BILL C-75 & JURY SELECTION

RECOMMENDATIONS ON JURY SELECTION AND FOR GREATER REPRESENTATIVENESS

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ISSUES TO BE ADDRESSED

1) What is the effect of preserving s. 638(1)(c) of the *Criminal Code* which excludes citizens from jury duty based solely on a criminal conviction?

2) Should peremptory challenges be preserved?

3) Is there any reason to change the challenge for cause procedure?

FINAL RECOMMENDATIONS:

As Our Jury System Ought to be as Representative as Possible:

1) Eradicate s. 638(1)(c) of the *Criminal Code*

- The use of criminal records as a means to automatically exclude citizens, in synergy with provincial juries acts,[1] represents an exclusion of up to 3.8 million Canadians[2], or more than 10 % of the population. Eradicating s. 638(1)(c), in correlation with a modified s. 626, would increase juror eligibility by as much as 3.8 million.

[1] See, for example, Ontario's *Juries Act*, RSO 1990, c J.3, s 4(b): A person is ineligible to serve as a juror who, (b) has been convicted of an offence that may be prosecuted by indictment, unless the person has subsequently been granted a pardon.

[2] Public Safety Canada, *2015 Corrections and Conditional Release Statistical Overview*, online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2015/index-en.aspx>: "Approximately 3.8 million Canadians have a criminal record**, but less than 11.0% of people convicted have received a pardon/record suspension."

- Any potential juror can already be challenged, as not being indifferent as between the Queen and an accused, pursuant s. 638(1)(b) of the *Criminal Code*; cause (i.e. actual proof) must be shown and accepted by static or rotating triers in order for citizens to be disqualified.[3] s. 638(1)(c) is therefore superfluous.

- Expand s. 626 of the *Criminal Code*, to read:

  > 626(3) Notwithstanding any law of a province referred to in subsection (1), no citizen may be disqualified, exempted or excused from serving as a juror in criminal proceedings merely on the basis of having an unpardoned criminal record.

2) Preserve Peremptory Challenges, but add Judicial Oversight (*Batson* challenge)

- Aboriginals, and other visible minorities, are overrepresented in the criminal justice system. This means, lamentably, that they are disproportionately the accused (and often thereby excluded from jury duty thereafter, as a result!). In those circumstances, to quote *R. v. Sherratt*, *infra*: "[p]eremptory challenges can also, in certain circumstances, produce a more representative jury depending upon both the nature of the community and the accused."

- Adopt Recommendation 15 of the *Iacobucci Report*, 2013, *infra*, and thereby legislate judicial oversight of the issuance of peremptory challenges, akin to what is done in the USA, re *Batson* challenges.

- Modify s. 629 of the *Criminal Code*, and make challenges to the array more viable.

3) Preserve the Challenge for Cause Procedure

- The procedure is well over one hundred years old; the proposed changes are not responsive to any known issue.

4) Convene a Federal Non-Partisan analysis of the Jury System in Canada

- The last non-partisan study of the jury system was the Law Reform Commission in 1980. This should be undertaken prior to any substantive changes to trial procedure.

INTRODUCTION

Trial by Jury is a critical and constitutional part of our criminal justice system. The Law Reform Commission in 1980 stated:

[3] If it is presumed that a person with a criminal record is biased, then such a presumption should be legislatively rebutted. Proof of such a bias should be required, as it is for the exclusion of other citizens, before a Canadian is denied their civic duty.

> Trial by jury is a fundamental institution, a veritable "rock of ages", in our system of criminal justice in Canada. The Law Reform concludes that there is good reason—historic, political, intellectual & pragmatic—to retain the jury system with but few substantial changes.[4]

Two years later, the *Charter of Rights and Freedoms* guaranteed "the benefit of trial by jury" for any person accused of a crime who faces 5 years or more in jail.[5] The constitution also mandates that a jury will be an independent, and impartial tribunal.[6] A jury must also be representative.

"Representativeness"

In *R v Sherratt*,[7] the Supreme Court explained the importance of "representativeness":

> The perceived importance of the jury and the Charter right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place.

In 2015, an Aboriginal man appealed his conviction by an all-white jury, at issue was the representativeness of his jury. As such, the Supreme Court had occasion to further define "representativeness." In *R v Kokopenance*:[8]

> Representativeness is an important feature of the jury; however, its meaning is circumscribed. What is required is a "representative cross-section of society, honestly and fairly chosen": *R. v. Sherratt*, [1991] 1 S.C.R. 509, at p. 524. There is no right to a jury roll of a particular composition, nor to one that proportionately represents all the diverse groups in Canadian society. **Courts have consistently rejected the idea that an accused is entitled to a particular number of individuals of his or her race on either the jury roll or petit jury**: *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.), at pp. 120-21; *R. v. Laws* (1998), 41 O.R. (3d) 499 (C.A.), at pp. 517-18; *R. v. Kent* (1986), 27 C.C.C. (3d) 405 (Man. C.A.), at pp. 421-22; *R. v. Bradley (No. 2)* (1973), 23 C.R.N.S. 39 (Ont. S.C.), at pp. 40-41. As Rosenberg J.A. observed in *Church of Scientology*, at p. 121, **"[w]hat is required is a process that provides a platform for the selection of a competent and impartial petit jury, ensures confidence in the jury's verdict, and contributes to the community's support for the criminal justice system**.[9] [emphasis added].

The Court went on to clarify that representativeness is about how a *province* constitutes a jury roll. To that end, the Court expanded:

> …representativeness is about the process used to compile the jury roll, not its ultimate composition. To date, the jurisprudence has discussed two key features of the jury roll process that ensure representativeness: the use of source lists that draw from a broad cross-section of society, and

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[4] Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials* by Chairman Francis Muldoon (Ottawa: Minister of Supply and Services Canada, 1980) at 1.
[5] *Constitution Act, 1982*, s 11(f), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[6] *Constitution Act, 1982*, s 11(d), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[7] *R v Sherratt*, [1991] 1 S.C.R. 509 [*Sherratt*].
[8] *R v Kokopenance,* [2015] 2 SCR 398 [*Kokopenance*].
[9] *Ibid* at para 39.

> random selection from those sources (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 20; *Sherratt*, at p. 525; *Church of Scientology*, at p. 121). I would add a third feature to this list, namely, the delivery of notices to those who have been randomly selected. A jury roll is representative when these three features are present, provided that the state has not deliberately excluded members of a particular group. This process aims to ensure [page425] that there is an opportunity for individuals with varied perspectives to be included on the jury: *Church of Scientology*, at p. 122. It also seeks to preclude systemic exclusion of segments of the population: *ibid.*, at pp. 122-24.

The concept of "representativeness" is the sum of: i) the process employed to assemble a jury roll, (ii) the process employed to randomly select possible jurors from that roll, and (iii) the process employed for delivering notices to those who are randomly selected. Of the foregoing, all three are delegated to the provinces, as per the division of powers at s. 92(14) of the *Constitution Act, 1867*.[10]

If Bill C75 seeks to improve representativeness, it must collaborate more with the provinces, who are most responsible for this component of the jury trial. This also means that representativeness can only be marginally addressed by Parliament. To that end, some healthy skepticism ought to be employed about federal legislation which seeks to modify well-entrenched trial procedures in the name of "representativeness."[11]

Some of the proposed amendments in Bill C75, however, can be calibrated so the two levels of government are working, hand in gauntlet, to achieve more representative jury pools, which will inexorably result in more representative petit juries, and thereby increase public confidence in the jury system.

1. Eradicate s. 638(1)(c) of the *Criminal Code*

Section 638(1)(c) of the *Criminal Code*, allows for any potential juror to be excluded if it is shown that they been convicted of an offence for which they were sentenced to death, or received a jail sentence of twelve months or more. No proof is required that the citizen is actually bias; proof of bias is a separate and discrete cause for exclusion of potential jurors, as per s. 638(1)(b) of the *Criminal Code*.

Bill C75 seeks to modify the wording of s. 638(1)(c), by removing "was sentenced to death or to a term of imprisonment exceeding twelve months", so it would now read:

> a juror has been convicted of an offence for which they were sentenced to a term of imprisonment of two years or more and for which no pardon or record suspension is in effect.

Parliament thus seeks to exclude all citizens with a criminal record, which satisfy the conditions listed in s. 638(1)(c). There is no reference to the type of offence, nor how long ago it may have

[10] The province is responsible for "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

[11] Mr Justice Felix Frankfurter, writing for the US Supreme Court in *McNabb v United States*, 318 U.S. 332 (1943)): "…the history of liberty has largely been the history of the observance of procedural safeguards."

been in the past. The mere fact of having a criminal record for a non-descript criminal offence, which resulted in a penitentiary sentence, is thereby permitted as the basis for denying an accused the benefit of these perspective, and simultaneously deprives the impugned citizens of their civic duty.

If this provision is considered in conjunction with the fact that every province (except Saskatchewan) excludes free citizens, based on a criminal record, one begins to appreciate the magnitude of the unjustified exclusion. In Ontario, for example, the *Juries Act*, R.S.O. 1990, c. J.3 states:

> *Ineligibility for personal reasons*
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> *4. A person is ineligible to serve as a juror who, (b) has been convicted of an offence that may be prosecuted by indictment, unless the person has subsequently been granted a pardon. R.S.O. 1990, c. J.3, s. 4; 2009, c. 33, Sched. 2, s. 38 (1).*

The foregoing is broader than s. 638(1)(c). In Ontario, a citizen with a record for an indictable offence, who has done no jail time, would be excluded. Between both levels of government, legions of citizens are being deprived for no justiciable reason. In 2009, the RCMP estimated that 3.8 million Canadians have a criminal record.[12] It is also well accepted that certain racialized communities are overrepresented in the criminal justice system. Unsurprisingly, involvement in the criminal justice system often translates into a criminal record. If a criminal record is used to screen potential jurors, then the communities which are overrepresented in the criminal justice system will correspondingly be underrepresented on jury rolls.

In *R v Kokopenance*, the Supreme Court held:

> That said, if the state deliberately excludes a particular subset of the population that is eligible for jury service, it will violate the accused's right to a representative jury, regardless of the size of the group affected. It is self-evident that the state will not have made reasonable efforts if it deliberately excludes part of the population.[13]

Criminal records are being used to exclude subsets of the population—this ought to be addressed by legislators. Why does a criminal record make a citizen not worthy of consideration for jury duty? The unstated basis for the exclusion is that people with criminal records cannot be trusted, or are biased against the state. In either case, this a stereotype. Is there any proof that can justify depriving citizens of this civic right, simply because of a certain type of mistake in the past? If there is proof of bias, then s. 638(1)(b) of the *Criminal Code* allows for cause to be shown, and if accepted, to serve as a basis for exclusion; s. 638(1)(c), is therefore superfluous.

Additionally, the notion that addressing criminal records as a basis for exclusion could increase representativeness was addressed in the *Iacobucci Report*, 2013. Specifically:

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[12] *Supra* note 2.
[13] *Supra* note 8 at para 66.

> **RECOMMENDATION 14**: the Ministry of the Attorney General, in consultation with the Implementation Committee, adopt measures to respond to the problem of First Nations individuals with criminal records for minor offences being automatically excluded from jury duty by:
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> a. amending the J*uries Act* provisions that exclude individuals who have been convicted of certain offences from inclusion on the jury roll, to make them consistent with the relevant *Criminal Code* provisions, which exclude a narrower group of individuals

With great respect to the Honourable Frank Iacobucci, the recommendation to have s. 4(b) of the *Juries Act* mirror s. 638(1)(c) of the *Code* still accepts the speculative position that because a person has a criminal record, and has gone to jail for one (or two years), they are therefore incapable of being fair, unbiased, or trusted. How can that be true?[14] A past mistake alone should not serve as a blanket reason to exclude such a large number of citizens. To that end, s. 638(1)(c) should be eradicated and s. 626 of the *Code*, in keeping with Recommendation 14, amplified to read:

> 626(3) Notwithstanding any law of a province referred to in subsection (1), no citizen may be disqualified, exempted or excused from serving as a juror in criminal proceedings merely on the basis of having a criminal record

In this way, both levels of government are collaborating to ensure that jury rolls are as representative as possible, which is in everyone's interest.

Excluding citizens with a criminal record not only affects the accused—it deprives citizens of their democratic rights, akin to those guaranteed by s. 3 of the *Charter*:

> DEMOCRATIC RIGHTS OF CITIZENS: 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The foregoing constitutional right is not qualified if a citizen has a criminal record, has done or is doing, "time" in the penitentiary.[15] In principle, voting, military service and jury duty, are among the highest acts of citizenship. The only one of those acts of citizenship that is automatically denied to our citizens based on a criminal record is jury duty.

We are talking simple math. Up to 3.8 million citizens will become eligible to serve on a jury, and with those views, jury rolls will be that much more representative of the community's conscience.

Finally, the fact that Bill C75 is preserving s. 638(1)(c) seems flat out inexplicable given the *Charter* statement:

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[14] Mr. Justice Brandeis' dissent in *Olmstead v United States,* 77277 U.S. 438 (U.S. Sup. Ct., 1928), is apt:
The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; **no record of crime, however long, makes one an outlaw**. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress.

[15] See *Sauve v Canada (Chief Electoral Officer),* 2002 SCC 68, 218 DLR (4th) 577.

> Service on juries has historically been viewed as one of the duties that are corollaries to the rights associated with citizenship. Jurors are required to be citizens because, as triers of fact in a criminal trial, they are directly participating in an adjudicative decision and are involved in the process or structure of government (broadly defined). The requirement for jurors to be Canadian citizens facilitates jurors' important function in the criminal justice process and enhances the accused's and public's confidence in the jury.[16]

Eliminate s. 638(1)(c) of the *Code*.[17]

2. Do Not Eliminate Peremptory Challenges

The Federal government's comments following the jury's acquittal of Mr. Gerald Stanley, ("we have to do better")[18] were quickly followed up by Bill C75, and the proposal to eliminate peremptory challenges. At issue for many is the fact that Mr Stanley was tried by an all-white petit jury, which was shaped by the accused's issuance of some 5 peremptory challenges to potential jurors that appeared Aboriginal—the *deceased* was Aboriginal.

The idea that an *accused* person has a right to a particular number of individuals of his or her race on a jury has been consistently rejected by the courts.[19] Furthermore, the Supreme Court confirmed that representativeness is about the *accused* receiving a fair trial, in appearance and reality:

> …it must be remembered that the right to a representative jury is an entitlement held by the accused that promotes the fairness of his or her trial, in appearance and in reality.

Representativeness is, therefore, a shield for an *accused* person, not a sword for the prosecution or for political gain. In that vein, the Supreme Court speaks about representativeness informing trial fairness, both in reality and in appearance.

One of the major justifications for peremptory challenges is that they inform trial fairness, from an accused's perspective, at the very least in appearances. Justice must not only be done, it must appear to be done[20] An accused, has very little control over the trial process; peremptory challenges give an accused some sense of fairness or control in selecting the citizens who will decide his fate.

Here are a few non-partisan perspectives on peremptory challenges:

- The Law Reform Commission, 1980:

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[16] Charter Statement—Bill C75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other acts and to make consequential amendments to other acts (29 March 2018), online: < http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c75.html>

[17] For further reading on the topic, see: Michael A. Johnston, *The Automatic Exclusion from Juries of Those with Criminal Records Should be Ruled Unconstitutional*, (2015) 17(2) C.R. 335.

[18] Bill Graveland, "'We have to do better': Trudeau reacts to Gerald Stanley verdict" *CTV News*, (10 February 2018), online: <https://www.ctvnews.ca/canada/we-have-to-do-better-trudeau-reacts-to-gerald-stanley-verdict-1.3798036>.

[19] *Supra* note 3 at para 39.

[20] See for e.g.: *Chatel v. The Queen*, [1985] 1 S.C.R. 39, at para. 13.

> The number of peremptory challenges for all offences should be increased. This will meet some of the objections raised by abolition of the stand asides. It can also be noted that this number is still well below the number permitted at common law, that is, 35. The peremptory challenge has been attacked and praised. Its importance lies in the fact that justice must be seen to be done. The peremptory challenge is one tool by which the accused can feel that he or she has some minimal control over the make-up of the jury and can eliminate persons for whatever reason, no matter how illogical or irrational, he does not wish to try the case.[21]

- In 1991, in *R v Sherratt*, the Supreme Court held:

> …While it may be, in some instances, that the peremptory challenges allocated to the accused and the Crown, and the Crown's additional right to stand aside, will be used by the parties to alter somewhat the degree to which the jury represents the community, peremptory challenges are justified on a number of grounds. The accused may, for example, not have sufficient information to challenge for cause a member of the panel he/she feels should be excluded**. Peremptory challenges can also, in certain circumstances, produce a more representative jury depending upon both the nature of the community and the accused**. Challenges of this nature also serve to heighten an accused's perception that he/she has had the benefit of a fairly selected tribunal.[22] [**emphasis added**]

- First Nations Representations on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci, February, 2013 (*Iacobucci Report*, 2013):

> **RECOMMENDATION 15**: the Ministry of the Attorney General discuss with the Implementation Committee the advisability of recommending to the Attorney General of Canada an amendment to the *Criminal Code* **that would prevent the use of peremptory challenges to discriminate against First Nations people serving on juries**. A practice that has developed in the U.S. by which judges are able to supervise the exercise of peremptory challenges, if a judge is of the opinion that the challenge is being used in a discriminatory manner. The point of this is that, if every change in the Report is implemented to its fullest, First Nations jury service could still be significantly undermined through discriminatory use of peremptory challenges. It should also be recalled that the Manitoba Inquiry report recommended the abolition of peremptory challenges to avoid the underrepresentation of Aboriginal people on juries.[23]

The most recent non-partisan inquiry into peremptory challenges did not recommend their eradication. Rather, a *Batson* challenge was recommended. This merits serious consideration for two reasons:

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[21] *Supra* note 4 at 54.
[22] *Supra* note 7 at para 58.
[23] The Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries,* (February 2013) <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html>.

- If Aboriginals are overrepresented in the criminal justice system, unfortunately they may often be the accused and can benefit from peremptory challenges. As articulated by the Supreme Court in *R v Sherratt*, *supra*: "**Peremptory challenges can also, in certain circumstances, produce a more representative jury depending upon both the nature of the community and the accused**." As a Barrister-At-Law, I can provide personal anecdotal experiences to corroborate this truth.

- Bill C75 already seeks to expand a judge's role in jury selection by amplifying the text of s. 633 of the *Criminal Code*.[24] Rather than provide a judge with a power that neither litigant would have, the power to stand-by jurors, the judge could over-see the validity of the issuance of a peremptory challenge.

1. No Reason to Change the Challenge for Cause Process

Bill C 75 proposes to amend s. 640, in order to:

> modify the process of challenging a juror for cause so that a judge makes the determination of whether a ground of challenge is true.

The *Charter* statement does not address this proposed modification. When the legislation was first read, on March 24th, 2018, the Honourable Minister of Justice said:

> To bring more fairness and transparency to the process, the legislation would also empower a judge to decide whether to exclude jurors challenged for cause by either the defence or prosecution.[25]

The foregoing suggests there are issues with fairness and transparency, in the challenge for cause process. That Bill C75 is thus remedial. However, there is no proof of any such issues, nor any non-partisan articulable cause which would justify altering an important, and well entrenched process. Should there be some evidence of a problem, before legislation which proclaims to "fix it" is passed?

Since the first *Criminal Code* in 1892[26], jurors have been used to determine if a challenge is true. The Ontario Court Appeal in *R v Husbands*, [2017] O.J. No. 3795, at para. 33 held:

> Since the enactment of our first *Criminal Code* in 1892, rotating triers have determined the truth of challenges for cause advanced on the basis that prospective jurors are not indifferent between the parties: *Criminal Code*, 1892, 55-56 Vic., c. 29, s. 668; *Noureddine*, at para. 35. Rotating triers remained the exclusive method of trying challenges for cause based on lack of indifference until the current s. 640 was amended by the addition of subsections (2.1) and (2.2), which came into force on May 29, 2008

[24] *Criminal Code*, RSC 1985, c C-46, s 633: The judge may direct a juror who has been called under subsection 631(3) or (3.1) to stand by for reasons of personal hardship, maintaining public confidence in the administration of justice or any other reasonable cause.
[25] < https://openparliament.ca/debates/2018/5/24/jody-wilson-raybould-2/only/>.
[26] *Criminal Code*, 1892, 55-56 Victoria, Chap. 29.

This was just calibrated in 2008. Why this change 10 years later?

Challenge for cause is the selection procedure whereby jurors, who are otherwise presumed impartial, may be challenged for impartiality or other causes. In order to determine if a potential juror should not take the Oath (or solemn affirmation), two jurors (sworn or unsworn) may be appointed on a fixed (or rotating) basis to determine if the person being questioned is telling the truth with respect to a certain "cause". If they are satisfied that cause has not been shown, the juror will not be excused. The juror must then be accepted, subject to peremptory challenge.

In Canada, we employ a legal fiction not shared in the United States—we presume that all jurors are impartial. In the U.S., a *voir dire* is held where questions are asked of a panel. The jurors are then challenged for cause or peremptorily.

In Canada, jurors are presumed impartial, ***R v Williams***, [1998] 1 S.C.R. 1128, and a litigant must therefore establish there is a basis to challenge a potential juror. A litigant must show that there is "a real risk of partiality" before a presumed impartial juror can be questioned. The burden is not necessarily onerous, but if a judge refuses to grant a challenge for cause on a basis that the party feels is just, then peremptory challenge becomes <u>all the more important.</u> Otherwise, a juror who a litigant took issue with would otherwise be sworn onto the jury, knowing the litigant objected to their presence. A litigant may wish to not have someone they potentially offended try their case.

A jury is constituted specifically to elicit the jurors' opinions on credibility and reliability. In this way, it makes sense to have jurors rule on the credibility and reliability of a potential fellow juror in the challenge for cause process. This embodies in principle a trial by the people and for the people. Additionally, the added virtue to having jurors assess the credibility and reliability of potential fellow jurors is that it teaches them at the outset the importance of their opinions, roles and judgement in the trial process.

To that end, it is also important to recall that jury duty has many positive aspects—society at large, and our democracy stand to benefit. In 1831, Alexis De Tocqueville wrote:

> The jury teaches every man not to recoil before the responsibility of his ow actions and impresses him with that manly confidence without which political virtue cannot exist. **It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government**. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society. The jury contributes most powerfully to form the judgement and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws of his country, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties.[27]

There is no reason to change the challenge for cause provision.

All of which is most respectfully submitted, this 1st day of September, 2018.

[27] Alexis De Tocqueville, *Democracy in America* (Boston, MA: John Allyn, 1876).