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# Don't Forget About the Jury: Advice for Civil Litigators and Criminal Prosecutors on Differences in State and Federal Courts in New York

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## **Don't Forget About the Jury: Advice for Civil Litigators and Criminal Prosecutors on Differences in State and Federal Courts in New York**

The Supreme Court of New York, New York County Courthouse stands tall at 60 Centre Street in downtown Manhattan. The Southern District of New York Daniel Patrick Moynihan Courthouse can be found right around the corner at 500 Pearl Street. Each day, jurors report to both courthouses to decide important issues in civil and criminal trials. This paper will examine the differences between juries in state and federal courts in New York and ultimately decide whether these differences are important.

In civil cases, forum selection has become an integral part of litigation strategy. Plaintiffs have the initial choice of where to file a complaint, and thus where to begin a lawsuit. Defendants have the power to remove cases, under circumstances prescribed by statute, from state court to federal court. Many factors enter into the decision of where to file a complaint or whether to remove a case including convenience, applicable law, and suspected biases. But what about the jury? Should a plaintiff consider characteristics of the jury when deciding where to file a complaint or a defendant in a civil case when deciding whether to remove?

In criminal cases, where the defendant is tried is determined largely by what type of crime the defendant has committed—federal or state—and where the crime has taken place. Is the jury afforded to a criminal defendant significantly different based on whether the defendant committed a crime against New York state or the United States, or whether the crime took place downstate or upstate? Should a criminal prosecutor consider characteristics of the jury before deciding to bring a case against a defendant who has committed a certain type of crime?

This paper will attempt to answer these key questions in civil and criminal cases. Part I will examine the role of the jury and the court structure in New York. Part II will examine New

York-specific differences between state and federal juries by examining methods of jury pool assembly, the demographics of members comprising the jury pool in all New York counties, and other factors that may influence the juror experience or the representativeness of the jury. Part III will provide advice for litigators and prosecutors, as well as determine any consequences of state and federal differences. Part IV will be a conclusion.

## **Part I: Background**

### **I. The Jury's Role**

Before deciding that exploring differences between state and federal juries is a pursuit worth researching and funding in New York state, it is important to consider whether the jury still plays an important role in today's legal system. With most civil cases settling before trial<sup>1</sup> and most criminal defendants agreeing to plea deals,<sup>2</sup> one might wonder whether the jury still has relevance in bringing civil or criminal cases to a final judgment or verdict.<sup>3</sup> Much has been written to inform citizens about how to avoid serving as a juror on jury duty,<sup>4</sup> and many

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<sup>1</sup> See Kevin Clermont & Theodore Eisenberg, *Litigation Realities Redux*, 88 CORNELL L. REV. 119, 121 (2002) (acknowledging that few cases reach trial in the American civil litigation system today) [herein after *Litigation Realities*].

<sup>2</sup> See Andrew Leipold & Peter J. Henning, *Federal Practice & Procedure, Federal Rules of Criminal Procedure*, 1A FED. PRAC. & PROC. CRIM. § 171 (4th ed.) (2014) (“In recent years fewer than 5% of the federal cases that go to judgment are resolved by a trial. A full 86% of those who are charged and 96% of those who are convicted end up pleading guilty or nolo contendere.”)

<sup>3</sup> For a vehement argument that more needs to be done to enhance the jury, see Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001). For an interesting overview of the declining use of the jury trial in Los Angeles state courts and some potential reasons for the decline, see Judge Michael L. Stern, *Advocacy in an Era of Declining Jury Trials*, 37-APR L.A. Law. 15 (2014).

<sup>4</sup> For humorous news articles providing tips on how best to avoid jury duty, see generally Erin Fuchs, *9 Ways to Get Out of Jury Duty*, BUSINESS INSIDER, available at <http://www.businessinsider.com/how-to-get-out-of-jury-duty-2012-7?op=1> (advising readers not to lie, but that they “might want to play up certain aspects of [their] personality” to avoid being chosen for a jury); Jennifer Waters, *Psst! You Want to Duck Jury Duty?*, WALL STREET JOURNAL, available at <http://online.wsj.com/articles/SB10001424052748703859304576309880479336872> (suggesting

Americans and lawyers alike have a general distrust in juries or feel skeptical that juries are able to perform complex tasks.<sup>5</sup>

Juries hear both civil and criminal cases in state courts and federal courts, all across the country. As most cases settle before going to trial, it is most often the most difficult cases that require jurors as fact-finders, as the parties were unable to reach an agreement earlier in the negotiation process. Neil Vidmar and Valerie Hans, in their book *American Juries: The Verdict*, devote an entire chapter to discussing what types of tasks juries must complete when assigned to different types of cases.<sup>6</sup> These tasks include, but are not limited to: listening to witnesses, evaluating conflicting stories, analyzing historical events, deciding liability, and awarding damages.<sup>7</sup> Despite a declining use of the jury as a procedural mechanism for concluding a civil lawsuit or criminal proceeding,<sup>8</sup> juries still remain tasked with deciding complex questions of fact each and every day.<sup>9</sup>

## II. The New York Court System and Forum Selection Issues

Before analyzing differences between federal and state juries, it is important to understand the structure of the New York court system. New York has four federal courts, organized by region—the Southern, Northern, Eastern, and Western District Courts. The

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that jurors should “put up a fuss,” teach or enroll in school, have a chronic illness, or know someone to avoid being chosen for a jury).

<sup>5</sup> See Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. LITIG. 117, 128 (2014) (claiming that there is “increasing skepticism and distrust of juries”).

<sup>6</sup> NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 125-47 (2007).

<sup>7</sup> See *id.* at 125-32.

<sup>8</sup> See Suja A. Thomas, *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1214 (2014) (analyzing the “fall of the jury”).

<sup>9</sup> For an overview of the importance of the civil jury, see Royal Furgeson, *Civil Jury Trials R.I.P? Can it Actually Happen in America?*, 40 ST. MARY’S L.J. 795, 798-811 (2009) (providing a history of the civil jury and reasons why the jury is still critical to the legal system today).

Southern District has two courthouses located in Manhattan and White Plains. The Northern District has five courthouses located in Albany, Binghamton, Plattsburgh, Syracuse, and Utica. The Eastern District has two courthouses located in Brooklyn and Long Island. The Western District has two courthouses located in Rochester and Buffalo. These federal courts hear both civil and criminal cases. The state courts, however, are not as centralized. The lower courts include supreme courts and county courts, which hear civil and criminal cases. There are also family courts, claims courts, as well as city, town, and village courts.

Why is it important for lawyers to have a clear understanding of the court structure and differences among the courts? In a civil case, the plaintiff has the power to decide where to file a complaint. Where a trial is conducted turns on several factors. Federal courts are courts of specific jurisdiction and can only hear certain types of cases as prescribed by statute.<sup>10</sup> State courts, in contrast, are courts of general jurisdiction and can hear any and all types of cases. Statutory authority also gives defendants the power to remove a case from state court to federal court under certain circumstances.<sup>11</sup>

The plaintiff in a civil case has the power to decide where to file a complaint and begin the case. Professors Clermont and Eisenberg have done extensive research on forum selection and the impact of the court on outcomes of a case.<sup>12</sup> Forum selection has become incredibly important to litigation strategy, even for cases that will ultimately settle. Forum selection, Clermont and Eisenberg write, “remains extraordinarily important in the American civil

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<sup>10</sup> See e.g., 28 U.S.C. § 1331 (2014) (providing original jurisdiction to district courts for all matters “arising under the Constitution, laws, or treaties of the United States”); 28 U.S.C. § 1332 (2014) (providing original jurisdiction to district courts for matters exceeding \$75,000 and matters for which there is diversity of parties).

<sup>11</sup> 28 U.S.C. § 1441 (2014) (“[a]ny civil action brought in a State court of which the district courts . . . have original jurisdiction, may be removed by the defendant or the defendants, to the district court . . . embracing the place where such action is pending”).

<sup>12</sup> *Litigation Realities*, supra note 1, at 1921-22.

litigation system.” The selection of a court “is a critical step for litigators, and any fight over forum can be the critical dispute in the case.”<sup>13</sup>

In a criminal case, what court a case is heard in depends on what type of crime the defendant commits—one against the United States (federal) or New York (state) and which entity ultimately brings charges against a defendant. Examples of state crimes include: offenses against another person, offenses involving damage to property, offenses involving theft, offenses involving fraud, offenses against public administration, offenses against public health, and offenses against public safety.<sup>14</sup> Examples of federal crimes include conspiracy, extortion and threats, kidnapping, mail fraud, and racketeering.<sup>15</sup>

## **Part II: New York State and Federal Juries**

### **I. Differences in Jury Assembly and Juror Participation Procedures**

#### **Sources From Which Jurors Are Pulled**

Any survey of jury assembly must begin with the procedures by which courts summon residents for service. New York state prescribes by statute from which sources jurors should be pulled.<sup>16</sup> In New York state, as the juror handbook explains, potential jurors are randomly selected from lists of registered voters, holders of drivers’ licenses or IDs from the DMV,

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<sup>13</sup> *See id.*

<sup>14</sup> *See* Chapter 40 of the Consolidated Laws of New York, N.Y. Penal Law, Titles G-P (2014).

<sup>15</sup> *See* Part 1 of 18 U.S.C. (Crimes and Criminal Procedure).

<sup>16</sup> *See* New York Judiciary Law § 506 (McKinney 2014) (“The commissioner of jurors shall cause the names of prospective jurors to be selected at random from the voter registration lists, and from such other available lists of the residents of the county as the chief administrator of the courts shall specify, such as lists of utility subscribers, licensed operators of motor vehicles, registered owners of motor vehicles, state and local taxpayers, persons applying for or receiving family assistance, medical assistance or safety net assistance, persons receiving state unemployment benefits and persons who have volunteered to serve as jurors by filing with the commissioner their names and places of residence.”).

databases of income tax filers, recipients of various government benefits, and volunteers.<sup>17</sup> In order to serve, a person must be a United States citizen, at least 18 years old, a resident of the county to which he or she is summoned, and able to understand and communicate in English.<sup>18</sup> A potential juror cannot have been convicted of a felony.

Each of the four federal courts in New York has a slightly different process for selecting jurors. On the whole, jury assembly in federal courts is governed by the Jury Selection and Service Act of 1968.<sup>19</sup> Federal courts appear to pull from fewer databases and provide for more exceptions than state courts.<sup>20</sup> One large difference is that the JSSA specifies a subset of individuals who are automatically barred from jury service: (a) members in active service in the Armed Forces (b) member of the fire or police departments of any State, and (c) public officers in any of the branches of the United States.<sup>21</sup>

The Act also provides for a list of groups of people for which serving could potentially be a hardship and, as such, excusing such persons would not be inconsistent with the Act. These groups include, but are not limited to: persons over seventy years of age, persons having legal custody and active daily care of a child, and volunteer safety personnel who serve without

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<sup>17</sup> New York State Unified Court System, Trial Juror's Handbook, available at [http://www.nyjuror.gov/pdfs/hb\\_Petit.pdf](http://www.nyjuror.gov/pdfs/hb_Petit.pdf).

<sup>18</sup> New York Judiciary Law § 510 (McKinney 2014); *See also* Information for Jurors, [http://www.nyjuror.gov/tbaj\\_eng.shtml](http://www.nyjuror.gov/tbaj_eng.shtml).

<sup>19</sup> 28 U.S.C. § 1863 governs the plan for random jury selection. It requires that each district court devise a written plan for random selection of jurors that should be reviewed by a panel of judges from the district.

<sup>20</sup> *See* 28 U.S.C. § 1863 (6) (2014).

<sup>21</sup> *See id.*

compensation.<sup>22</sup> The following table includes the sources the district courts use to comprise juries, as explained to jurors on each court’s website.<sup>23</sup>

Southern District	The Southern District has adopted a plan for juror selection. The judges concluded that the persons whose names appear on the voter registration lists of the eight counties used for the last federal or state election represent a fair cross-section of the community. The initial selection of persons from these lists should be made at random. <sup>24</sup>
Northern District	Jurors are randomly selected by computer from voter registration lists and Department of Motor Vehicle records in accordance with procedures established by the judges of this Court and in full compliance with all relevant federal statutes and court rules. Prospective jurors received a questionnaire by mail to be completed and returned to the Court. The names of qualified persons are placed on a list from which the Court randomly selects its prospective jurors.
Eastern District	Every two years, in the year following a federal election, the rolls of voters from each county in the Eastern District of New York are used together with a list from the New York Department of Motor Vehicles from the same counties to create a master list of potential jurors within the District. A random selection of names from that master list is drawn from as jurors are needed by the Court.
Western District	Jurors are randomly selected from county voter registration lists and licensed motor vehicle operator lists for the State of New York. Names are entered into a pool and jurors may be randomly summoned either as a grand or petit juror.

### Difference in Postponement System

Another important characteristic of a court system is the ease or difficulty with which a resident can postpone jury service. While it seems as though a one-time postponement from performing a jury summons is available generally in all courts throughout New York, the method and ease for postponement does vary at the federal and state level.<sup>25</sup>

<sup>22</sup> *See id.*

<sup>23</sup> This information was compiled from the “Juror FAQ” section of each court’s website. For more information, see Eastern District: <https://www.nyed.uscourts.gov/court-info/faq/JURY>, Northern District: <http://www.nynd.uscourts.gov/juror-faq>, Western District: <http://www.nywd.uscourts.gov/faq/3#t3n147>, Southern District: [http://www.nysd.uscourts.gov/jury\\_handbook/juryplan\\_feb\\_2009.pdf](http://www.nysd.uscourts.gov/jury_handbook/juryplan_feb_2009.pdf).

<sup>24</sup> The unique plan adopted by the Southern District judges includes the use of a “master jury wheel” maintained using electronic databases. *See* Amended Plan for the Random Selection of Grand and Petit Jurors in the United States District Court for the Southern District of New York, available at [http://www.nysd.uscourts.gov/jury\\_handbook/juryplan\\_feb\\_2009.pdf](http://www.nysd.uscourts.gov/jury_handbook/juryplan_feb_2009.pdf).

<sup>25</sup> For a comprehensive study on postponement behavior in the Connecticut court system, *see e.g.*, Karen A. Berris, *Appearance Rates of Potential Jurors Who Confirm, Postpone, or Fail to Respond to the Jury Summons: Are Postponed Jurors Saying “No” or “Not Now”?*, 59 *DRAKE. L. REV.* 649 (2011).



New York state jury commissioners have the power to postpone a juror's service.<sup>26</sup> The New York State Juror Handbook sets forth the basic postponement procedures in the New York courts. It says that, "[E]ach juror summoned to serve in Supreme, County, District, or City court is allowed one automatic postponement, which can be requested by telephone, mail or, in some counties, by e-mail. The juror may select a date two to six months after being summoned. If the requested date is not available, the juror will be summoned for the closest available date. Requests for postponement should be made at least a week before the scheduled date of appearance. Generally, postponements are not granted on the scheduled appearance date."<sup>27</sup> This appears to be a fairly juror-friendly system. The courts have an online website portal for postponing jury duty, which appears to simply require the current date summoned and a future date for service.<sup>28</sup>

In the Southern District, by contrast, a juror must use the return envelope included with the summons to mail back the summons along with a note indicating when the juror can serve within the next six months.<sup>29</sup> In the Eastern District, the website simply tells jurors that "[the office] do[es] not accept postponements or excusals via email. Please contact the Jury Office . . . for further information." The Western District requires a juror to defer jury service "in writing using the back of the jury qualification questionnaire." It also asks jurors to "give the reason why [he or she] need[s] to be deferred and when would be a better time for [him or her] to serve

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<sup>26</sup> New York Judiciary Law § 517 (McKinney 2014) (noting that "the commissioner of jurors may, in his or her discretion, on the application of a prospective juror who has been summoned to attend, excuse such prospective juror from a part or the whole of the time of jury service or may postpone the time of jury service to a later day during the same or any subsequent term of the court").

<sup>27</sup> New York State Juror Handbook, *supra* note 17, at 3.

<sup>28</sup> To see the ease with and process which a juror summoned for state court can postpone his or her service, see <https://iapps.courts.state.ny.us/postponement/DefermentServlet>.

<sup>29</sup> See Jury Duty FAQs , Southern District of New York, at [http://www.nysd.uscourts.gov/jury\\_faq.php](http://www.nysd.uscourts.gov/jury_faq.php).

as a juror within a 6-month period.”<sup>30</sup> The Northern District is the only district that employs an “e-juror” system by which jurors can postpone service online.<sup>31</sup>

### **Difference in Penalties for Absent Jurors**

Another important difference between federal and state juries is the difference in fine for not appearing for jury duty. The New York State Juror Handbook claims that skipping jury duty can result in civil or criminal penalties and that anyone who skips jury service will be assigned to serve on a future date.<sup>32</sup> Section 527 of the Judiciary Law allows the commissioner of jurors to bring a proceeding for noncompliance against a juror who does not respond to a qualification questionnaire or who fails to attend after being summoned to jury duty.<sup>33</sup>

The statute continues to say that the civil penalty shall not exceed two hundred fifty dollars.<sup>34</sup> To collect the fine, it must be established that the person actually received the questionnaire or summons in question and a notice of noncompliance was served. If a citizen requests a hearing, a charge of noncompliance may not be sustained upon a finding of any fact that indicates that attendance would cause “undue hardship or extreme inconvenience.”<sup>35</sup> These terms are defined in Section 517 and include a mental or physical condition that causes him or her to be incapable of performing jury service.<sup>36</sup>

The New York State Juror Handbook poses the question: What happens if a juror does not report for jury service? It answers the question by explaining that jury duty is similar to

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<sup>30</sup>Frequently Asked Questions – Jury Service, Western District of New York, at <http://www.nywd.uscourts.gov/faq/3#t3n165>.

<sup>31</sup> See <https://ecf.nynd.uscourts.gov/ejuror/TransportRoom?servlet=login> for information on the Northern District’s “E-juror” system.

<sup>32</sup> New York State Unified Court System, *NYS Juror Handbook*, available at [http://www.nyjuror.gov/pdfs/hb\\_Petit.pdf](http://www.nyjuror.gov/pdfs/hb_Petit.pdf) (2009).

<sup>33</sup> New York Judiciary Law § 527 (McKinney 2014).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> New York Judiciary Law § 517 (McKinney 2014).

paying taxes. It is mandatory, and failure to report can result in civil or criminal penalties. The handbook also indicates that anyone who skips jury service will receive a new date for future jury service.<sup>37</sup>

In federal courts, the penalties appear to be even harsher. The Jury Selection Act governs the power of courts to address juror absence.<sup>38</sup> The Northern District of New York has the following warning on its website, which mirrors the language from the Jury Selection Act: “Any juror who fails to report for jury duty may be served an Order to Show Cause. The Court may then hold a hearing on the Order to Show Cause. Jurors who fail to show adequate cause for their absence from jury duty can be held in contempt of court under the Jury Selection Act (28 U.S.C. 1866(g)).”

Penalties for not appearing for service in federal courts, including the Northern District, include a fine of not more than \$1,000, imprisonment of not more than three days, community service, or any combination of the three.<sup>39</sup> To persuade jurors who respond to a summons, the Southern District alternatively appeals to jurors’ emotions instead of referring to a statutory provision. It poses the question on the FAQ section of its website: Is jury duty mandatory? Its answer is: “Yes. The United States Constitution guarantees the right to a trial by jury in both criminal and civil cases. Your participation as a juror helps make that possible.”<sup>40</sup>

## **II. Differences in Demographics and Jury Pools**

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<sup>37</sup> New York State Juror Handbook, *supra* note 17, at 3.

<sup>38</sup> 28 U.S.C. § 1866(g) (2014).

<sup>39</sup> See <http://www.nynd.uscourts.gov/juror-faq>.

<sup>40</sup> See [http://www.nysd.uscourts.gov/jury\\_faq.php](http://www.nysd.uscourts.gov/jury_faq.php).

Maintaining a diverse jury is an ideal to which our courts have strived to achieve since as early as 1940.<sup>41</sup> But why should a state be concerned with demographics and the racial, educational, gender, and income distribution of jurors deciding its cases? Neil Vidmar and Valerie Hans, in their book *American Juries: The Verdict*, write that a diverse jury will promote accurate fact finding because a diverse group will encourage more thorough debate, add insight into the decision-making process, and on the whole encourage better fact-finding.<sup>42</sup> Professors Vidmar and Hans cite a study performed by Samuel Sommers who compared heterogeneous mock juries with more racially diverse juries and found that the diverse juries had richer discussion and were more accurate in their statements regarding the case.<sup>43</sup>

To determine whether there are demographic differences between the jury pool in state and federal courts, I compiled 2012 and 2013 census data from the American Community Survey for all counties in New York state and organized the data at the federal court level. I excluded residents under 18, but there is no way of determining the population of the state who has been convicted of a felony, are not citizens of the county in which they are summoned, or cannot communicate in the English language.<sup>44</sup>

#### Southern District of New York

*Gender*                      *Race*                      *Education/Income*

<sup>41</sup> For more background on the development of the diverse jury, see Hillary Weddell, Note, *A Jury of Whose Peers? Eliminating Racial Discrimination in Jury Selection Procedures*, 33 B.C. J.L. & SOC. JUST. 453, 461-68 (2013).

<sup>42</sup> NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 74-75 (2007).

<sup>43</sup> *Id.*

<sup>44</sup> Population data is from the American Community Survey (ACS) 2013 data and reflects the population of individuals in New York counties 18+ years of age. Data on gender was pulled from the ACS Table: Sex By Age Table B01001. Data on race was pulled from ACS Table: Sex by Age White Alone, Black Alone, Hispanic or Latino Tables B01001A, B01001B, and B01001I. Information on educational attainment was retrieved from ACS Table: Sex by Age by Educational Attainment for the Population 18 Years and Older Table B15001. Data on median income is from the 2013 Census Data County Quickfacts. For more information, see [www.census.gov](http://www.census.gov) and <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

County	Population	F	M	W	B	H/L	H.S.	Bach.	Med. Income
Bronx	1,053,451	54.1	45.9	22.6	33.4	52.8	27.6	10.7	\$34,300
Dutchess	235,968	51.7	49.3	81.1	10.2	9.9	31.7	16.4	\$71,508
New York	1,387,820	53.4	46.6	58.7	14.4	23.9	13.6	32.4	\$68,370
Orange	276,895	50.5	49.5	76.5	9.9	17.1	29.5	16.0	\$70,712
Putnam	77,775	50.5	49.5	91.9	N/D	11.5	26.8	20.7	\$95,259
Rockland	231,636	51.8	48.2	70.9	13.1	16.0	24.3	20.7	\$86,020
Sullivan	59,975	48.4	51.6	85.0	N/D	12.5	31.3	13.2	\$48,050
Westchester	744,606	52.6	47.4	67.4	14.4	21.4	20.1	22.6	\$81,093
<b>SDNY Total*</b>	<b>4,068,118</b>	<b>52.9</b>	<b>47.1</b>	<b>53.4</b>	<b>18.9</b>	<b>28.8</b>	<b>21.7</b>	<b>21.8</b>	<b>\$69,414</b>

\*The numbers for race add up to more than 100% due to problems with the data for Hispanic/Latino individuals.

## Notable Findings

The Southern District is comprised of eight counties and is the second most populated district in New York. As mentioned previously, the Southern District has courthouses in Manhattan and White Plains (Westchester County). In terms of gender, it is relatively evenly split and unremarkable. In terms of race, it is one of the more diverse districts, with only 53% of residents being white alone. It is also the most educated district, with over 20% of individuals possessing a bachelor's degree. When you compare the counties with the federal courts, there are some striking comparisons. None of the counties are more diverse than the federal level in terms of gender, but there are certainly differences in racial composition, education, and income.

Overall, the individual counties of the district adequately reflect the population of the entire district, with a few exceptions. Putnam and Sullivan counties are much less diverse than the Southern District as a whole, with over 80 % of residents being white alone. Most of the racial diversity at the district level arguably comes from the diverse nature of New York and Bronx counties. When it comes to education and income, only a few counties seem significantly different from the pool at the county level. New York county is very educated, with over 32% of resident possessing a bachelor's degree.

Only Sullivan County has more a higher percentage of males than females. Bronx County has the highest percentage of females. The potential jurors in Sullivan county are less educated that those at the district level. Income is incredibly diverse throughout the county, as evidenced by Bronx County having a median income of around \$34,000 and Putnam county having a median income around \$95,000. This is perhaps the most interesting statistic and the most obvious difference in the jury pools.

Northern District of New York

County	Population	Gender		Race			Education/Income		
		F	M	W	B	H/L	H.S.	Bach.	Med. Income
Albany	246,901	52.3	47.7	80.1	11.5	4.5	26.2	9.0	\$59,359
Broome	159,106	51.6	48.4	88.9	4.6	3.0	31.9	14.0	\$45,856
Cayuga	62,948	49.0	51.0	93.0	4.4	2.2	34.8	11.9	\$50,950
Chenango	39,045	50.7	49.3	97.0	N/D	N/D	40.1	9.3	\$44,127
Clinton	66,543	48.5	51.5	91.6	N/D	N/D	34.5	12.2	\$50,522
Columbia	50,388	50.3	49.7	92.4	3.2	3.2	30.8	13.4	\$56,445
Cortland	39,272	51.9	48.1	94.7	N/D	N/D	32.2	11.3	\$47,497
Delaware	38,332	50.0	50.0	95.4	N/D	2.9	40.0	9.9	\$43,004
Essex	32,029	47.9	52.1	89.7	N/D	N/D	35.3	11.3	\$47,400
Franklin	41,421	43.9	56.1	83.0	N/D	N/D	35.5	8.6	\$45,702
Fulton	43,165	51.0	49.0	95.8	1.6	1.9	38.9	7.8	\$45,333
Greene	39,746	47.5	52.5	90.8	6.4	4.3	38.2	10.0	\$47,539
Hamilton	4,028	49.8	50.2	97.8	1.0	1.0	34.0	13.6	\$51,595
Herkimer	50,292	51.7	48.3	97.2	1.0	1.3	35.3	11.3	\$44,288
Jefferson	87,626	48.5	51.5	89.1	4.8	4.9	36.3	10.8	\$46,549
Lewis	20,451	49.7	50.3	98.1	1.0	1.2	45.2	7.3	\$45,187
Madison	57,163	51.3	48.7	95.2	2.0	1.6	34.1	12.5	\$52,293
Montgomery	38,392	52.1	47.9	93.0	1.4	9.0	36.0	9.4	\$42,830
Oneida	183,266	50.5	49.5	88.9	5.4	3.7	32.2	13.1	\$49,148
Onondaga	359,506	52.7	47.3	84.3	9.3	3.3	26.2	17.8	\$53,593
Oswego	93,923	50.5	49.5	96.7	1.0	1.6	39.5	8.9	\$47,288
Ostego	50,652	52.3	47.7	95.4	1.7	2.8	31.5	13.2	\$46,358
Rensselaer	126,679	51.2	48.8	89.6	5.5	3.2	29.0	15.8	\$58,959
Saint Lawrence	88,797	49.4	50.6	93.5	N/D	2.1	33.3	9.8	\$43,745
Saratoga	173,902	51.2	48.8	95.0	1.7	2.3	26.2	21.3	\$67,712
Schenectady	120,406	55.9	44.1	82.6	8.7	4.9	30.7	14.7	\$56,445
Schoharie	26,040	49.8	50.2	95.9	N/D	N/D	38.5	8.9	\$51,896
Tioga	39,212	51.0	49.0	97.2	N/D	N/D	36.2	13.5	\$56,488
Tompkins	86,520	51.3	48.7	82.7	3.9	4.3	17.0	18.5	\$50,539
Ulster	146,902	50.6	49.4	88.8	5.8	7.9	30.4	15.2	\$58,934
Warren	52,644	51.8	48.2	96.9	N/D	N/D	34.0	14.5	\$54,909
Washington	50,488	48.4	51.6	93.9	N/D	N/D	42.4	10.9	\$50,864
<b>NDNY Total</b>	<b>2,715,785</b>	<b>50.9</b>	<b>49.1</b>	<b>89.4</b>	<b>5.8*</b>	<b>3.6*</b>	<b>31.3</b>	<b>16.6</b>	<b>\$50,417</b>

\*These totals reflects the lack of data for various counties, as indicated by “N/D” in each cell.

## Notable Findings

The Northern District is comprised of thirty two counties, but is the third largest of the four districts. As previously mentioned, the Northern District has courthouses in Albany, Binghamton, Plattsburgh, Syracuse, and Utica. At the district level, it is evenly split in gender. It is predominantly white alone and fairly uneducated. Its median income is fairly close to the income of most of its counties.

At the county level, Saratoga county is the outlier, with 95% of residents classifying as white alone and having a median income over \$17,000 higher than that of the district. Some counties are incredibly small in number. For example, Hamilton County has only 4,028 people. In terms of race, it is astounding that even the counties with large numbers of people have such few minority residents. For example, Oneida and Onondaga are large counties, and each have over 80% of residents identifying as white alone. Additionally, ten of the counties have fewer than 10% of residents possessing a bachelor’s degree. On the whole, the counties appear to mirror the federal court composition—a fairly homogenous population.

### Eastern District of New York

County	Population	Gender		Race			Education/Income		
		F	M	W	B	H/L	H.S.	Bach.	Med. Income
Kings	1,987,080	53.7	46.3	43.9	34.1	18.7	26.2	19.2	\$45,215
Nassau	1,050,478	52.9	47.7	71.2	11.1	14.3	24.0	22.7	\$97,049
Queens	1,826,674	52.1	47.9	43.6	18.2	26.4	27.0	18.7	\$56,780
Richmond	366,229	52.4	47.6	77.6	9.5	15.8	31.4	17.8	\$73,496
Suffolk	1,160,440	51.4	48.6	82.1	7.3	15.7	29.1	17.8	\$87,778
<b>EDNY Total</b>	<b>6,390,901</b>	<b>52.5</b>	<b>47.5</b>	<b>57.2</b>	<b>19.5</b>	<b>19.4</b>	<b>26.9</b>	<b>19.0</b>	<b>\$72,064</b>

## Notable Findings

The Eastern District comprises only five counties, but is the largest district by population in New York. As previously mentioned, the Eastern District has courthouses in Brooklyn and Long Island. The district has a fairly even distribution of male and female residents. One interesting statistic to note is that each county as well as the district as a whole has a greater percentage of female residents than male residents. The Eastern district is fairly racially diverse, of average education, and has the highest median income in New York.

Each of the five counties individually is fairly large. On the county level, Kings and Queens county are very racially diverse. Nassau, Richmond, and Suffolk counties are all over 70% white alone. None of the counties is markedly different in education, but median income varies widely throughout the county. As an example, the average resident of Kings County earns approximately \$45,000, compared to the average resident of Nassau County, who earns approximately \$97,000—almost double.

#### Western District of New York

County	Population	Gender		Race			Education/Income		
		F	M	W	B	H/L	H.S.	Bach.	Med. Income
Allegany	38,249	49.7	50.3	95.9	N/D	N/D	36.5	8.9	\$42,095
Cattaraugus	61,085	51.1	48.9	94.0	N/D	1.4	41.0	8.7	\$43,202
Chautauqua	105,241	51.1	48.9	94.3	2.3	5.2	33.8	10.0	\$41,975
Chemung	69,277	50.7	49.3	90.5	6.5	N/D	35.1	11.8	\$48,128
Erie	726,275	52.4	47.6	81.5	12.1	3.9	28.2	16.5	\$49,977
Genesee	47,054	50.6	49.4	93.4	3.0	2.3	36.6	11.8	\$51,734
Livingston	52,364	50.2	49.8	93.3	N/D	2.7	31.1	12.6	\$54,244
Monroe	584,354	52.5	47.5	79.2	13.4	6.3	24.9	18.7	\$52,700
Niagara	170,170	52.0	48.0	90.1	6.3	1.9	33.9	13.2	\$47,736
Ontario	83,654	51.8	48.2	94.8	2.1	2.8	28.2	16.8	\$56,455
Orleans	33,507	50.9	49.1	90.0	6.8	3.4	40.5	9.6	\$50,113
Schuyler	14,601	50.5	49.5	97.4	1.0	1.3	37.8	8.3	\$47,869
Seneca	27,805	47.3	52.7	92.3	5.7	2.6	34.8	11.3	\$49,155
Steuben	75,827	50.8	49.2	95.2	1.7	1.2	36.2	10.3	\$46,519
Wayne	71,347	50.5	49.5	94.9	3.2	2.9	36.1	12.0	\$53,497
Wyoming	33,455	44.7	55.3	90.2	7.2	3.1	39.9	8.8	\$50,635
Yates	19,194	52.0	48.0	97.6	1.0	1.4	35.9	11.4	\$48,245
<b>WDNY Total</b>	<b>2,213,459</b>	<b>51.7</b>	<b>48.3</b>	<b>85.6</b>	<b>9.5*</b>	<b>4.1*</b>	<b>30.1</b>	<b>15.1</b>	<b>\$49,075</b>

\*These totals reflects the lack of data for various counties, as indicated by "N/D" in each cell.



## **Notable Findings**

The Western District is comprised of seventeen counties and is the smallest district by population. As previously mentioned, the Western District has courthouses in Rochester and Buffalo. It is not remarkable in its gender distribution and reflects its individual counties in its lack of racial diversity. With only 15% of the county's residents possessing a bachelor's degree, it is a fairly uneducated district. The median income of the district is the lowest in the state, at only around \$49,000.

At the county level, Erie and Monroe are significantly larger than the other counties and are more racially diverse than the other counties and the district as a whole. Some counties have strikingly low percentages of diverse residents. Yates county, for example, has over 97% of its residents identifying as white alone. In five of the counties, fewer than 10% of the residents possess a bachelor's degree. The range of median incomes is unremarkable, ranging from about \$41,000 to about \$54,000. Overall, the counties appear to mirror the federal composition, as the area is fairly homogenous.

## **New York State and Federal Courts' Application of *Duren***

Once demographic data on the pool of jurors is collected, it seems logical to examine whether any of the state, county, or federal courts had been the subject of challenges to the constitutional protections in the Sixth Amendment. If a court had granted such a challenge, it would mean that the defendant was able to show that there was a problem with the jury selection or assembly process. Even if the court did not grant the challenge, it would provide helpful perspective on which counties or districts had potential problems with representativeness.

As background, the Sixth Amendment of the Constitution provides to criminal defendants “an impartial jury of the State.”<sup>45</sup> Within this protection, the Supreme Court has created a “fair-cross section” requirement for a jury in both criminal and civil cases—a requirement that jurors must be pulled from a fair cross-section of the community. The empaneled jury itself does not need to be representative of the community, simply the pool from which jurors are chosen. The landmark case in this area, *Duren v. Missouri*,<sup>46</sup> laid out a three-factor test that a defendant must meet in order to prove a prima facie violation of the Sixth Amendment. First, a defendant must show that the group excluded is a “distinctive” group in the community. Next, the representations of this group in jury pools must not be fair and reasonable in relation to the number of such persons in the community. Finally, the underrepresentation must be due to “systematic exclusion” of the group in the jury process.<sup>47</sup>

All federal and state courts are bound by the cases in this area and follow the *Duren* three-factor test. New York state adopts the fair-cross section requirement in Chapter 30, Article 16 of the Consolidated Laws of New York.<sup>48</sup> The relevant statute provides that “all litigants in the courts of this state entitled to trial by jury shall have the right to . . . juries selected at random from a fair cross-section of the community in the county.”<sup>49</sup>

A Westlaw search of cases citing *Duren* in New York state courts yields thirty nine results, with many cases being appealed to the Second Appellate Division. The benchmark case out of the Court of Appeals of New York was decided in 1983, four years after *Duren*. *People v.*

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<sup>45</sup> U.S. CONST. amend. VI.

<sup>46</sup> 439 U.S. 357 (1979).

<sup>47</sup> *Id.* at 364.

<sup>48</sup> New York Judiciary Law § 500 (McKinney 2014).

<sup>49</sup> *Id.*

*Guzman*<sup>50</sup> was an appeal from The Supreme Court, Kings County, where the defendant argued that there was a disproportionately lower percentage of Hispanics present in the Grand Jury pool.<sup>51</sup> The court found that, unlike in *Duren*, no systematic exclusion *purposely* excluded such jurors or was directly aimed at excluding them.<sup>52</sup> Several lower court cases have reached a similar result—that the defendant was unable to show systematic exclusion.<sup>53</sup> It is incredibly difficult to prove a successful challenge to the fair-cross section requirement in New York state court.

It is equally difficult to succeed on a *Duren* challenge in New York federal courts.<sup>54</sup> A Westlaw search of cases citing *Duren* in the Second Circuit, governing law for the district courts of New York, yields twenty one results. A total of forty cases appear for the four district courts: fifteen in the Eastern District, seven in both the Northern and Southern Districts, and eleven in the Western District.<sup>55</sup>

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<sup>50</sup> 60 N.Y.2d 403 (1983).

<sup>51</sup> *Id.* at 407.

<sup>52</sup> *Id.* at 411. The court explained that all jurors were summoned by the subpoenas, which were sent to Hispanics in proportion to their percentage in the population. The fact that a lower percentage of Hispanics responded was simply an “inherent defect in the process.” *Id.*

<sup>53</sup> See *People v. Hall*, 42 Misc.3d 1208(A) (2013) (holding that defendant could not show that town of Pelham, New York had systematically excluded African Americans from jury pool); *People v. Gilchrist*, 98 A.D.3d 1232 (2012) (holding same in Monroe County); *People v. Parker*, 304 A.D. 3d 146 (2003) (holding same in Erie County).

<sup>54</sup> See *United States v. Plaza-Andrades*, 507 Fed.Appx. 22, 25-26 (2d. Cir 2013) (holding that defendant’s fair cross-section right was not violated by holding trial in Utica Division as opposed to more diverse Syracuse/Auburn Division); *Leslie v. LaValley*, No. 10-cv-2391, 2014 WL 3489317, at \*7-8 (E.D.N.Y. Jul. 2014) (holding that petitioner fails to show that African-Americans were not reasonably represented in jury nor that exclusion was systematic); *United States v. Walsh*, 884 F. Supp. 2d 88, 92 (S.D.N.Y. Aug. 2012) (holding that defendant’s Sixth Amendment challenge to the exclusion of the age 70 and older population did not involve a “distinctive group”).

<sup>55</sup> The number of cases brought in state and federal court arguing Sixth Amendment violations seems fairly low. However, one cannot infer from this that there are only few problems within these courts. Due to the high burden *Duren* imposes on defendants, lawyers may be reluctant to raise such problems with the court.

## Comparison of Census Data to Reported New York Juror Reports

In September 2010, New York state passed a law that directs the commissioner of jurors to collect information about race, ethnicity, age, and sex of those who present for jury service and then prepare a report with findings.<sup>56</sup> The first report that was prepared was twenty pages long and included information about the demographic makeup of the residents of the counties in the state, demographic information about jurors who actually appeared for service, and general information about New York's efforts to increase jury representativeness.<sup>57</sup> The second and third reports were much less detailed and only provided data on jurors who appeared or served.<sup>58</sup>

To determine whether the population appearing for jury service mirrored the jury eligible population, I compared my census-created data to the data of the most recent report, reflecting jurors who served in the calendar year 2013.<sup>59</sup> The report says that a total of 478,296 jurors served in the calendar year 2013 in New York state. 397,742 jurors filled out cards as required by law. Based on my calculations, there are 15,388,263 jurors who could be eligible for service.<sup>60</sup> This means that 3.10% of New Yorkers statewide appeared for jury service, and 83% of those who appeared for service completed the card.

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<sup>56</sup> New York Judiciary Law § 528 (McKinney 2014) (“The commissioner of jurors shall collect demographic data for jurors who present for jury service, including each juror's race and/or ethnicity, age and sex, and the chief administrator of the courts shall submit the data in an annual report to the governor, the speaker of the assembly, the temporary president of the senate and the chief judge of the court of appeals.”).

<sup>57</sup> See Ann Pfau, First Annual Report Pursuant to Section 528 of the Judiciary Law, available at [https://www.nycourts.gov/publications/pdfs/528\\_ReportNov2011.pdf](https://www.nycourts.gov/publications/pdfs/528_ReportNov2011.pdf).

<sup>58</sup> See A. Gail Prudenti, Second Annual Report Pursuant to Section 528 of the Judiciary Law 2011-2012, available at [https://www.nycourts.gov/publications/pdfs/528Report2011\\_12.pdf](https://www.nycourts.gov/publications/pdfs/528Report2011_12.pdf).

<sup>59</sup> See A. Gail Prudenti, Third Annual Report Pursuant to Section 528 of the Judiciary Law 2013, available at <http://www.nycourts.gov/publications/pdfs/528Report2013.pdf>.

<sup>60</sup> This number most likely overstates the actual eligible for service due to state and federal exceptions, but is the closest the census data will allow.

Each person who appears for service is asked to fill out a collection card. The juror must fill in the data, indicate whether he or she is serving on a trial or grand jury, indicate his or her gender, answer questions about race, Hispanic origin, date of birth, and indicate county. For my purposes, data on gender and race organized by county is most relevant. I have chosen two counties as examples to illustrate an approach for determining whether the fair cross-section of the population is appearing for service—whether jury panels adequately represent the community as a whole.

In New York County, 81,660 jurors reported out of the 1,387,820 eligible for jury service in my data—approximately 5.9%. Of those, 75,163 completed juror cards—92%. The female/male breakdown of the jurors was 42% male and 53% female. My census-created data shows that the overall population is 46.6% male and 53.4% female. This is not a significant difference. For race of the jurors who filled out the cards, the report shows 61% White, 9% Black, and 15% Hispanic. The breakdown from my census-created data shows 58.7% White, 14.4% Black, and 23.9% Hispanic. This shows that the actual jurors reporting for service and completing cards does not exactly mirror the population.

In Onondaga County, 5,635 jurors reported and 4,409 jurors completed cards. This means that 1.57% of the population of the county reported, and of those who reported, approximately 78% completed cards. 46% of the jurors who completed cards were male and 51% female. My census-created data shows 47.3% male and 52.7% female. This could indicate a significant difference. For race, the breakdown of jurors who completed cards was 81% White, 4% Black, and 2% Hispanic. My census-created data indicates 84.3% White, 9.3% Black, and 3.3% Hispanic. This again is a difference in composition, which may or may not be significant.

The technique suggested here focuses on comparing representativeness of the eligible juror population with demographic characteristics of jurors who appear for service. Shari Seidman Diamond, in a 2006 law review article, suggests that there is a loss of prospective jurors at each stage of the qualification and summons process.<sup>61</sup> She writes that a comparison of demographic characteristics of a surrounding area with the actual jury pool that a court draws reveals a “systematic underrepresentation of minorities, younger individuals, and those at lower incomes,” citing a study conducted on jury pools in Connecticut.<sup>62</sup> A large-scale study of this nature should be conducted in all New York state counties and federal courts to discover underrepresented populations in jury pools and jurors who appear for service.

### **Part III: Analysis of Differences**

Which if any of these differences are or could potentially be material to case outcomes? My research identified five places where federal and state juries can differ: jury assembly, difference in postponement, difference in penalties for jurors who do not comply with summonses, demographic differences, and varying degrees of success for *Duren* challenges.

First, an analysis of the differences in jury assembly—the sources from which jurors are pulled—suggests that the Jury Selection and Service Act of 1968 provides substantially more exclusions from the jury pool in federal court than in state court. In the Southern District of New

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<sup>61</sup> See Sheri Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 733-37 (2006).

<sup>62</sup> The New York Section 528 reports collect data on race and age, but not income. As an aside, to fully answer the question whether a diverse group of jurors is serving on empaneled juries undoubtedly requires a study of voir dire procedures and how and when lawyers use peremptory challenges, which impacts the composition of seated juries. On this point, Professor Diamond explained that the composition of empaneled juries compared with the composition of the jury pool has “received little attention,” but that generally the distribution is fairly similar. See Diamond, *supra* note 60, at 735.

York, for example, juror names are pulled from only the most recent voting lists, whereas in state courts, they are pulled from voter lists as well as four additional sources.<sup>63</sup>

This could have a significant impact on who appears for jury service and whether certain populations are disproportionately represented on empaneled juries.<sup>64</sup> More research should be done on whether the populations excluded by the JSSA are significantly underrepresented in federal court compared to state court and how often and for what reasons judges are granting exceptions for those who fall within the hardship categories.

Second, federal courts offer less flexibility for postponing service and impose harsher fines for non-compliance with a jury summons. It is unclear what effect the differences in postponement rates and penalties for jurors who do not report have on overall jury participation. If there is a group that is continually postponing service to a different day or month, this could have an impact on overall participation.<sup>65</sup> More research should be done to determine whether

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<sup>63</sup> Several scholars suggest that the sources and lists from which jurors are pulled greatly influence juror participation. See Diamond, *supra* note 52, at 733; Nancy Gertner, *12 Angry Men (And Women) In Federal Court*, 82 CHI.-KENT L. REV. 613, 617-19 (2007). Judge Gertner describes the administrative problems in compiling lists from which jurors in federal court are drawn. She points out that minorities do not vote in the same proportion as whites and that relying on resident lists can be problematic because of the disproportionate upkeep associated with them. *Id.*

<sup>64</sup> The New York State Board of Elections data shows that statewide, 11,806,472 people are registered to vote. This is approximately 76% of the total eligible juror population of 15,388,263 that my data included. Simply pulling from voter registration lists would exclude almost 3.6 million New Yorkers. See

[http://www.elections.ny.gov/NYSBOE/enrollment/county/county\\_nov14.pdf](http://www.elections.ny.gov/NYSBOE/enrollment/county/county_nov14.pdf).

<sup>65</sup> An interesting case out of the District of Columbia deals with this issue. The defendant raised a Sixth Amendment challenge claiming that, because the court chose jurors for empaneled juries on Mondays, this led to an underrepresentation of African Americans. The defendant argued that most people who defer service were placed on a Monday, and the people who defer jury service have a higher education and income. Thus, the defendant argued, the population of his jury was skewed. The D.C. Court of Appeals found that the appellant failed to show the underrepresentation was systematic, as required under *Duren*. See *Diggs v. United States*, 906 A.2d 290, 296-98 (2006).

certain groups postpone more frequently than others and whether ease of postponement affects juror participation in any way.<sup>66</sup>

A determination of whether the steeper fines for noncompliance with jury summonses imposed by federal courts has a significant impact on juror participation is based on an understanding of how these procedures play out in the courts. For example, it could be the case that people with higher incomes are simply paying the fine instead of serving on juries. This may have an impact on the demographic make-up of juries in a particular county or district at particular times.

Finally, research shows that diverse perspectives, most likely to be found among a diverse jury, are essential for sound decision-making.<sup>67</sup> Revealing and understanding demographic differences and how *Duren* challenges are received by the courts requires a case-by-case, county-by-county, and district-by-district analysis. When deciding whether demographic make-up will look significantly different in state and federal court, litigators should conduct analyses similar to the one I have conducted—compare the eligible jury population in the state with that of the federal court to determine if any meaningful differences exist. Litigators should also research *Duren* challenges in these locations to uncover any structural flaws that have been raised.

Some districts such as the Northern and Western Districts appear to be fairly homogenous and may not produce significant differences in jury make-up at the state and federal

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<sup>66</sup> Research on jury representativeness in Monroe County, conducted by Professor Valerie Hans and cited in an article written in the Cornell Journal of Law and Public Policy, has looked at New York state jury reform, including postponement procedures. Professor Hans suggests that New York employs “many of the best practices for jury pool selection” including offering automatic one-time postponements. See Valerie P. Hans, *Jury Representativeness: It’s No Joke in the State of New York*, CORNELL J. L. & PUB. POL’Y BLOG (Jan. 20, 2012).

<sup>67</sup> NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 74-75 (2007).



level. However, litigants in the Southern and Eastern Districts may find more demographic disparities between the state and federal courts. For prosecutors, if a type of criminal case will be sensitive to a segment of the population, this could also influence the decision whether or not to bring charges against a particular defendant or how the lawyers should prepare the case and focus arguments. For example, in a sexual assault case, a prosecutor may not want to bring charges against a defendant where he or she knows that there is an overwhelming majority of one gender present in the county or who are likely to appear for service. Similarly, if the prosecutor is dealing with a case regarding racial profiling, a prosecutor may not want to bring charges in a county or district that is fairly racially homogenous.

#### **Part IV: Conclusion**

Overall, my research suggests that there are key differences between both the various procedures and demographics of the jury pool that can influence a trial proceeding in state and federal courts in New York.

The first question I hoped to answer was whether a plaintiff in a civil case should consider characteristics of the jury in deciding whether to file a complaint and similarly, if a defendant in a civil case filed in a New York trial court should consider characteristics of the jury when deciding whether or not to remove the case from state court to federal court. The answer largely depends on the county and district in question. Litigators should conduct a review of the five topics I have presented here: jury assembly procedures, differences in postponement systems, differences in penalties for noncompliance with jury summonses, demographic differences, and *Duren* challenges.<sup>68</sup>

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<sup>68</sup> For this review to be meaningful, of course, New York state and federal court systems must work to ensure that their laws are clear and that accurate, expansive data is recorded and published in all of these areas.

In the criminal context, I set out to research whether the jury afforded to a criminal defendant significantly different based on whether the defendant committed a crime against New York state or the United States or the location of the crime committed. Should a criminal prosecutor consider any of these factors in deciding whether or not to pursue a case against a particular defendant? These questions are more easily answered by the research. It does seem as though the jury afforded to a criminal defendant differs depending on the type of crime—state or federal—that the defendant commits. If these differences are significant in some way to a criminal prosecutor, he or she should use them strategically.

While the Supreme Court of New York, New York County Courthouse and the Southern District of New York Daniel Patrick Moynihan Courthouse may sit just blocks away from one another in downtown Manhattan, there is a substantial difference in many of the procedures employed with respect to the jurors who appear in each building to serve as fact-finders every day. Civil litigators and criminal prosecutors can gain from knowledge of these differences and should take into account any consequences of them in making critical decisions relating to forum and prosecution.