of lay participation in specific countries or regions of the world. One generation of jury scholars builds upon the work of an earlier generation.

Kutnjak Ivković and Hans used their database to explore the relationship between lay participation and democracy, and whether having a lay participation system supports democratic practices. Although the findings in their Article in this Symposium suggest that there is a connection between juries and democratization, their work does not address whether the relationship is causal. The answer to that fascinating question is one that jury scholars need to grapple with in future research.

Kutnjak Ivković and Hans' work reminds readers that lay participation takes several different forms, and Boulanger-Bonnelly's work studying lay magistrates in England and Wales and justices of the peace in Colombia, and Zhiyuan Guo's work examining lay assessors on mixed courts in China, provide detailed analyses of the ways that these different forms of lay

62. Dimitri Vanoverbeke & Hiroshi Fukurai, *Lay Participation in the Criminal Trial in Japan*, *in* JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 21, at 69.

63. *Id.* at 79 (noting Okinawan attorney Toshio Ikemiyagi's suggestion that "now is the time to introduce the American-style, all-citizen jury system in both criminal and civil cases" in Okinawa); *see also* MATTHEW J. WILSON, HIROSHI FUKURAI & TAKASHI MARUTA, JAPAN AND CIVIL JURY TRIALS: THE CONVERGENCE OF FORCES 74 (2015) (advocating the introduction of lay participation in civil cases in Japan).

participation work in particular countries. However, there are many forms of lay participation (juries, mixed courts, magistrates, justices of the peace, and lay courts) in 125 of the 195 countries that use laypeople as legal decision makers in criminal cases, as Kutnjak Ivković and Hans have described.[64] All these countries' different forms of lay participation are in need of study and documentation. Several global projects on lay participation rely on the laws on the books; it is also important to understand how institutions of lay participation operate in practice. For example, a country might have a law on the books that provides the option of trial by jury, yet jury trials might occur only in rare instances.

American jury scholars often focus on American juries, but the work of jury scholars in other countries examining how well their juries work enables jury scholars to understand jury systems beyond the borders of the United States. Spain, for example, passed its Jury Law in 1995.[65] Mar Jimeno-Bulnes has assessed the Spanish jury system as it has developed since then.[66] At the 2022 Global Meeting in Lisbon, Jimeno-Bulnes organized a panel of Spanish jury scholars, judges, and practitioners who presented their views on the Spanish jury system and who did so in Spanish. As a result, the papers presented at this panel, "The Spanish Jury at the Crossroads: Origin, Participants and Verdict/El Jurado Español en La Encrucijada: Origen, Participantes y Veredicto," will be included in a book about the Spanish jury written for a Spanish audience.[67] The Argentine and American scholars working together have also published in Spanish and English.[68] To disseminate scholarly knowledge broadly, jury scholars in other countries need to reach audiences in their own country, which they do when they publish in their own language.

64. Kutnjak Ivković & Hans, *supra* note 23, at 334.

65. Ley Orgánica del Tribunal del Jurado (B.O.E. 1995, 122) (Spain). It became effective on November 24, 1995 and was amended by Organic Law 8/1995 (B.O.E. 1995, 275) and by Organic Law 10/1995 (B.O.E. 1995, 281).

66. *See, e.g.*, Mar Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 86 CHI.-KENT L. REV. 585 (2011).

67. EL JURADO ESPAÑOL EN LA ENCRUCIJADA: ORIGEN, PARTICIPANTES Y VEREDICTO (Mar Jimeno-Bulnes ed., forthcoming).

68. For example, Ad Hoc Publishers in Buenos Aires has published collections of two of the co-editors' English-language writings, translated into Spanish: LAS MÚLTIPLES DIMENSIONES DEL JUICIO POR JURADO: ESTUDIOS SOBRE EL COMPORTAMIENTO DEL JURADO (Shari S. Diamond ed., 2016); EL JUICIO POR JURADOS: INVESTIGACIONES SOBRE LA DELIBERACÍON, EL VEREDICTO Y LA DEMOCRACIA (Valerie P. Hans & John Gastil eds., 2014). An earlier version of the Diamond et al. article in the current volume will appear in Spanish in LECTURES ABOUT THE CIVIL JURY (forthcoming). For an example of a collaboration by American and Argentine jury scholars and practitioners published in English, see Vanina G. Almeida, Denise C. Bakrokar, Mariana Bilinksi, Natali D. Chizik, Andrés Harfuch, Lilián Andrea Ortiz, Maria Sidonie Porterie, Aldana Romano & Shari Seidman Diamond, *The Rise of the Jury in Argentina: Evolution in Real Time*, *in* JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 21, at 25.

3. New Technologies and the Jury

In the wake of the pandemic, another question that jury scholars need to consider is what needs to take place in the courtroom and what can take place online. Although this question did not begin with the pandemic, the pandemic forced courts to make use of technology in ways that they would not have done otherwise. Now that courts have gained some experience with virtual hearings, are there some practices that are useful to continue online?

Rossner and Tait's research focuses on the intersection of courts and technology. Although the immersive platform that Rossner and Tait mention is not yet available, courts appear to be ready for some proceedings to be held remotely, such as the U.K. virtual hearings pilot program. Rossner and Tait's past studies offer insights into how participants experience being present in a brick-and-mortar courtroom versus how they experience being present in a virtual hearing. The experiences are not identical, and their studies help to explore the differences. Although courts are likely to move slowly in the direction of virtual hearings, in spite of their experience during the pandemic, there might be some parts of a jury trial in the post-pandemic times that can incorporate remote participants to everyone's benefit. For example, in the Superior Court of Justice in Toronto, Canada, a young witness who was sexually assaulted was able to testify via Zoom. This allowed her to be seen by everyone in the courtroom, including the criminal defendant, without her having to see the defendant.[69] Although the experience of being in a brick-and-mortar courtroom is not the same as being in a virtual courtroom at least at this time, jury scholars need to do research, as Rossner and Tait have done, to try to understand the differences between the two experiences,[70] particularly as technologies keep changing. Jury scholars need to keep asking the question: What is lost and what is gained when jury trials do not take place in the courtroom?

B. Teaching and Reaching the Next Generation of Jury Scholars

Research on new technologies and the jury is a topic that could attract junior scholars to the field. After all, a generation that grew up with the Internet, laptop computers, smartphones, and social media is well-suited to explore the many ways that technology can enhance or endanger the jury experience. Today's jury scholars need to think about developing the next

69. *See, e.g.*, R. v. Andall, (2022) (Can. Ont. Super. Ct. J.) (observing jury trial) (notes on file with Nancy S. Marder).

70. *See, e.g.*, Hans, *supra* note 45, at 323-25, 328-30 tbl.1 (comparing in-person mock jury trials before the pandemic and online mock jury trials during the pandemic, using the same trial video, and finding few differences).

generation of jury scholars. What will encourage them to enter the profession and what are the skills that they need to have?

Although jury trials are few in number,[71] they continue to attract widespread public attention. Jury trials are riveting because they are based on human drama. Some of the high-profile jury trials can be used to pique students' interest in the jury. Professors can use voir dire transcripts, jury instructions, and video clips from these high-profile jury trials to bring the jury to life in the classroom. They can bring in lawyers, judges, former jurors, and jury consultants to discuss their roles. They can also send students into courthouses to observe jury trials and gain firsthand experience about how juries work.[72] Law professors need to offer courses on the jury and many do. Another possibility is to offer a short, intensive jury course during the winter intersession. In law schools that have intersession courses, the professor and students can focus entirely on the jury course; such intensive, focused study can be an advantage for both students and professor alike.[73]

Although the next generation will need many of the same skills that jury scholars have always needed, they also will need some new ones to continue to build the field. In addition to legal research on laws on the books, there is a need for empirical work to study law in action, which requires quantitative and qualitative skills. There is also the need for jury scholars who do theoretical work as well as those who contribute practical, hands-on recommendations and reforms. But what is different is that jury scholars will need familiarity with new technologies so that they can ask how courts can use technology to aid jurors in their role.

C. Ongoing Collaborations

Collaboration is the key to current and future research on the jury. As Satoru Shinomiya described in his *Foreword*, he was aided in his efforts to bring *saiban-in seido* to Japan by relying on "a [lot of] help from [his] friends."[74] Collaboration takes place from one generation of jury scholars to the next. Each of us who writes about the jury today depends on jury research that has been done by earlier jury scholars. Each of us who is a jury scholar

71. *See, e.g.*, Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119 (2020); Mark Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7; Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

72. *See, e.g.*, The American Jury, Chicago-Kent College of Law (Winter Intersession Course 2023) (providing for students to go into local courtrooms to observe jury selection) (course syllabus and courtroom observation template on file with Nancy S. Marder).

73. *See id.*

74. Satoru Shinomiya, *Foreword – A View from the Bar - A Long and Winding but Lucky Road to Lay Participation in Japan*, 98 CHI.-KENT L. REV. 7, 11 (2023) (quoting THE BEATLES, *With a Little Help from My Friends*, *on* SGT. PEPPER'S LONELY HEARTS CLUB BAND (EMI 1967)).

today depended on mentors to show us the way, just as Shinomiya depended on his friends. We, in turn, have to serve that function for the next generation of jury scholars.

There are many ways to collaborate. This Symposium came about through the collaboration of members of the Law and Society Association's CRN and IRC network on lay participation in legal decision-making. For more than two decades, the members of this network have met at LSA's annual meetings, organized panels on jury scholarship, and exchanged ideas. Although we come from different countries and disciplines, we share a common interest in lay participation. This common interest has led us to collaborate in shared projects—from specialized jury conferences[75] to jury symposia publications[76] to jury books.[77]

Another way that jury scholars can collaborate is by creating repositories of work on the jury that jury scholars in other countries can access and use to advance their own research agendas. These jury scholars might not be able to travel to LSA's annual meetings, but they can find out what took place at those meetings, who is working on which research topics, and what publications are available in their area of research. Websites hosted by some of our respective universities enable us to share this jury scholarship with anyone who has access to the Internet.[78] This is an example of technology and the jury that has no downside.

CONCLUSION

The pandemic forced courts to experiment with new versions of jury trials that included in person, online, or a combination of both. Some of the changes in the courtroom, such as the masking, social distancing, and transparent barriers, proved temporary once the pandemic lessened. Other changes, such as conducting some parts of the jury trial remotely, proved useful and will continue in some limited ways. The topics addressed in this Symposium, including race and the jury, new developments in lay

75. *See, e.g.*, Nancy S. Marder & Valerie P. Hans, *Introduction* to *Juries and Lay Participation: American Perspectives and Global Trends*, 90 CHI.-KENT L. REV. 789, 791-800 (2015) (describing two jury conferences, one held in Oñati, Spain and the other at Chicago-Kent College of Law, and the main issues that sparked debate among attendees).

76. *See id.* at 824 n.193 (listing several symposia).

77. *See, e.g.*, JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE, *supra* note 21.

78. *See, e.g.*, *Lay Participation in Law*, CORNELL L. SCH., https://www.lawschool.cornell.edu/academics/centers-programs/lay-participation-in-law/ (providing information about the members and activities of the CRN and IRC networks on Cornell Law School's website); *The Justice John Paul Stevens Jury Center*, IIT CHI.-KENT COLL. OF L., https://www.kentlaw.iit.edu/law/faculty-scholarship/centers-institutes/justice-john-paul-stevens-jury-center (providing a select annotated bibliography of jury scholarship and a repository of symposia on the jury published by *Chicago-Kent Law Review*).

participation, and new technologies and the jury, are longstanding issues with the jury. A crisis such as a pandemic can heighten some of these issues, but it can also point to the resilience of the jury and the novel ways in which it can move forward. Perhaps the jury is resilient, not because it avoids all change, but because it changes in small, incremental steps over time.[79]

79. *See, e.g.*, Gertner, *supra* note 19, at 6 (describing small, incremental improvements in voir dire, one case at a time).