

# **MONTHLY LUNCHTIME SEMINAR SERIES**

*60<sup>th</sup> Session:*

## **DIVERSITY IN ACTION: BATSON 2018**

*Daniel Wolfe, J.D., PhD  
Justice Mary Anne Mason  
Judge Kathleen M. Pantle*

*January 18, 2018*



# DECISIONQUEST®

**DANIEL WOLFE, J.D., PH.D.**

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Dr. Daniel Wolfe is Senior Vice President of DecisionQuest, Inc., a trial consulting and strategic communications firm with offices in Los Angeles, Chicago, Houston, Pennsylvania, New York, Boston, Washington DC, Atlanta, Miami, and Minneapolis. The firm is comprised of approximately 100 individuals.

Dr. Wolfe provides research-based and experiential data analysis to trial teams nationwide and oversees the standards in practice of the jury consulting team nationally. Dr. Wolfe works on high-profile and large-exposure litigation involving such matters as antitrust, product liability, intellectual property, professional malpractice, environmental, and securities. He consults on national litigation matters pertaining to a variety of industries, including automotive, airline, pharmaceutical, petroleum/petrochemical, biotech, and medical. An expert in the fields of witness preparation, voir dire, and jury selection, he is also skilled in providing quantitative and qualitative analyses of venues through focus groups and mock trials.

A jury consultant and researcher since 1986, he has been in the national spotlight on numerous occasions for his work on high-profile criminal and civil cases involving celebrities and professional athletes. He has appeared as a commentator on both local and national talk shows and has been quoted in a wide range of media, including national publications such as The National Law Journal, Lawyers Weekly, Newsweek, and USA Today. He has authored many articles and book chapters on the subjects of juries, juror perceptions, ethics in trial consulting, and the interrelation of attorney gender and courtroom bias. Dr. Wolfe has over 25 years of jury consulting research experience and has worked on over 1,500 cases.

A noted jury consulting expert, Dr. Wolfe has been honored to present for numerous legal organizations throughout the country, including the American Bar Association, the American Trial Lawyers Association, the American Board of Trial Advocates, Defense Research Institute, several Inns of the Court, and various state and local bar associations. His professional affiliations include the American Psychological Association, the American Bar Association, the American Psychology-Law Society, and the American Society of Trial Consultants, of which he is past president.

Dr. Wolfe received his J.D., his Ph.D. in law and psychology, and his M.A. in psychology from the University of Nebraska. He holds his B.A. in psychology and sociology from Colorado State University.



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## SPECIALIZED PROFESSIONAL COMPETENCE

Development and implementation of persuasive trial strategy and themes  
Witness evaluation and communication training  
Traditional and alternative research designs and methodologies  
Jury selection and voir dire strategies

## EXPERTISE

Psychology and law  
Sociology and group dynamics  
Juror decision-making and cognitive heuristics  
Persuasive communication techniques

## EXPERIENCE

25 years of conducting jury research and trial consulting  
Consulted on more than 700 civil and criminal cases  
Conducted pretrial jury research in 42 states and more than 100 jurisdictions National  
practice on numerous high-profile and complex cases

## EDUCATION

Ph.D., Law & Psychology, University of Nebraska Lincoln (1990)  
Dissertation: *Juror Comprehension in Complex Cases: An Examination of Juror Notetaking and  
the Insanity Defense*  
National Institute of Mental Health Fellowships (1986-1987 & 1989-1990)

J.D., University of Nebraska Lincoln College of Law (1989)  
International Academy of Trial Lawyers Student Advocacy Award (1989)  
American Jurisprudence Award for Civil Clinical Practice (1989)  
Who's Who Among American Law Students (1986-1989)

M.A., Applied Social/Developmental/Personality  
University of Nebraska Lincoln, Lincoln, Nebraska (1989)  
Thesis: *An Organizational Approach to Court Structure: A Case in Point With Juvenile Court  
Decision Making*



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B.S., Psychology & Sociology, Colorado State University (1983) (cum laude)  
Certification: Criminal Justice Interdisciplinary  
Program Phi Beta Kappa National Honor Society  
(1982)

## PROFESSIONAL EXPERIENCE

October 2014 – Present: Senior Vice President and Senior Jury Consultant, DecisionQuest. Responsible for consulting staff for the Chicago region; development and training, business development, and litigation consulting.

July 1999 – October 2014: Senior Jury Consultant and Director of Jury Consulting, TrialGraphix. Responsible for consulting staff for the Chicago region; development and training, business development, and litigation consulting.

March 1996 – July 1999: Director of Jury Research, FTI/Consulting, Inc. Responsible for litigation research staff for the Chicago region; staff development and training, business development, and general litigation consulting.

May 1993 – March 1996: Managing Director, Litigation Sciences, Inc., Chicago. Responsible for litigation research staff for the Midwest division; staff development and training, business development, and general litigation consulting.

November 1992 – May 1993: Consultant, Litigation Sciences, Inc., Chicago. Responsible for case management, supervision and coordination of litigation research (ranging from pretrial research and jury selection to post-trial interviews), and general litigation consulting.

August 1990 – November 1992: Research Associate, Litigation Sciences, Inc., Chicago. Responsible for general litigation research, statistical analysis, and report generation.

## PROFESSIONAL ASSOCIATIONS

American Society of Trial Consultants (President, 2004 – 2005)  
American Society of Trial Consultants Foundation (Board Member, 2006 - Present)  
Academy of Trial Consultants (President, 2014 - Present)  
American Psychological Association  
American Bar Association (Litigation & Dispute Resolution Sections)  
American Law-Psychology Society (Division 41 of APA)



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## PUBLICATIONS

A. Krebel & D. Wolfe, "Query or Question: Does Allowing Jurors to Ask Questions Impact Their Online Behavior?" *Litigation Counsel of America: Litigation Commentary & Review*, 7 *Litigation Commentary & Rev.* (March/April 2015)

D. Wolfe & C. Falcicchio, "Accentuate Your Argument and Increase Your Persuasive Power With a Hyperlinked Brief," *The Jury Expert*, 22(6), 23-26 (November 2010)

D. A. Perrott & D. Wolfe, "Out and Proud: Ethical and Legal Considerations in Retaining a Trial Consultant to Assist With Witness Preparation." *The Jury Expert*, 22(1), 54-62, (2010):  
<http://www.astcweb.org/public/publication/article.cfm/1/22/1/Ethical-and-Legal-ConsiderationsinRetaining-a-Trial-Consultant-for-Witness-Preparation>

D. Wolfe & L. Johnson, "Tactics and Ethical Considerations in Leveraging Demonstratives," *Massachusetts Lawyers Weekly* (February 2, 2009)

D. Wolfe, "In 2008, Trial Technique is High Technique," *PLI's All-Star Briefing* (October 6, 2008)

R. G. Stuhan, M. M. Gomez & D. Wolfe, "Impeaching with prior inconsistent statements: it's not as devastating as you might think -- an original study," *For the Defense* (April 2007)

D. Wolfe, "The use of technology in complex cases: courtroom tools for a visual culture," 18(2) *The Jury Expert* 1-5 (February 2006)

D. Wolfe & K. Weber Sikich, "Selecting and deselecting jurors," in Inside and outside the jury box: effective trial strategies, Nordstrom, R (Ed.), 149 – 181, Springfield: Illinois Institute for Continuing Legal Education, (2006)

D. Wolfe & J. Richardson, "Leverage your demonstrative exhibits," *Trial* (August 1, 2005)

D. Wolfe., "Seeing is believing: visual tools for today's courtroom," *Chicago Daily Law Bulletin* and *Chicago Lawyer, Midwest Technology Guide* (March 2004)

L. Kuslansky & D. Wolfe, "Juror perceptions in patent cases: neither intellectual nor property," 12(2) *The Journal of Proprietary Rights* 2-9 (2000)



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D. Wolfe & D. Graham, "The defense rests on the quality of its closing arguments," *Illinois Legal Times*, (August 1999)

D. Wolfe & E. Bodaken, "How to use legal technology to influence jurors' perceptions," 17(2) *Legal Tech Newsletter* 1-2 (1999)

"National center for state courts," *Jury Trial Innovations*, Wolfe, D. (contributing author), Munsterman, G., Hannaford, P. & Whitehead, M. (Eds) (1997)

D. Rice, D. Wolfe & J. Kalinowski, "Using behavioral sciences in antitrust litigation," *Antitrust Counseling and Litigation Techniques* (Ed) (1993)

B. Swain & D. Wolfe, "Strategic use of pretrial juror questionnaires," 2-4 *International Legal Strategy* 77-80 (1993)

E. Campbell, D. Pierre-Trettel, H. Koenig, J. Pfeifer, D. Wolfe, & K. Harper, Gender and presentational style: "When the verdict is unaffected by an attorney's personal characteristics, justice is served," 33 *Washburn Law Journal* 415-454 (1992)

D. Wolfe, K. Olson, A. Tomkins, W. Reay, J. Clark & R. Kimbrough, "Using focus group methodologies to obtain child and family mental health research, policy, and evaluation data." In A. Algarin (Ed.), *Proceedings of Third Annual Research Conference on a System of Care for Children's Mental Health: Building a Research Base*. Tampa, FL: Research and Training Center for Children's Mental Health, Florida Mental Health Institute (1991)

D. Wolfe & D. Provorse, The service system for juveniles from the judge's perspective: "Compilation of interview responses from judges," *Nebraska's Intergovernmental and Community Planning Process for Children and Families*, Policy Research Office, Lincoln, NE (1988)

## JUDGE MARY ANNE MASON

Judge Mason graduated from Loyola University School of Law in 1977. She was Lead Articles Editor for the Loyola Law Journal. From 1977-79, she served as a law clerk to the Honorable Daniel J. McNamara, Justice, Illinois Appellate Court. In 1979, she was appointed an Assistant United States Attorney for the Northern District of Illinois in the Chicago Office where she served in the Civil Division until 1985. From 1985 to September 2000, Judge Mason was in private practice with the law firm of Kevin M. Forde, Ltd., handling primarily complex commercial cases and class actions. She has argued numerous appeals in the Illinois Appellate and Supreme Courts as well as the Seventh Circuit Court of Appeals. In 2000 she was invited to join the American Academy of Appellate Lawyers. In September 2000, Judge Mason was appointed to the bench by the Illinois Supreme Court and elected to a full term in November 2002. Since July 2004, she has served in the Chancery Division. She has chaired the Chancery Division Mediation Rule Committee since 2005 and is the immediate past chair of the Illinois Supreme Court Committee on Discovery Procedures. She is a member of the Board of Directors of the Chicago Bar Foundation and has presented on various topics to CBA CLE seminars as well as presented at the bi-annual Judicial Education Conference.

**Legal Experience:** Prior to becoming a judge, Judge Pantle was working as a Cook County Assistant Public Defender for 14 years.

**Judicial Experience:** Judge Pantle was elected a full circuit judge in 1998. Judge Pantle is currently assigned to the General Chancery Division. She was assigned to the General Chancery Division in January 2007. Her initial assignment was the 1st Municipal District handling traffic, general misdemeanor, and domestic violence cases. Subsequently, Judge Pantle was assigned to the Juvenile Justice Division where she presided over delinquency cases for over three years. She was then assigned to the Chicago Felony Criminal Division for three and one-half years and presided over felony cases at the Skokie Courthouse and the Criminal Courts Building at 26<sup>th</sup> and California.

**Education:** Judge Pantle graduated from Regina Dominican High School. She received her B.S. *magna cum laude* from Loyola University of Chicago. In 1982, Judge Pantle received her Juris Doctor Degree from Loyola University of Chicago.

**Awards:** Judge Pantle received a Distinguished Service Award from the Anixter Center in 2003 and the St. Vincent DePaul Award for Community Service in 2002.

**Publication:** Judge Pantle is the co-author (along with Crystal Marchigiani) of the "Arrest, Search, and Seizure" Chapter of the IICLE Publication *Defending Illinois Criminal Cases* (2010 ed., 2007 ed., 2003 ed.). She is also a Topic Editor for the Judicial Benchbook on Evidence.

**Seminars:** Judge Pantle has spoken at a number of seminars on different topics. In January 2012, she, Judge Mary Anne Mason, and Justice Thomas Appleton were co-speakers at the Education Conference for Illinois judges on the topic of Recusals, Disclosures, and Substitutions of Judge. In October 2011 Judge Pantle was a panel member for a CBA seminar on e-discovery. Also in fall 2011, she and Crystal Marchigiani spoke at a criminal defense seminar on the topic of the Fourth Amendment. Judge Pantle and Judge Mason were co-speakers at the 2010 Education Conference on the topic of Declaratory Judgments. In 2008, Judge Pantle was a speaker at a CBA seminar and lectured on contempt. Judge Pantle has spoken at IICLE seminars on the topics of the Fourth Amendment and jury selection.

**Membership:** Judge Pantle is a member of the Chicago Bar Association and the Chair of the Commercial Litigation Committee (Bar Year 2011-2012).

**Other:** Judge Pantle is an Adjunct Professor of Law at DePaul University School of Law. She coaches the DePaul Trial Team.



# *Jury Diversity in 2018*

**Daniel Wolfe, J.D., Ph.D., *DecisionQuest***

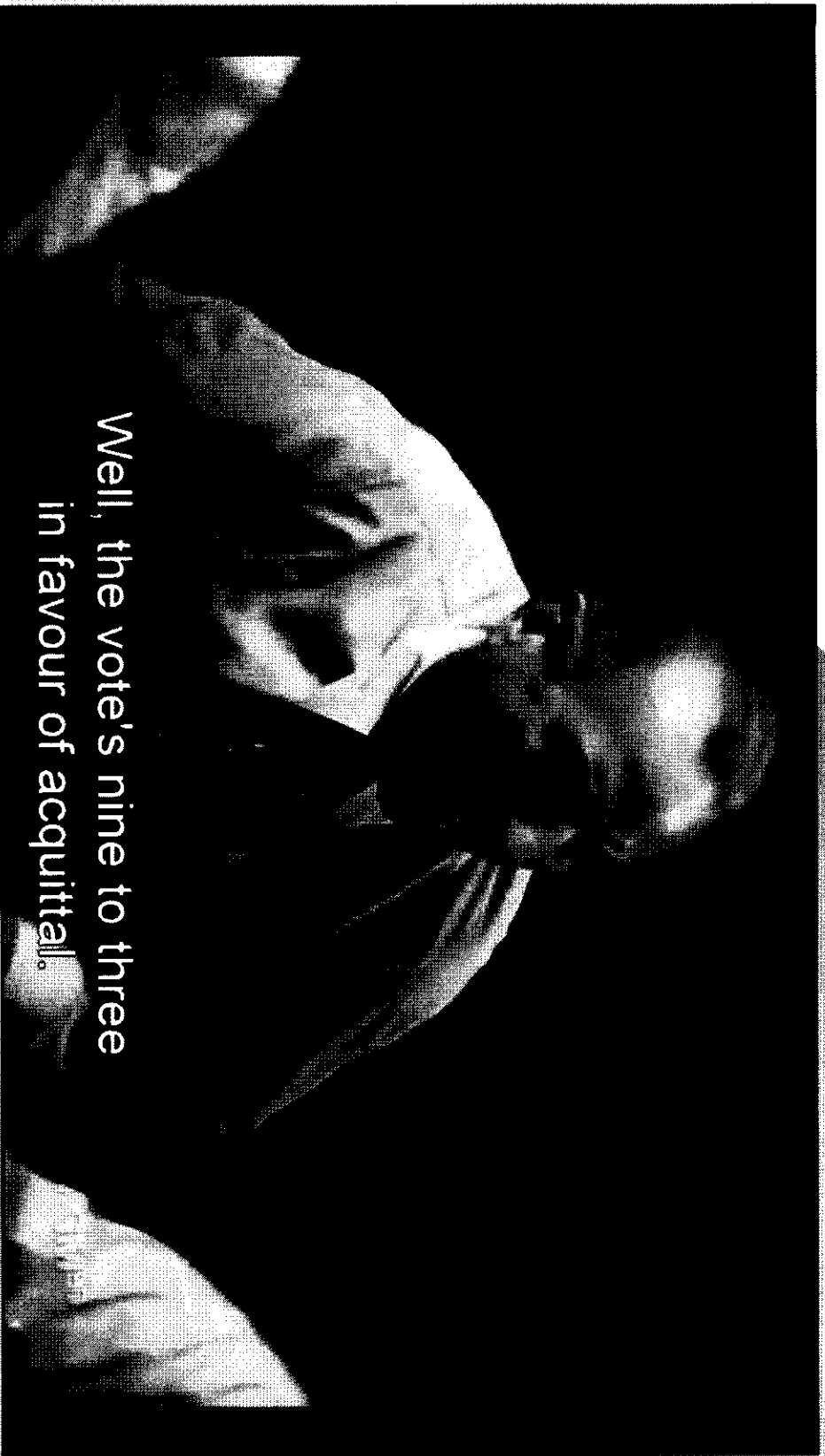
**January 18, 2018**

## **When Gut Instinct Collides with Common Sense**

**“Beware of the Lutherans, especially the Scandinavians; they are almost always sure to convict. Either a Lutheran or Scandinavian is unsafe, but if both in one, plead your client guilty and go down the docket. He learns about sinning and punishing from the preacher, and dares not doubt. A person who disobeys must be sent to hell; he has God’s word for that.”**

Clarence Darrow, 1936

## 12 Angry (White) Men – Does Racial Diversity Matter?



Well, the vote's nine to three  
in favour of acquittal.



## Importance of Diversity

- Supreme Court rulings re Constitutional rights to serve on juries
- Ensures procedural justice: diversity = legitimacy
- Enhances group dynamics and information sharing/vigorous debate in deliberations
- Motivates jurors to process trial information more carefully and thoroughly, particularly when social norms and judgments involved (e.g., “reasonable person”)
- Reduces groupthink and irrational decision making
- Increases juror satisfaction

## **Barriers to Diversity – Master Jury Wheel and Venire Selection**

- Source lists, such as voter's registration, driver's license and state ID lists may exclude low SES people
- Summons are returned as not deliverable/renters move frequently in large urban areas
- Lower SES individuals are less likely to have child care and reliable transportation
- Hispanics and Asians are more likely to be removed for cause for language issues than other ethnic/racial groups

## Barriers to Diversity – Jury Size

- Judge Dolan kept track of the race of the members of the venire (civil cases)
- Tracked by those who were selected, those who were struck for cause, and those who were removed by the plaintiff and by the defendant
- Black jurors were substantially less well represented on 6-person juries than 12-person juries
- Although not as great, Hispanics were less well-represented on 6-person juries than 12-person juries as well

## Barriers to Diversity – Jury Size

- 2009 Study: Plaintiffs removed fewer blacks, fewer females, and wealthier jurors; defense removed more blacks and poorer jurors
- In the end, it was mostly a wash, the pool of jurors remained basically unchanged because even though counsel exercised challenges in a way that shows race was a factor, it evened out
- 2016 Study: Whites more likely to be removed by defense than by prosecution and Blacks were more likely to be removed by the prosecution than the defense
- Racial discrepancies between the venire and panel were slight
  - it was a wash

## **Barriers to Diversity – Jury Size**

- 2007 Study: Respondents asked to choose last juror on a case where a woman killed her abusive husband in his sleep
- Respondents were much more likely to remove the female juror



## Barriers to Diversity – Implicit Bias

- Unconscious, unintentional bias
- Individuals do not have direct control or understanding of their perceptions and motivations
- Combination of early experiences, affective experiences, and learned cultural biases
- Research has shown that people have implicit attitudes towards many different topics, such as race, gender, age, disability, and sexual orientation

## Barriers to Diversity – Implicit Bias

- Implicit bias measures can often be dissociated from explicit bias measures, meaning that known bias may be different from unconscious bias
- Socially dominant groups often have implicit bias against subordinate groups
- Individuals usually prefer members of a category to which they belong

## **Demonstrating Implicit Bias**

**A father and son have a car accident and are both badly hurt. They are both taken to separate hospitals.**

**When the boy is taken in for an operation, the surgeon says, "I cannot do the surgery because this is my son." How is this possible?**

## **Solution to Unconscious Bias**

- United States District Court for the Western District of Washington Unconscious Bias Video
- Acknowledge that unconscious bias exists and occurs for all of us
- Carefully examine decisions and judgments as jurors
- Question decisions by asking if they would be different if witness, lawyer, or person on trial were of a difference race, age, or gender

## Importance of Diversity in the Legal Profession

- Ensures procedural justice: diversity = legitimacy (“There is a reason George Strait isn’t being booked at the Apollo”)
- Knowing and connecting with jury is key to being an effective storyteller
- Having a trial team with different world and life views increases the chances of communicating the client’s story in a way that has more universal appeal
- Diversity in trial team decreases the chances of using a strategy and message that will leave some jurors unaffected, or worse, biased against your client
- Give the jury someone to root for -- provide the jury with individuals the jurors consciously or subconsciously want to see win

## Importance of Diversity in the Legal Profession (Cont'd)

- Make-up of the trial team influences the jury's perception of the client
  - trial attorneys tell jurors that they can trust them just as the clients who chose them as their lawyers
- Importantly, jurors will trust those with whom they identify
- Likewise, a trial team should be perceived by the jury as an ensemble cast – each member should play an important and necessary role in the production
- It is critical that the jury see all of the trial team members as stars, actively presenting the client's case, rather than as bit players or extras
- 2016 Study: Men have automatic preference for men; women have automatic preference for women (and have stronger preference than men do)

## Importance of Diversity in the Legal Profession (Cont'd)

- Gender inappropriate responses (e.g., women perceived as angrier); male and female jurors each rated attorney of their own gender more positively than attorney of the other gender
- Male jurors rated opening by female attorney to be less persuasive than opening by male
- For the male attorney, but not for female attorney, greater emotionality was associated with greater persuasiveness and effectiveness
- Topic of the trial moderates the effect of attorney's gender – both men and women are more influential when talking about topics that are stereotypically associated with their gender (e.g., women are more likely to exert influence in family and sexual harassment cases)

**DIVERSITY IN ACTION:  
BATSON 2018**

Hon. Mary Anne Mason  
*Appellate Court, First District*

Hon. Kathleen M. Pantle  
*Circuit Court of Cook County  
Chancery Division*





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

- Discrimination in jury selection is unlawful
- A party has the right to challenge opposing party's use of a peremptory challenge to exclude potential jurors who belong to a constitutionally protected class

## Constitutionally Protected Classes

- **Race:** *Batson v. Kentucky*
- **Gender:** *People v. Hudson*, 195 Ill.2d 117 (2001)
- **Ethnic Background:** *Hernandez v. New York*, 500 U.S. 352 (1991)
- **Sexual Orientation:** *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014)

## What About Age?

Age is ***NOT*** a protected class for  
*Batson* purposes.

*Lawler v. Macduff*, 335 Ill. App.3d 144 (2d Dist. 2002)

## 705 ILCS 305/2

- Religion and economic status are statutorily-protected classes
- Race, color, sex, and national origin are also statutorily protected

## **It Applies NOW**

- **January 1, 2018:** Effective date of statutory amendment creating protections
- The statute applies to all parties
- The prospective juror must be otherwise qualified and able to serve on the jury

## Scope of Protection

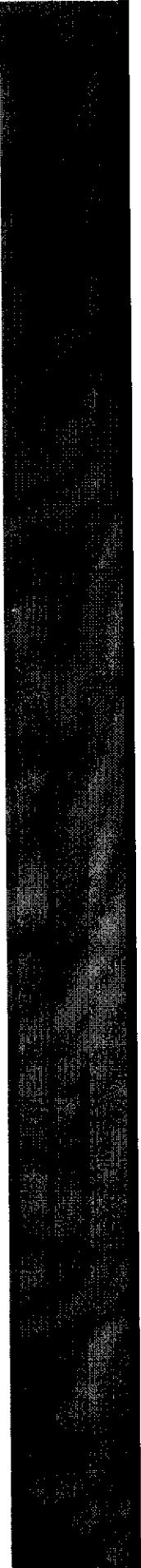
The legislature incorporated the definitions contained in 775 ILCS 5/1-103 (Illinois Human Rights Act) when defining the terms “religion”, “sex”, and “national origin.”

## Scope of Protection

“Religion’ includes all aspects of religious observance and practice, as well as belief.”

*(775 ILCS 5/1-103(N))*





“Sex’ means the status of being  
male or female.”

*(775 ILCS 5/1-103(0))*

## Scope of Protection

“Sexual orientation” is NOT listed as a protected class under 705 ILCS 305/2.

NB: The Human Rights Act has a separate definition for “sexual orientation”

## However....

The Human Rights Act defines  
“unlawful discrimination” as  
including discrimination against a  
person based on sexual orientation.

*(775 ILCS 5/1-103(Q))*

## Scope of Protection

“National origin’ means the place in which a person or one of his or her ancestors was born.”

*(775 ILCS 5/1-103(K))*

## **Batson Rule Applies To:**

### **All parties:**

- Prosecution and defense in criminal cases
- All parties in civil cases (including private litigants)  
*McDonnell v. McPartlin*, 192 Ill.2d 505, 526 (200)
- Party raising the challenge is not the same race as the excluded juror  
*Id.* citing *Powers v. Ohio*, 499 U.S. 400 (1991)

## Three-Step Process

- 1) Court must follow this process
- 2) Stages should not be collapsed
- 3) Fact-intensive inquiry

*People v. A.S., 2016 IL App (1st) 161250*

## First Step

- The burden is on the party making *Batson* challenge
- *Prima facie* showing

## **Non-Exhaustive List of Factors**

*(People v. Rivera, 221 Ill.2d 481, 501 (2006))*

- Racial identity between party (incl. prosecutor) and excluded juror
- Disproportionate use of peremptory challenges against one group
- Level of representation in venire as compared to the jury



## Non-Exhaustive List of Factors

- Questions & statements during *voir dire* & while exercising peremptories
- Whether excluded jurors are a heterogeneous group sharing race, gender or ethnic background as their only common characteristic
- Race of party, victim, and witnesses

## Note:

- One improper strike can be enough to make a *prima facie* showing
- However, the number of peremptories against a group, standing alone, is NOT sufficient to make out a *prima facie* case

## Second Step

- *If prima facie* case made, burden shifts to party exercising peremptory
- Must articulate a race-neutral reason for excluding each dismissed juror
- Reason need not rise to level justifying exercise of a challenge for cause

## Examples of Race-Neutral Reasons

- Undisclosed criminal background
- Jurors employed in the social work field
- Jurors (or family members) who are crime victims or suffered a personal injury

## *Third Step*

- Ultimate determination: whether party opposing the challenge has made the required showing of **purposeful discrimination**
- A court should evaluate the explanations (for peremptories) in light of the circumstances of the case

## Third Step

- Trial court should evaluate the demeanor of the party exercising the peremptories and the juror
- Ultimate burden of persuasion rests with, and never shifts from, the opponent of the strike

*Rice v. Collins*, 546 U.S. 333, 338 (2006)

# Remedies for *Batson* Violation

The trial court can:

- Dismiss the venire and get a new venire **OR**
- Seat the challenged juror(s)

*Batson v. Kentucky*, 476 U.S. at 99 n. 24

*People v. Byrd*, 2017 IL App (2d) 140715, ¶ 24-30

# QUESTIONS



# Course Evaluation Form

Title of Course: **"DIVERSITY IN ACTION: BATSON 2018"**

Date of Course: January 18, 2018      Location: James R. Thompson Center Assembly Hall  
Auditorium

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**Directions:** On a scale of 1 to 5, (5 being the highest or best and 1 being the lowest or worst), please rate the program:

**Rate how well this course satisfied your personal objectives**      5   4   3   2   1  
Comments: \_\_\_\_\_

**Rate how well the environment contributed to the learning experience**      5   4   3   2   1  
Comments: \_\_\_\_\_

**Rate how well the written materials contributed to the learning experience**      5   4   3   2   1  
Comments: \_\_\_\_\_

**Rate the level of significant intellectual, educational or practical content**      5   4   3   2   1  
Comments: \_\_\_\_\_

*Please rate the faculty using the same 1 – 5 scale:*

Name: JUSTICE MARY ANNE MASON

Comments: \_\_\_\_\_

Name: JUDGE KATHLEEN PANTLE

Comments: \_\_\_\_\_

Name: MR. DANIEL WOLFE

Comments: \_\_\_\_\_

Overall Teaching Effectiveness					Effectiveness of Teaching Methods					Significant Current Intellectual or Practical Content				
5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
5	4	3	2	1	5	4	3	2	1	5	4	3	2	1

**SUGGESTIONS FOR FUTURE SEMINARS:**

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