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## FAIR JURIES

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*High-profile jury trials have catapulted concerns about jury fairness to the center of public consciousness. The public demands—and deserves—fairness from its juries. Despite the jury’s sound performance in most cases, we can do better. The groundwork for the jury’s capacity for fairness is laid long before prospective jurors enter the courtroom. It is further shaped by processes that occur during jury selection, throughout the trial, and in the course of jury deliberations. Most of these influences are not immediately visible to the public. In this Article, we provide a comprehensive examination of the phases of the jury trial that are critical to achieving fair juries. We describe how problems at each stage of the jury trial can undermine performance and we propose a set of important empirically-grounded reforms that will strengthen jury selection and trial procedures, optimizing fair juries now and into the future.*

Key words: anti-bias instructions; *Batson*; challenges for cause; implicit biases; jury; jury instructions; jury selection, jury service; jury venire; peremptory challenges; racism; representativeness

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## I. INTRODUCTION

As juries decide controversial cases in the American legal system, the public holds its breath. What will a nearly all-white jury do with three white defendants on trial for shooting and killing an unarmed Black man?<sup>1</sup> What will a racially heterogeneous jury do with a white police officer on trial for killing a Black man?<sup>2</sup> In a politically divided country, how will a jury evaluate evidence that the ally of a sitting president committed financial crimes?<sup>3</sup> How will a jury respond to a young defendant armed with an assault rifle during a protest who claims self-defense when charged with fatal shootings of two men?<sup>4</sup> And how will a civil jury decide whether organizers of a political protest rally were liable for the death and injuries that ensued?<sup>5</sup>

The public demands fairness from its juries and is entitled to receive it. By jury fairness, we mean decision-making by an impartial jury drawn from a fair cross-section of the community and guided to reach a verdict by the relevant evidence and law. The foundation for the jury's capacity for fairness is laid long before prospective jurors enter the courtroom. It is further affected by developments during jury selection, the trial, and jury deliberations. Most of these influences are not immediately observable to the public. This Article offers a comprehensive examination of the three phases of the jury trial that are critical to achieving fair juries.

Our jury system works well in the majority of cases.<sup>6</sup> But our goal should be to optimize the working of this remarkable democratic institution. We use

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1. Richard Fausset, *What We Know about the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/2DLK-D22W>]; Joe Hernandez, *How the Jury in the Ahmaud Arbery Case Ended Up Nearly All White—and Why It Matters*, NPR (Nov. 5, 2021), <https://www.npr.org/2021/11/05/1052435205/ahmaud-arbery-jury> [<https://perma.cc/RLB9-29AQ>].

2. Nicholas Bogel-Burroughs, *Jurors Who Convicted Derek Chauvin are Identified for First Time*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/01/us/derek-chauvin-trial-jury.html> [<https://perma.cc/6V38-NFUQ>].

3. Sharon LaFraniere & Emily Baumgaertner, *The Paul Manafort Trial: What the Jurors will Consider*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/us/politics/paul-manafort-trial-jury-verdict.html> [<https://perma.cc/9K8B-DKBK>]; Brandi Buchman, *Jury Seated in Paul Manafort Fraud Trial in Virginia*, COURTHOUSE NEWS SERV. (July 31, 2018), <https://www.courthousenews.com/jury-seated-in-manafort-trial-in-virginia/> [<https://perma.cc/AM2H-W8NX>].

4. Julie Bosman, *Jurors for Kyle Rittenhouse Trial Are Swiftly Selected*, N.Y. TIMES (Nov. 19, 2021), <https://www.nytimes.com/2021/11/01/us/kyle-rittenhouse-trial-jury.html> [<https://perma.cc/Q3YJ-WJMR>].

5. Neil MacFarquhar, *Jury Finds Rally Organizers Responsible for Charlottesville Violence*, N.Y. TIMES (Nov. 23, 2021), <https://www.nytimes.com/2021/11/23/us/charlottesville-rally-verdict.html> [<https://perma.cc/YH8A-NSQ9>].

6. A substantial body of research, including our own scholarship, confirms the basic soundness of most jury verdicts. *See, e.g.*, BRIAN H. BORNSTEIN & EDIE GREENE, THE JURY UNDER FIRE 309 (2017) (summarizing

empirical research to reveal how problems at each stage of a jury trial can undermine optimal jury composition and performance, and we offer a program of changes that can fulfill the promise of obtaining maximal fairness in jury trials.

Jury selection during courtroom proceedings has dominated public and scholarly attention. As we demonstrate, that focus does not capture the much larger set of steps that affect the jury's fairness. The initial phase that is essential for fair juries is achieving a representative pool of prospective jurors who appear in court.<sup>7</sup> That goal was explicitly recognized in *Taylor v. Louisiana*, when the U.S. Supreme Court considered the makeup of the jury pool and specified that the Sixth Amendment guarantee of an impartial jury requires that jury lists in both federal and state courts be composed of a fair cross-section of the community.<sup>8</sup> Similarly, this goal was captured in Principle 10 of the 2005 A.B.A. *Principles for Juries and Jury Trials*: "Courts Should Use Open, Fair, and Flexible Procedures to Select a Representative Pool of Prospective Jurors."<sup>9</sup> Without beginning the process of assembling a jury with a representative pool of prospective jurors, courts cannot produce juries that fully reflect the community.

The second key phase encompasses the procedures used to determine which of the prospective jurors who are summoned to serve will actually become members of a jury. The procedures that lead from being part of the jury pool to serving on a jury require courts to evaluate and rule on a variety of potential reasons why a prospective juror should *not* serve.<sup>10</sup> In addition to ensuring that prospective jurors are legally qualified to serve according to the statutory eligibility requirements, courts must evaluate whether jury service would cause undue hardship that warrants an excuse or delay in service, a concern made particularly prominent during the COVID-19 pandemic.<sup>11</sup> Courts must also determine whether a prospective juror cannot be fair in a particular trial.<sup>12</sup> In addition to these decisions on whether to excuse a juror for cause, courts are charged with monitoring

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research and concluding that criticisms of the jury are often based on limited information and myths); HARRY KALVEN, JR., & HANS ZEISEL, *THE AMERICAN JURY* 160–61 (1966) (finding strong judicial agreement with jury verdicts); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 346 (2007) (summarizing research on jury competence); Shari Seidman Diamond & Mary R. Rose, *The Contemporary American Jury*, 14 ANN. REV. L. & SOC. SCI. 239, 253 (2018) (evaluating research and concluding that "jurors are motivated to reach the correct verdict, one they perceive as fair and consistent with the evidence").

7. See *infra* Part III.

8. 419 U.S. 522, 530 (1975) ("[A] fair cross section of the community is fundamental to the American system of justice."); see also *Duren v. Missouri*, 439 U.S. 357, 358–60 (1979).

9. AM. BAR ASS'N, *PRINCIPLES FOR JURIES & JURY TRIALS* 10 (2005) [hereinafter A.B.A. PRINCIPLES]. The A.B.A.'s Principles are advisory but were endorsed by the Conference of Chief Justices, a body composed of the chief justices of each state supreme court. The Conference adopted a formal resolution, which "[e]ncourages all state courts to implement procedures and practices consistent with the ABA Principles for Juries and Jury Trials." Conference of Chief Judges, Resolution 14: In Support of the American Bar Association Principles for Juries and Jury Trials, adopted as proposed by the Court Management Committee at the 29th Midyear Meeting on January 18, 2006.

10. See 28 U.S.C. § 1865(b).

11. See *id.* § 1866(c).

12. See *id.*

the peremptory challenges that attorneys propose for removing prospective jurors from a panel during jury selection.<sup>13</sup> Exclusion of potential jurors based on race, ethnicity, or gender undermines the promise of a fair trial.<sup>14</sup> Jury selection is complicated because individuals, including jurors, judges, and the parties, may harbor implicit biases that they are not even aware they have.<sup>15</sup> Principle 11 of the 2005 A.B.A. *Principles for Juries and Jury Trials* recognizes the importance of this phase, stating that “Courts Should Ensure that the Process Used to Empanel Jurors Effectively Serves the Goal of Assembling a Fair and Impartial Jury.”<sup>16</sup>

The third phase is the trial, where determining what evidence and legal guidance the jury will receive are critically important for fair juries. That phase includes addressing potential biases that can infect trial proceedings. Courts must determine whether evidence is relevant and not unduly prejudicial, as well as how to instruct jurors on the law.<sup>17</sup> Moreover, the same implicit biases that operate during jury selection may also affect the conduct of the trial.<sup>18</sup> The challenge for courts is how to structure the jury trial and provide guidance that minimizes the effects of these biases. In recent years, courts have become more aware of this challenge and several modern jury commissions and court-appointed working groups have been charged explicitly with addressing it.<sup>19</sup> The primary thrust of this effort has been on educating jurors through jury instructions.<sup>20</sup> The operative guiding principle might be characterized as: Courts Should Attempt to Provide Appropriate Guidance and Minimize the Impact of Bias, both Explicit and Implicit, on Jurors and Juries.

We begin in Part II by analyzing the important roles that representativeness, impartiality, and enhanced fact-finding and legal guidance play in achieving fair jury trials. In Parts III, IV, and V, we examine each of the three phases of the trial: assembling a representative jury pool, selecting an impartial jury, and conducting a trial that maximizes jury performance and minimizes the effects of bias on the seated jury. We show the key role that each plays in producing fair juries, using some of the high-profile cases we opened with to illustrate the issues that arise. We explore the challenges in assembling and seating fair juries and in conducting fair jury trials and propose ways to address those challenges with research-based recommendations to maximize the likelihood of fair juries. In Part VI, we consider how recent high-profile cases have handled these challenges, finding that some cases that have riveted public attention show how far we have

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13. *See id.* § 1870.

14. *Batson v. Kentucky*, 476 U.S. 79, 85–87 (1986) (race); *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (race and ethnicity); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (gender).

15. *See, e.g.*, Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (finding that judges harbor the same kinds of implicit biases as the general American population).

16. A.B.A. PRINCIPLES, *supra* note 9.

17. *See* FED. R. EVID. 403.

18. *See* Rachlinski, Johnson, Wistrich & Guthrie, *supra* note 15, at 1221.

19. Examples include California, Connecticut, New Jersey, and Washington State. *See discussion infra* Section V.E.

20. *See id.*

progressed, yet others underscore what else we must do to secure the promise of fair juries. We conclude in Part VII with an assessment of jury fairness now and in the future.

## II. ACHIEVING FAIR JURIES

### A. *Maximizing Representativeness*

There are sound reasons for maximizing the likelihood of a representative jury by requiring that jurors be randomly selected from a community cross-section. Juries that reflect the full range of community perspectives are in a position to incorporate these diverse views into their fact-finding. Compared to homogeneous juries, diverse juries engage in more robust and vigorous deliberation.<sup>21</sup> Although much of the empirical jury literature focuses on racial diversity, the positive impacts of diversity extend beyond racial diversity. Jurors with varying backgrounds and beliefs, like members of other heterogeneous problem-solving groups, bring diverging interpretations of the evidence to the table and test one another's construals of the evidence during their deliberations.<sup>22</sup>

Samuel Sommers conducted a mock jury experiment in which he asked participants to arrive at a decision in a racially-charged case.<sup>23</sup> Half of the mock juries consisted of only white jurors, whereas the other half were racially diverse juries consisting of four whites and two Blacks.<sup>24</sup> Comparing the deliberations of all-white and racially-mixed juries, Sommers discovered that diverse jury deliberations were more accurate, more expansive, and longer.<sup>25</sup> It was not simply that the minority jurors contributed new and different information. The white jurors acted differently in all-white versus mixed-race juries.<sup>26</sup> The white jurors made fewer factual mistakes and raised more issues and evidence during the deliberation.<sup>27</sup> In short, they appeared to be more careful in their decision-making in a diverse, as opposed to an all-white, jury.<sup>28</sup>

Another mock jury experiment compared all-white and diverse juries deciding a murder case, examining how they responded to differences in the race

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21. See Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1024 (2003) (summarizing research). See also Amanda Nicholson Bergold, *What Psychology Says about Jury Diversity*, 61 JUDGES' J. 6 (2022) (collecting sources about the values of jury diversity).

22. Stefan Schulz-Hardt, Marc Jochims & Dieter Frey, *Productive Conflict in Group Decision Making: Genuine and Contrived Dissent as Strategies to Counteract Biased Information Seeking*, 88 ORG. BEHAV. & HUM. DECISION PROCESSES 563, 566 (2004) (reviewing research showing that heterogeneity fosters more accurate judgments and better solutions in problem solving, and that it facilitates consideration of unshared information during group discussions).

23. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 597 (2006).

24. *Id.* at 601.

25. *Id.* at 604–05.

26. *Id.* at 605–06.

27. *Id.*

28. *Id.*

of the parties.<sup>29</sup> All-white juries mentioned more case facts when the defendant and victim were white than when the defendant and victim were Black; diverse juries did not show a significant difference in the number of case facts mentioned between the cases with white or Black parties.<sup>30</sup> Thus, jury diversity reduced the disparity in facts discussed during the deliberation between cases with Black and white parties.<sup>31</sup>

The presence of racial minorities on the jury is likely to limit the expression of prejudice during deliberation.<sup>32</sup> As University of Michigan psychology and law professor Phoebe Ellsworth observed, “[w]hite people worry about being racist when they’re reminded of it, but when it’s all white people, it just doesn’t occur to them to remember their egalitarian values.”<sup>33</sup> Concern about being considered racially prejudiced appears to lead to greater self-monitoring.<sup>34</sup>

Some might worry that, because of their members’ different backgrounds and experiences, diverse juries will be less able to agree on a final verdict. Hung juries are rare, but more importantly, hung juries do not appear to arise from diversity on the jury.<sup>35</sup> An in-depth study of hung juries in criminal cases in state courts analyzed the factors associated with hung juries and found that evidentiary factors, the perceived fairness of the legal outcome, and jury dynamics, but *not* the jury’s diversity, predicted the likelihood of a hung jury.<sup>36</sup> Therefore, there is no evidence that increasing the jury’s diversity makes it more difficult for juries to arrive at a verdict.

In addition to salutary effects on their decision-making, diverse juries convey a number of democracy-enhancing benefits. Representative juries are more likely to be seen as legitimate decision-makers, which in turn contributes to public confidence in the justice system.<sup>37</sup> A jury’s racial representativeness appears to be especially important. U.S. Supreme Court Justice Thomas observed in

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29. Liana Peter-Hagene, *Jurors’ Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 LAW & HUM. BEHAV. 232, 240–43 (2019). In this experiment, racial diversity was achieved by including two Black confederates in mock juries along with white participants. White mock jurors’ behavior differed when they were in all-white versus racially mixed juries, as found in the Sommers research.

30. *Id.* at 241.

31. *Id.*

32. Steve McGonigle, Holly Becka, Jennifer LaFleur & Tim Wyatt, *A Process of Jury Elimination*, DALLAS MORNING NEWS, Aug. 21, 2005, at 1A.

33. *Id.*

34. Margaret C. Stevenson, Brad L. Lytle, BreighAnna J. Baumholser & Evan W. McCracken, *Racially Diverse Juries Promote Self-Monitoring Efforts During Jury Deliberation*, 3 TRANSLATIONAL ISSUES PSYCH. SCI. 187, 187 (2017).

35. PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, NAT’L INST. OF JUST., ARE HUNG JURIES A PROBLEM? 84–86 (2002), <https://ncsc.contentdm.oclc.org/digital/collection/juries/id/27/> [<https://perma.cc/H3TH-4VKB>].

36. *Id.* at 84–86. The project identified three key factors that were associated with hung juries: trial evidence that was fairly close, so that either verdict could be justified; the level of conflict among jurors; and the belief that the law was unfairly applied to the defendant. In contrast, the researchers “found no relationship whatsoever between the likelihood that a jury would hang and its racial, ethnic, gender, or socio-economic composition.” *Id.* at 85.

37. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1039–40 (2003).

*Georgia v. McCollum* that news stories often included the phrase “all-white jury,” suggesting readers’ interest in knowing the race of the jurors as they consider jury verdicts.<sup>38</sup>

Leslie Ellis and Shari Seidman Diamond tested how a jury’s racial composition affected perceptions of fairness in a hypothetical trial in which the African American defendant was charged with shoplifting and the witnesses against him were white.<sup>39</sup> Half the participants were told that the jury was all white; the other half learned instead that the jury included four African Americans and eight whites.<sup>40</sup> Overall, the study participants thought a not guilty verdict was the fairest outcome in the case, based on the evidence they read.<sup>41</sup> When the verdict was not guilty, and thus consistent with the evidence, there was no difference between the perceived fairness of the verdict reached by the homogeneous all-white jury and the heterogeneous mixed-race jury.<sup>42</sup> When the jury reached a guilty verdict, however, the verdict reached by the racially-mixed jury was seen as fairer than the verdict of the all-white jury.<sup>43</sup> Another way to look at the results is that when a racially heterogeneous jury decided the case, the verdict did not influence the perceived fairness of the trial. But when a verdict that seemed inconsistent with the facts was reached, observers’ fairness judgments were affected by the racial representativeness of the jury as it was described to them.

Distributing jury service equitably across different groups of our diverse citizenry is also important for its educational potential. The French thinker Alexis de Tocqueville considered the jury as “one of the most effective means of popular education at society’s disposal.”<sup>44</sup> Jury service allows members of the public a close-up view of what happens in our legal system.

Reassuringly, most jurors come away with enhanced regard for the legal system, the judiciary, and the jury system.<sup>45</sup> That is especially important because preexisting views of government institutions, including the jury system, differ by race and ethnicity.<sup>46</sup> Mary Rose, Christopher Ellison, and Shari Seidman Diamond surveyed Texas residents and found that non-Hispanic whites expressed a

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38. An analysis of the frequency of the phrase “all-white jury” in three major newspapers found that it occurred more than 200 times during a five-year period. *Georgia v. McCollum*, 505 U.S. 42, 61 n.1 (1992) (Thomas, J., concurring).

39. Ellis & Diamond, *supra* note 37, at 1044.

40. *Id.*

41. *Id.* at 1046.

42. *Id.* at 1048.

43. *Id.*

44. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252–53 (J. P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1840).

45. Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 285–86 (Robert E. Litan ed., 1993). In one of the largest surveys, Janice Munsterman and her colleagues surveyed 8,468 jurors in sixteen federal and state courts, finding that 63% of the jurors reported that their views of jury service were more positive following their service. JANICE T. MUNSTERMAN, G. THOMAS MUNSTERMAN, BRIAN LYNCH & STEVEN D. PENROD, NAT’L CTR. FOR STATE CTS., *THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE* 7 (1991).

46. Mary R. Rose, Christopher Ellison & Shari Seidman Diamond, *Preferences for Juries over Judges Across Racial and Ethnic Groups*, 89 *SOC. SCI. Q.* 372, 372–73 (2008) (summarizing research on racial and



more pronounced preference for trial by jury over trial by a judge than did African American residents and Hispanic residents.<sup>47</sup> Jury service, however, more robustly boosted the positive regard for the jury among minority residents.<sup>48</sup> Compared to non-Hispanic whites who served on juries, minorities who served on juries expressed a stronger preference for a jury over a judge in civil cases.<sup>49</sup>

Participating as a juror increases other forms of civic engagement such as voting; this benefit has been found for both criminal and civil jury service. John Gastil and his colleagues examined the connection between jury service and voting records.<sup>50</sup> In a study of seven U.S. jurisdictions, they obtained jury service data and voting history records.<sup>51</sup> Comparing jurors' voting history before and after jury service, Gastil and his colleagues discovered that low-propensity voters who served as jurors in criminal cases were more likely to vote after jury service.<sup>52</sup>

In a separate analysis of civil jury service and voting records, Valerie Hans, John Gastil, and Traci Feller found that the link between jury service and voting was affected by structural characteristics of the jury.<sup>53</sup> Jurors who served on civil juries of twelve persons or juries that were required to reach a unanimous decision—in short, the traditional form of trial by jury—were significantly more likely to vote following their service, controlling for their pre-service voting history.<sup>54</sup> Jurors who decided cases with organizational (as opposed to individual) defendants also increased their voting after jury service.<sup>55</sup>

In sum, representative juries are highly desirable, not only because they are robust factfinders but also because they strengthen democracy by encouraging civic engagement and enhancing the regard for and legitimacy of its institutions.

To what extent does the modern American jury profit from these benefits that flow from representativeness? It is undisputed that jury pools and juries are more representative of the community than they were in the days of the English colonial and early American jury.<sup>56</sup> And courts have come a long way from the days when local officials selected citizens for jury service based on their race,

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ethnic minorities' lower positivity toward government institutions and surveying 1,465 Texas residents and finding racial and ethnic differences in support for jury trials).

47. *Id.* at 372.

48. *Id.* at 384–85.

49. *Id.*

50. JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 4–5 (2010); John Gastil, E. Pierre Deess & Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 586 (2002); John Gastil, E. Pierre Deess, Phil Weiser & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POL. 1, 1 (2008).

51. GASTIL, DEESS, WEISER & SIMMONS, *supra* note 50, at 4–5.

52. *Id.* at 46.

53. Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 714 (2014).

54. *Id.* at 710–12.

55. *Id.*

56. JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 1–23 (1977).

gender, community ties, and status.<sup>57</sup> The pool of potential jurors was historically composed exclusively of white male property owners, excluding all women and minorities, who were not eligible to serve as jurors when the country was founded.<sup>58</sup> Even as legal barriers to the participation of racial and ethnic minorities and women fell, use of literacy tests and special exemptions and reliance on “key man” systems in which jury commissioners selected individual community members for jury service limited the pool of individuals who reported for jury duty.<sup>59</sup>

Jon Van Dyke’s 1977 book, *Jury Selection Procedures*, offers a snapshot in time of the incomplete progress in achieving representative jury panels a decade after the 1968 Jury Selection and Service Act required that voter lists be the source for summoning citizens in federal jury trials.<sup>60</sup> He compiled then-current data about jury venires and jury representativeness from multiple federal and state jurisdictions.<sup>61</sup> Summarizing his findings at that moment, he noted:

Despite recent gains, in most courts in the United States significant segments of the population are still not included on juries as often as they would be in a completely random system aimed at impaneling a representative cross-section. Blue-collar workers, non-whites, the young, the elderly, and women are the groups most widely underrepresented on juries, and in many jurisdictions, the underrepresentation of these groups is substantial and dramatic.<sup>62</sup>

The intervening four-plus decades have seen substantial progress in moving toward greater representativeness, with the elimination of “key man” systems, reductions in the number of exclusions and exemptions from jury duty, and the emergence and current dominance of computer-assisted random selection from source lists.<sup>63</sup> A number of jurisdictions also introduced one day/one trial systems, whereby the jury service obligation is limited to one day (if not selected for a trial during that day) or one trial, if selected.<sup>64</sup> Nonetheless, the states differ in the specific approaches they take to forming the list of residents to qualify and summon for jury service.<sup>65</sup>

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57. *Id.* at 14–16 (describing how property qualifications, exclusion of women, and “key man” systems limited who could serve on juries); Neil Guzy, *Citizen Participation in Juries*, in *THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA* (Wilbur R. Miller ed., 2012).

58. See VAN DYKE, *supra* note 56, at 14.

59. *See id.*

60. *See id.* at 23–44.

61. *Id.*

62. *Id.* at 24.

63. *See id.* at 1–23.

64. David E. Kasunic, *One Day/One Trial: A Major Improvement in the Jury System*, 67 *JUDICATURE* 78, 79–80 (1983) (reporting more representative jury pools under a one day/one trial system).

65. AM. BAR ASS’N, *How Courts Work: The Jury Pool* (Sept. 09, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/jurypool/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jurypool/) [https://perma.cc/9E4A-56A9].

In principle, federal and state constitutions, as well as modern statutes, insist that juries be drawn from fair cross-sections of the community.<sup>66</sup> New York State's law, for example, provides that:

It is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the county or other governmental subdivision wherein the court convenes; and that all eligible citizens shall have the opportunity to serve on grand and petit juries in the courts of this state, and shall have an obligation to serve when summoned for that purpose, unless excused.<sup>67</sup>

The federal Jury Selection and Service Act of 1968 established statutory rights to a jury drawn from a representative cross-section, and many states adopted similar provisions.<sup>68</sup> In 1975, the U.S. Supreme Court in *Taylor v. Louisiana* specified that the Sixth Amendment to the U.S. Constitution guarantees litigants the selection of a criminal jury drawn from a fair cross-section of the community, although it does not insist that the petit jury be representative of the larger community.<sup>69</sup> Many justifications for the right to a criminal jury drawn from a fair cross-section of the community apply to civil juries as well. Cases interpreting the Seventh Amendment right to jury trial in civil cases emphasize the importance of drawing civil jurors from a representative cross-section of the population.<sup>70</sup> The Equal Protection clause of the Fourteenth Amendment forbids discrimination on the basis of membership in protected classes.<sup>71</sup> Yet, as we document below, at the operational level, slippage occurs, undermining the representativeness of the jury pool in many jurisdictions.<sup>72</sup> Further losses in representativeness occur as jurors are selected for the trial.<sup>73</sup>

### B. *Optimizing Impartiality*

Assuming a maximally expansive outreach for a representative jury pool, further action is required to seat an impartial group of jurors—a second element required for fair juries. Once a randomly selected subgroup of potential jurors is chosen from the source list and summoned to a courtroom for service in a specific case, due process and fairness require courts to assess the individual prospective jurors' ability to serve as fair and impartial factfinders.<sup>74</sup> Courtroom jury selec-

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66. See, e.g., U.S. CONST. amend. VI; N.Y. JUD. L. § 500 (McKinney 2019).

67. N.Y. JUD. L. § 500 (McKinney 2019).

68. Jury Selection and Service Act of 1968, 28 U.S.C. § 1861.

69. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“[A] fair cross section of the community is fundamental to the American system of justice.”); see also *Duren v. Missouri*, 439 U.S. 357, 358–59 (1979).

70. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 159 n.16 (1973).

71. U.S. CONST. amend. XIV § 1.

72. See discussion *infra* Part VII.

73. See discussion *infra* Section IV.B.

74. *Frank v. Mangum*, 237 U.S. 309, 335 (1915).

tion procedures, including voir dire, challenges for cause, and peremptory challenges, can dramatically influence the makeup of the trial jury.<sup>75</sup> In contrast to some other countries that require the jury that decides the case to be composed of a specific demographic makeup,<sup>76</sup> in the United States there is no guarantee that the trial jury must itself be representative of the community. As we document, the multiple steps in the jury selection process often undermine the representativeness of sitting juries.

In the courtroom, during the voir dire of prospective jurors, the judge and/or attorneys for the parties inquire about jurors' backgrounds, experiences, and attitudes that might undermine their impartiality and thus would justify exclusion through either a successful challenge for cause decided by the judge or through an attorney's peremptory challenge.<sup>77</sup> Here, the need for impartiality may eclipse the desire to seat a representative jury. Yet traditional courtroom jury selection procedures were based on several key assumptions that now appear questionable in light of new psychological research. The first assumption is that prospective jurors are well aware of their own biases and prejudices. A second assumption is that the procedures will allow, even encourage, prospective jurors to admit these biases. And a third assumption is that, if a prospective juror admits to a bias, in many cases the judge or attorney will be able to successfully rehabilitate the juror so that the juror's fact-finding is purged of bias.<sup>78</sup>

Juror bias may stem from conscious prejudice, implicit or unconscious bias, preexisting attitudes, and experiences. New research on implicit bias, combined with an extensive body of research on juror decision-making, has provided us with a better grasp of how jurors' backgrounds, life experiences, and attitudes are significant.<sup>79</sup> Jurors' characteristics shape their perceptions of evidence, which feed into their construction of a narrative account of what happened in the

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75. See, e.g., Francis X. Flanagan, *Peremptory Challenge and Jury Selection*, 58 J.L. & ECON. 385, 385 (2015).

76. Consider Argentina's new jury systems, for example, which require that trial juries be composed of half men and half women. Two provinces also require that juries in cases with aboriginal parties include jurors from their community. Vanina Almeida, Denise Bakrokar, Mariana Bilinski, Natali Chizik, Andrés Harfuch, Andrea Ortiz, Sidonie Porterie, Aldana Romano & Shari Seidman Diamond, *The Rise of the Jury in Argentina: Evolution in Real Time*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE 25, 37 (Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy S. Marder eds., 2021). Another example is Canada, which has two official languages (English and French); defendants are entitled to have their cases heard by jurors who speak their language. Regina Schuller & Neil Vidmar, *The Canadian Criminal Jury*, 86 CHI.-KENT L. REV. 497, 499–500 (2011).

77. See Jessica M. Salerno, John C. Campbell, Hannah J. Phalen, Samantha R. Bean, Valerie P. Hans, Daphna Spivack & Lee Ross, *The Impact of Minimal versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45 LAW & HUM. BEHAV. 336, 337 (2021).

78. See *id.* See also David Yokum, Christopher T. Robertson & Matt Palmer, *The Inability to Self-Diagnose Bias*, 96 DENV. L. REV. 869 (2019).

79. JENNIFER K. ELEK & ANDREA L. MILLER, NAT'L CTR. FOR STATE CTS., *THE EVOLVING SCIENCE ON IMPLICIT BIAS* (2021). The substantial body of research on jury decision-making is summarized in BORNSTEIN & GREENE, *supra* note 6; DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* 180–210 (Brian Bornstein & Monica Miller eds., 2012); VIDMAR & HANS, *supra* note 6.

dispute at the center of the litigation.<sup>80</sup> Evidence that is inconsistent with expectations and with the juror's developing narrative account may be minimized or even ignored.<sup>81</sup>

With respect to criminal jury trials, attitudes toward due process versus crime control are linked to a wide variety of criminal justice judgments.<sup>82</sup> Phoebe Ellsworth asserts that criminal justice attitudes come in a "bundle" of assumptions that shape perceptions of different elements of a case.<sup>83</sup> She illustrates this point with reference to a hypothetical supporter of capital punishment:

[I]f we consider a juror who strongly favors capital punishment, several beliefs in the constellation will operate to produce a guilty verdict. His positive attitude toward the prosecution side of the case will lead him to attend to the prosecuting attorney and to see the prosecution story as more plausible; similarly for police officers called as witnesses. His suspicion of defense attorneys will cause him to discount the testimony of defense witnesses, and render the defense less persuasive. His lack of sympathy for the defendant and his worries about the high levels of crime he perceives in his society will lead him to be relatively unconcerned about the possibility of a mistaken conviction, and may even lower his personal standard of proof to convict for any charge. Just the reverse pattern of biases would be expected to apply to a juror who was strongly opposed to capital punishment.<sup>84</sup>

Regarding civil jury trials, research has amply documented the ways in which experiences with and attitudes toward civil litigation influence civil jurors' perceptions of evidence and ultimate decisions.<sup>85</sup> In one study, researchers asked a group of prospective jurors in a Wisconsin jury pool to provide their estimates of how often a typical plaintiff's case had merit (on average, they estimated 52%).<sup>86</sup> These prior beliefs predicted their evaluations and verdicts in a hypothetical civil case.<sup>87</sup> In other research conducted with actual civil jurors, mock civil juries, and opinion surveys, general views about plaintiff credibility and the existence of a litigation crisis affected civil jury decisions.<sup>88</sup> For example, those who agreed with items such as "there are far too many frivolous lawsuits today"

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80. Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 42 (Reid Hastie ed., 1993); VIDMAR & HANS, *supra* note 6, at 132–35.

81. *See, e.g.*, VIDMAR & HANS, *supra* note 6, at 134.

82. Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 *LAW & HUM. BEHAV.* 31, 33–34 (1984).

83. Ellsworth, *supra* note 80, at 49.

84. *Id.* at 50.

85. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 *CHL-KENT L. REV.* 1179, 1181–82 (2003).

86. Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 *J. EXPERIMENTAL PSYCH.: APPLIED* 91, 97 (2001).

87. *Id.*

88. VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* 58–78, 222–49 (2000).

were less likely to find the civil defendant negligent or to recommend a substantial award.<sup>89</sup> Other researchers have discovered that preexisting views about businesses can influence civil case judgments.<sup>90</sup> These studies suggest the value of exploring attitudes toward civil litigation, plaintiffs, and corporate defendants during voir dire.

Another experiment documented the ways in which implicit racial biases might affect civil jury decision-making.<sup>91</sup> Participants read short scenarios, many based on famous tort cases, such as *Brown v. Kendall*.<sup>92</sup> The names of the plaintiff and the defendant in the scenarios were experimentally varied, using stereotypically Black (Tyrone, Malik) or white (Brendan, Art) names.<sup>93</sup> After the participants made judgments about liability and damages, participants completed an Implicit Association Test (“IAT”) for Black and white races.<sup>94</sup> Overall, a litigant’s race and implicit racial bias, as expressed on the IAT, affected how participants judged the defendant’s responsibility and how they assessed damages.<sup>95</sup> Participants with high IAT scores, reflecting strong preferences for whites over Blacks, gave more legal responsibility to Black defendants compared to white defendants who had engaged in the same actions.<sup>96</sup> They also recommended higher awards for plaintiffs who sued Black defendants.<sup>97</sup> Dollar awards for Black plaintiffs were lower than dollar awards for white plaintiffs who experienced the same negligently caused injuries.<sup>98</sup>

These results converge with the findings of a recent field study that examined the effects of a plaintiff’s race on pain and suffering decisions in tort cases in three states.<sup>99</sup> The researchers used U.S. Census information to impute the race and ethnicity of parties through their surnames.<sup>100</sup> They analyzed the economic and noneconomic damage awards for plaintiffs of different (imputed) races and ethnicities.<sup>101</sup> For economic damages such as medical expenses and lost income, no racial differences in awards emerged.<sup>102</sup> For noneconomic (pain

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89. *Id.* at 74–76.

90. Shari Seidman Diamond, Michael J. Saks & Stephan Landsman, *Jurors’ Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 309–10 (1999).

91. Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CAL. L. REV. 507, 538–52 (2020), [https://southern.californialawreview.com/wp-content/uploads/2020/07/Hans\\_Website.pdf](https://southern.californialawreview.com/wp-content/uploads/2020/07/Hans_Website.pdf). [<https://perma.cc/LTE3-RUG8>].

92. In *Brown v. Kendall*, 60 Mass. 292 (1850), the defendant was attempting to break up a fight between his dog and the plaintiff’s dog but hit the plaintiff in the eye with a stick. The case is notable and included in torts casebooks as one of the first U.S. tort cases to rely upon the reasonable person standard. *See, e.g.*, JAMES A. HENDERSON & DOUGLAS A. KYSAR, *THE TORTS PROCESS* 173–76 (10th ed. 2022).

93. Cardi, Hans & Parks, *supra* note 91, at 532.

94. *Id.* at 531.

95. *Id.* at 558–59.

96. *Id.* at 546.

97. *Id.* at 551.

98. *Id.* at 550.

99. Erik J. Girvan & Heather Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. AGGRESSION, CONFLICT & PEACE RES. 247, 247 (2016). The states were Florida, Illinois, and New York.

100. *Id.* at 248.

101. *Id.*

102. *Id.*

and suffering) damages, however, Black plaintiffs received less than white plaintiffs, even when the researchers statistically controlled for the amount of economic damages that the plaintiffs were awarded.<sup>103</sup> The study offers suggestive evidence of arguments that the injuries of racial and ethnic minorities are devalued relative to those of whites.<sup>104</sup> As the IAT study found, implicit racial bias might shape this differential perception of the seriousness of a plaintiff's injury.

A juror's gender may also affect jury decision-making. A meta-analysis examining the impact of juror gender on decisions in sexual assault cases confirmed that women were significantly more likely than men to convict the defendant.<sup>105</sup> Similarly, meta-analyses of research on gender differences in perceptions of potential sexual harassment have found reliable differences between men and women respondents in their views of what constitutes sexual harassment.<sup>106</sup> Although there is substantial overlap between women and men, women define a broader range of behaviors as constituting harassment.<sup>107</sup> The gender difference is larger for actions that are categorized as reflecting a hostile work environment than for actions that would constitute quid pro quo harassment.<sup>108</sup>

A juror's gender, race, and other demographic characteristics may at times be associated with distinctive attitudes toward the issues in a specific type of jury trial, as the example of gender differences in sexual harassment cases indicates. But even those cases show varying differences depending on whether the case involves quid pro quo or hostile work environment. As a general matter, demographic characteristics are typically not robust predictors of bias toward one side or the other in civil litigation.<sup>109</sup> Instead, attitudes—especially attitudes that are specifically relevant to case issues—are stronger predictors of a prospective juror's likely biases.<sup>110</sup>

In sum, given what we now know about the often unconscious or implicit biases that influence decision-making, the traditional approaches to jury selection procedures for detecting bias and removing prejudiced prospective jurors

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103. *Id.* at 252–53.

104. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 21 (2010) (arguing that U.S. tort law in practice devalues the injuries of women and racial and ethnic minorities); Cardi, Hans & Parks, *supra* note 91, at 510–11 (summarizing commentary in task force reports and elsewhere of disadvantages of African American plaintiffs and defendants in civil case outcomes).

105. James W. Schutte & Harmon M. Hosch, *Gender Differences in Sexual Assault Verdicts: A Meta-analysis*, 12 J. SOCIO. BEHAV. & PERSONALITY 759, 759 (1997) (analyzing studies and finding a small overall effect size for gender of .17). For a general discussion of gender effects on jury decision-making, see Vivian N. Rotenstein & Valerie P. Hans, *Gentlewomen of the Jury*, 29 MICH. J. GENDER & L. 243, 260–82 (2022).

106. Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 43 (1998) (undertaking a meta-analysis of 111 studies and finding an overall small effect size for gender of .17); Maria Rotundo, Dung-Hanh Nguyen & Paul R. Sackett, *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCH. 914, 918 (2001) (analyzing sixty-two studies and finding an overall moderate effect size for gender of .30).

107. Rotundo, Nguyen & Sackett, *supra* note 106, at 918.

108. *Id.*

109. Hans & Jehle, *supra* note 85, at 1180 (summarizing research).

110. *Id.*

are likely to fall short. We need new methods to assess bias to achieve the goal of fair juries.

*C. Enhancing Unbiased Fact-Finding and Legal Guidance*

To achieve a fair jury trial, the legal system depends on the judge to ensure that the evidence presented at trial is relevant, and that the jury is accurately instructed on the applicable law governing the particular case. But more is needed for a fair jury trial. Relevant evidence can at times be unduly prejudicial. The evidence in some cases can be quite complex, including scientific evidence that involves unfamiliar terminology and concepts.<sup>111</sup> Jury instructions can be accurate, but not convey clearly the legal standards that the jurors are expected to follow. Rules of evidence, trial court procedural rules, and pattern jury instructions attempt to address these challenges and guide jurors toward fair decision-making, but they sometimes miss readily available opportunities to assist in enhancing jury performance.

The courtroom is an unfamiliar setting for most jurors. They have preconceptions about trials, but many of those expectations are based primarily on incomplete pictures from news reports and the frequently inaccurate portrayals of juries and jury trials in films and on television.<sup>112</sup> Jurors do understand that the attorneys, parties, and witnesses in a trial will be trying to persuade them to favor their side.<sup>113</sup> As jurors attempt to accurately reconstruct the events that led to the trial, they depend on the judge to see that they have all of the relevant information they should consider, to provide them with the tools they need to understand, recall, and evaluate the evidence, and to supply them with the legal guidance to apply the law fairly.<sup>114</sup>

Yet judges are constrained in fulfilling these tasks, in part by rules that permit some potentially prejudicial information into evidence. In addition, judges must act as the gatekeepers who determine what forms of expert testimony will be permitted, even though most judges themselves are novices when it comes to scientific or technical evidence.<sup>115</sup> We have some disturbing examples, particularly instances involving forensic evidence, in which the gatekeeping function has failed, allowing supposedly scientific evidence to be admitted that was unreliable and invalid (e.g., the “arson indicants” that purportedly demonstrated that Cameron Todd Willingham intentionally set the fire that killed his children and wrongfully led to Willingham’s conviction and execution).<sup>116</sup> According to one

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111. Shari Seidman Diamond & Richard O. Lempert, *Science and the Legal System: Introduction*, 147 DAEDALUS 5, 5 (2018).

112. Nancy S. Marder, *What Hollywood, USA, Teaches the World (Incorrectly and Correctly) about Juries*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE 285 (Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy Marder eds., 2021).

113. *See id.* at 301.

114. *See id.* at 293.

115. Valerie P. Hans & Michael J. Saks, *Improving Judge & Jury Evaluation of Scientific Evidence*, 147 DAEDALUS 164, 164 (2018).

116. Rachel Dioso-Villa, *Scientific and Legal Developments in Fire and Arson Investigation Expertise in Texas v. Willingham*, 14 MINN. J. OF L., SCI., & TECH. 817, 829 (2013).



estimate based on exonerations, more than one in five wrongful convictions have involved faulty forensic evidence.<sup>117</sup> A fair jury trial depends on a vetting process that does not present the jury with invalid evidence cloaked in the mantle of science.

Judges have sometimes been reluctant to respond to juror needs in ways that change traditional procedure or that call for an intervention that may risk an appeal. Before the reform movement in jury trials that began in the 1990s, the norm was to treat the jury as a passive recipient of information, expecting the jurors simply to silently watch the trial and listen to the evidence and instructions and then arrive at a verdict.<sup>118</sup> Perhaps surprisingly, juries performed very well, which may explain why changes came slowly, but the system burdened jurors unnecessarily and missed the opportunity to optimize juror comprehension and recall by providing jurors with the tools that facilitate learning in other contexts and that judges regularly use.<sup>119</sup>

Another lost opportunity to avoid unnecessary miscommunication can arise when the deliberating jury sends out a question about the law and the judge provides a minimal response. In *Weeks v. Angelone*, the jury submitted a question about the death penalty instructions in a capital case.<sup>120</sup> The question was:

If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?<sup>121</sup>

Rather than directly answering that question, the court responded by directing the jury to the portion of the instructions, which, as Justice Stevens pointed out, had already failed to inform the jury that they did not have “a duty ‘to issue the death penalty’ if they believed that ‘Weeks . . . is guilty of at least 1 of the alternatives.’”<sup>122</sup> What was needed was “a simple, clear-cut statement from the judge that that belief was incorrect.”<sup>123</sup> The jury sentenced Weeks to death.<sup>124</sup> The U.S. Supreme Court found no fault with the trial court’s response. The majority was willing, despite the evidence, to presume that the response was sufficient.<sup>125</sup>

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117. U. Mich., % *Exonerations by Contributing Factor*, NAT’L REGISTRY OF EXONERATIONS <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last visited Feb. 8, 2023) [<https://perma.cc/Y9JE-6PU5>].

118. See e.g., H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 378, 393 (Robert E. Litan ed., 1993); B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280 (1996); JURY TRIAL INNOVATIONS 5 (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead, eds., 2d ed., 2006).

119. B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1229 (1993).

120. *Weeks v. Angelone*, 528 U.S. 225, 228 (2000).

121. *Id.* at 229. (emphasis in original)

122. *Id.* at 242 (Stevens, J., dissenting).

123. *Id.*

124. *Id.* at 230–31.

125. *Id.* at 234.

A follow-up empirical study by Stephen P. Garvey, Sheri Lynn Johnson, and Paul Marcus revealed the wisdom of the dissenting justices in *Weeks*.<sup>126</sup> The researchers presented mock jurors with a summary of the evidence, attorney arguments, and instructions in the *Weeks* case.<sup>127</sup> Comprehension of the instruction was significantly lower among jurors who were given the *Weeks* jury question and the judge's response than among jurors who were given the question and the direct answer to it.<sup>128</sup>

A similarly unnecessary failure of communication occurred for real jurors in the Arizona Jury Project when a jury submitted a question about the attorney's fees, assuming that they were a part of the "reasonable expenses" specified in the jury instructions, although that provision was intended to refer only to medical expenses.<sup>129</sup> The judge directed them back to that page (which they had been looking at) rather than telling them directly that attorney's fees were not to be included in any award for compensation.<sup>130</sup> The jury determined that it was up to them to determine the amount of attorney's fees and make an award that included that amount.<sup>131</sup> Although this error occurred in only one of the fifty cases in the Arizona Jury Project, on the assumption that it was inappropriate for the jury to add an award for attorney's fees as part of compensatory damages, the fairness of the jury's deliberation in this case was unnecessarily compromised by the miscommunication.<sup>132</sup> To apply the law, jurors need to be instructed completely and clearly. Court instructions do not always fulfill this role, and jurors may struggle, even as they try to apply the law, and even if they do not submit a question to the judge asking for clarification. As legal novices, juries depend on the judge to educate them about the relevant law. Fair juries need instructions that they can understand and apply. The problem is that we have evidence that the judge does not always fulfill this important teaching role. Researchers have accumulated evidence documenting the failures of jury instructions, both in lab-

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126. Stephen P. Garvey, Sheri Lynn Johnson & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 627 (2000).

127. *Id.* at 628.

128. *Id.* at 639.

129. The element of damages was described in the instructions as: "Reasonable expenses of necessary medical care, treatment, and services rendered." Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1561 (2012) [hereinafter *Kettleful of Law*].

130. *Id.* at 1559.

131. *Id.* at 1561.

132. Note, however, that while the jury was technically wrong in this case, some scholars have argued that the rule of having each side bear its own attorney's fees should be replaced by a fee-shifting rule that allows the successful plaintiff to recover his attorney's fees. See Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1896-97 (2001), for a discussion of a fee-shifting rule.

oratory experiments<sup>133</sup> and on post-trial questionnaires administered to real jurors following their jury service,<sup>134</sup> and in a few studies, revealing inaccurate comprehension of relevant legal concepts despite jurors' participation in simulated deliberations.<sup>135</sup>

The situation is not all grim, however. Some research shows that juries can develop a reasonable grasp of most of the law they need to understand.<sup>136</sup> In the actual deliberations of the Arizona Jury Project, Shari Seidman Diamond, Beth Murphy, and Mary R. Rose found that the jurors spent substantial time discussing the legal instructions;<sup>137</sup> 79% of their comments were correct reflections of the law and only 9% were errors that were not explicitly corrected by another juror or as a result of a question submitted to the judge.<sup>138</sup> We note that the study took place in Arizona, where civil jurors benefit from the procedures that jurors in many other jurisdictions do not have that we discuss in Part V, *infra* (e.g., individual copies of the instructions that the jurors each receive for their use during deliberations).

In sum, to maximize the likelihood of fair juries, we need to attend to three distinct phases of the jury process: the assembling of a representative jury pool; the selection of impartial jurors in the courtroom; and procedures that enhance unbiased fact-finding and provide appropriate legal guidance of jurors during the trial. We now turn to a consideration of each of these phases, listing ways in which current approaches interfere with the selection and guidance of fair juries and identifying solutions that will help us achieve the goal of fair juries.

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133. See, e.g., Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1316 (1979) (finding that jurors paraphrasing essential terms in instructions had an accuracy rate of 54%); Amiram Elwork, James J. Alfini & Bruce D. Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 436 (1982) (finding that accuracy was 51% for a more complex case and 65% for a less complex case); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 347 (2000) (finding that accuracy was 47% for mock jurors in a capital case); see also Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCH. PUB. POL'Y & L. 589, 589 (1997) (reviewing empirical studies of the effectiveness of instructions).

134. See, e.g., Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 548 (1992) (finding that jurors responding to a post-trial survey rarely showed higher rates of accuracy on legal issues on which they had been instructed than jurors who had not been instructed on those issues); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 88 (1998) (finding that former civil jurors responding to a post-trial questionnaire on instruction comprehension had accuracy rates of 58%).

135. See, e.g., Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481, 486-89 (2009) (finding that mock jurors had scores of less than 50% correct on a post-deliberation test of instruction comprehension); Richard L. Wiener, Melanie Rogers, Ryan Winter, Linda Hurt, Amy Hackney, Karen Kadela, Hope Seib, Shannon Rauch, Laura Warren & Ben Morasco, *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 10 PSYCH. PUB. POL'Y & L. 516, 555 (2004) (showing essentially no effect for deliberation in improving juror comprehension scores on tests of instructions).

136. *Kettleful of Law*, *supra* note 129, at 1543.

137. *Id.* at 1552 (17.1% of all comments were about legal instructions).

138. *Id.* at 1594.

### III. PHASE 1: ASSEMBLING A REPRESENTATIVE JURY POOL

We have identified the multiple benefits that flow from empaneling a diverse jury drawn from a fair cross-section of the community.<sup>139</sup> But achieving that goal presents a challenge. We now examine why it is difficult to assemble a fully representative group from the population. Unlike registration for the military draft, there is no requirement that individuals must register for potential jury service when they reach the age of eighteen.<sup>140</sup> As a result, states and the federal government must produce their own lists of prospective jurors. They also devise their own requirements for jury service and their own methods for identifying individuals eligible to serve.<sup>141</sup>

#### A. *Causes of Nonrepresentativeness*

There are multiple reasons why jury pools do not fully capture the jury-eligible population, starting with limitations of the lists of community members that courts rely upon for summoning prospective jurors. Other important factors that contribute to a lack of jury pool representativeness include qualifications, exemptions, excuses, and failures to respond to qualification questionnaires and summonses.<sup>142</sup>

##### 1. *Source Lists*

Summoning prospective jurors begins with the source lists. At the federal court level, the 1968 Jury Service and Selection Act broke ground by requiring that voter registration rolls be used as juror source lists and that summonses be sent randomly.<sup>143</sup> The 1970 Uniform Jury Selection and Service Act provided a model statute for states to adopt and also endorsed random selection, as well as supplementation of voter rolls with other lists.<sup>144</sup>

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139. *See supra* Section II.A.

140. *Who Needs to Register*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/register/who-needs-to-register/#p1> (last visited Feb. 9, 2023) [<https://perma.cc/AX3Q-6WPP>] (“U.S. born and naturalized citizens, parolees, undocumented immigrants, legal permanent residents, asylum seekers, refugees, and all males with visas of any kind which expired more than 30 days ago.”).

141. *See, e.g., A Guide to Jury Service*, ILL. STATE BAR ASS’N, <https://www.isba.org/public/guide/juryduty#:~:text=How%20are%20citizens%20selected%3F,service%20once%20every%20twelve%20months> (last visited Feb. 9, 2023) [<https://perma.cc/XTA7-UZNR>].

142. *See, e.g.,* Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records*, PRISON POL’Y INITIATIVE (Feb. 18, 2021) <https://www.prisonpolicy.org/reports/juryexclusion.html> [<https://perma.cc/J52G-83SF>].

143. 28 U.S.C. § 1866.

144. Vincent L. McKusick & Daniel E. Boxer, *Uniform Jury Selection and Service Act*, 8 HARV. J. ON LEGIS. 280, 280 (1971).

The National Center for State Courts (“NCSC”) *State-of-the-States Survey of Jury Improvement Efforts* provides an overview of national practices with respect to source lists.<sup>145</sup> The most frequent source list is the voter registration list, followed by the driver’s license list.<sup>146</sup> A majority of states require each of these lists.<sup>147</sup> A minority of states also include non-driver’s identification cards and tax rolls.<sup>148</sup> Only a handful of states require the use of any other source.<sup>149</sup> Many states do permit courts to rely upon additional source lists, although their use is not mandatory.<sup>150</sup>

It is understandable that some jurisdictions might rely on different source lists. Consider the fact that residents in urban areas are less likely to have driver’s licenses and own cars, compared to residents in rural areas where car ownership is higher.<sup>151</sup> Some states are also able to draw upon unique and relatively comprehensive lists of community residents. For example, localities in Massachusetts are required by statute to conduct an annual census;<sup>152</sup> and Alaska relies on a list of residents who receive benefits from the Alaska Permanent Fund.<sup>153</sup>

But we now know through empirical research that most of the source lists—including the two that are most frequently relied upon, lists of voters and driver’s license holders, do not fully capture the entire community of jury-eligible voters. For example, minorities tend to have lower voter registration rates. While 77% of citizens identifying as white non-Hispanic were registered in 2020, only 69% of those identifying as Black and 61% of those identifying as Hispanic were registered.<sup>154</sup> Hence, it is good practice to include multiple source lists to maximize the representativeness of the jury list.<sup>155</sup>

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145. GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT’L CTR. FOR STATE CTS., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS 13–14 (2007), [https://www.ncsc-jurystudies.org/\\_\\_data/assets/pdf\\_file/0016/5623/soscompendiumfinal.pdf](https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf) [<https://perma.cc/H7P8-Y4ZQ>] [hereinafter STATE-OF-THE-STATES SURVEY]. See also *State of the States Survey of Jury Improvement Efforts*, CTR. JURY STUD. (2022), <https://www.ncsc-jurystudies.org/state-of-the-states/state-of-states-survey> [<https://perma.cc/7L M5-GMY3>]. NCSC resources on fair cross-section law and summoning practices may be found at <https://www.ncsc-jurystudies.org/what-we-do/fair-cross-section> [<https://perma.cc/J8TZ-FEEC>].

146. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 13.

147. *Id.*

148. *Id.* at 14.

149. *Id.* at 13.

150. *Id.* at 14.

151. See *The Cities Where No One Wants to Drive*, USA TODAY (Feb. 14, 2015, 8:30 AM), <https://www.usatoday.com/story/money/cars/2015/02/14/247-wall-st-cities-no-one-wants-drive/23363835/> [<https://perma.cc/GEN6-BYYD>].

152. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 14.

153. *Id.*

154. U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION, BY SEX, RACE AND HISPANIC ORIGIN, FOR STATES: NOVEMBER 2020 (Apr. 2021) U.S. CENSUS BUREAU, Current Population Survey, November 2020, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html> [<https://perma.cc/J8 S9-QT3G>] (click on “Table 4b,” which also provides breakdown by state).

155. The merging of the lists should include the removal of duplicate names that appear on more than one list, so that each individual is included no more than once. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 13 (recommending “that the master jury list include at least 85% of the total community population”). States differ in the quality of databases they use to produce their master lists, so careful monitoring is required to effectively merge and assess the accuracy of the combined list. See PAULA HANNAFORD-AGOR, MIRIAM HAMILTON & ERICA BAILEY, ELIMINATING SHADOWS AND GHOSTS: FINDINGS FROM A STUDY OF INCLUSIVENESS,

## 2. *Qualifications to Serve*

Citizenship, residency, an age of eighteen or above, absence of a serious criminal record, and fluency in English are basic qualifications for jury service in virtually all states.<sup>156</sup> A handful of states have explored allowing noncitizen residents to participate as jurors, but those states remain in the minority.<sup>157</sup>

One common disqualification has become the subject of recent debate: felony disenfranchisement. In James Binnall's comprehensive book on the subject, he observes that the felon-juror exclusion is "far and away the most extreme form of civic marginalization in the United States."<sup>158</sup> Eight percent of U.S. residents have felony convictions.<sup>159</sup> The majority of states continue to ban these residents from jury service, and many impose the ban even if their punishment has concluded and they are no longer under supervision.<sup>160</sup>

Just one state, Maine, currently has no restrictions.<sup>161</sup> Twenty-six states and the federal government permanently ban convicted felons from jury service, and another thirteen forbid jury service until the completion of the felon's sentence.<sup>162</sup> Eight states and the District of Columbia use hybrid approaches where the ban depends on the felony charge, the sentence, the type of jury, or the term of years.<sup>163</sup> Two states provide for lifetime for-cause challenges that remove prospective jurors who are felons.<sup>164</sup>

Because of the racially disproportionate existence of felony records, the disqualification makes it more difficult to assemble representative juries.<sup>165</sup> Ex-

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REPRESENTATIVENESS, AND RECORD ACCURACY IN MASTER JURY LISTS AND JUROR SOURCE LISTS IN THREE STATES 12–13 (2022) ([https://www.ncsc.org/\\_data/assets/pdf\\_file/0025/82681/Master-Jury-List.pdf](https://www.ncsc.org/_data/assets/pdf_file/0025/82681/Master-Jury-List.pdf)).

156. In New Mexico, a state constitutional provision forbids the restriction of the right of citizens to serve on juries because of an inability to speak, read, or write English. N.M. CONST., art. VII, § 3.

157. The Connecticut Jury Selection Task Force recommended that noncitizen residents be permitted to serve as jurors to remedy the underrepresentation of certain subgroups in the community. See CONNECTICUT JURY SELECTION TASK FORCE, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 7 (2020) [hereinafter CONNECTICUT JURY SELECTION TASK FORCE]. In 2013, the California legislature passed legislation allowing noncitizens who were legal residents in the United States to serve as trial jurors, but Governor Brown vetoed the bill. Eyder Peralta, *Calif. Gov. Brown Vetoes Bill Giving Non-Citizens Jury Duty*, NPR: THE TWO-WAY (Oct. 7, 2013, 7:49 PM), <https://www.npr.org/sections/thetwo-way/2013/10/07/230242924/calif-gov-brown-vetoes-bill-giving-non-citizens-jury-duty> [<https://perma.cc/LHS4-7VL7>].

158. JAMES M. BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM 20 (2021). See also VIDMAR & HANS, *supra* note 6, at 80.

159. Sarah K. S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1814 (2017).

160. See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 593 (2013).

161. BINNALL, *supra* note 158, at 19.

162. *Id.* at 19–20, app. A at 149–59; see also Roberts, *supra* note 160, at 596.

163. BINNALL, *supra* note 158, at 19.

164. *Id.* at 19–20, app. A at 149–59.

165. Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 56, 70 (2020); Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Juror Exclusion in Georgia*, 32 JUST. SYS. J. 335, 335, 352 (2011) (using U.S. census data and Georgia Department of

cluding convicted felons for life from serving on a jury has the effect of disproportionately excluding Black adult males. While people with felony convictions account for 8% of all adults, they account for 33% of the African American adult male population.<sup>166</sup> Darren Wheelock estimated that felony juror exclusion reduces the pool of eligible African Americans in Georgia by nearly one-third, reducing the expected number of African American men on a jury from 1.61 to 1.17 per jury.<sup>167</sup>

Recent research by Binnall and others suggests that traditional justifications for the felon-juror exclusion are not well supported.<sup>168</sup> Binnall draws on empirical research in social psychology and personality showing the strong situational determinants of human behavior, which weighs against the lifetime bans on jury service of those with felony convictions.<sup>169</sup> His surveys of convicted felons' attitudes toward the courts find considerable variability in pro-prosecution views among those with felony records, which suggests that individualized voir dire rather than the complete bans could address juror bias among prospective jurors with felony records.<sup>170</sup> Although Binnall's research and book focus on criminal jury participation, the arguments for felon-juror exclusion are even weaker in the civil jury context when the government is not a party.

### 3. Exemptions

Most states specify statutory exemptions from jury service. In addition to previous jury service, citizens may claim an exemption on the basis of age or by virtue of their occupation, with political office holders, law enforcement officers, and judicial officers being the occupations with the most frequent statutory exemptions.<sup>171</sup> Nationwide, approximately 5 to 7% of individuals summoned to jury duty claim an exemption, reducing those who are available to serve.<sup>172</sup>

A substantial number of exemptions can dramatically decrease the pool of potential jurors, as New York State's example illustrates. When occupational exemptions were widely available in New York, a report indicated that "5 to 10%

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Corrections data to calculate that the felon-juror exclusion reduces the number of African Americans eligible for jury service statewide by a third).

166. Shannon, Uggem, Schnitker, Thompson, Wakefield & Massoglia, *supra* note 159, at 1814; *see also* Paula Hannaford-Agor & Nicole L. Waters, *Safe Harbors from Fair-Cross-Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool*, 8 J. EMPIRICAL LEGAL STUD. 762, 777 (2011) (reporting that 1.4% of Whites, 8.9% of Blacks, and 4.3% of Hispanics have been incarcerated in a state or federal prison as the result of a felony conviction).

167. Wheelock, *supra* note 165, at 352.

168. BINNALL, *supra* note 158, at 43–44. In addition, on the ability of felon-jurors to participate in group deliberation, Binnall reports a mock jury experiment that compared mock juries that had at least one felon-juror to those that did not. Interestingly, compared to mock jurors without a felony conviction, felon-jurors participated proportionately more and mentioned more novel case facts. *Id.* at 71–73.

169. *Id.* at 30–45.

170. *Id.* at 50–61.

171. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 14–15.

172. *Id.* at 22 tbl.16 (showing that 7.3% of individuals claim exemptions in "one-step" courts that combine a qualification questionnaire and a summons, and 5.1% claim exemptions in "two-step" courts that send separate qualification and summons mailings).

of New Yorkers who return their qualification questionnaires claim an occupational exemption.”<sup>173</sup> After these exemptions were eliminated in 1994, the number of available potential jurors increased, and “the percent of persons reporting who indicated that this was their first time on jury duty increased from 33% to over 50%.”<sup>174</sup> Another result of the elimination of professional exemptions was that one million people were added to New York’s master jury list.<sup>175</sup> Not surprisingly, jurisdictions that have greater numbers of statutory exemptions have significantly higher exemption rates: if a court offers an exemption, it is often taken.<sup>176</sup>

#### 4. *Excuses*

Some studies document the effects of excuses on representativeness. For example, in one jurisdiction that tracked the removal through excuses by race and ethnicity, members of minority racial groups requested and were granted temporary hardship excuses (for example, for job or childcare reasons) more frequently than members of other racial groups, increasing departures from representativeness.<sup>177</sup> Anna Offit has characterized excuses based on economic hardship as “benevolent exclusion.”<sup>178</sup> She trenchantly observes:

Like race- and sex-based jury discrimination during the peremptory challenge phase of jury selection, the routine dismissal of citizens who face economic hardship excludes not only people but also the diversity of ideas, experiences, and frames of interpretation that characterize the American population. By failing to make sure that people who are poor can serve, we impoverish our shared understanding of doing justice.<sup>179</sup>

Nationwide, approximately 6 to 9% of individuals summoned to jury duty are excused.<sup>180</sup> As with exemptions, the removal of those who are excused from the pool of prospective jurors means that their distinctive experiences and perspectives are absent from the juries that are selected.

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173. OFF. OF THE CHIEF ADMIN. JUDGE, N.Y. UNIFIED CT. SYS., JURY REFORM IN NEW YORK STATE: A SECOND PROGRESS REPORT ON A CONTINUING INITIATIVE 33 (1998).

174. *Id.*

175. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 14. *See also Comparative Data*, NAT’L CTR. FOR STATE CTS.: CTR. FOR JURY STUD., <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz> (last visited Feb. 1, 2023) [<https://perma.cc/69HP-PV8S>].

176. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 22–23.

177. *See, e.g.*, JURY REPRESENTATIVENESS: A DEMOGRAPHIC STUDY OF JUROR QUALIFICATION AND SUMMONING IN MONROE COUNTY, NEW YORK 29 (2011), <https://mcb.org/?pg=JuryDiversification> [<https://perma.cc/76ME-RTQZ>] [*hereinafter* Monroe County Study].

178. Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613, 616 (2021).

179. *Id.* at 613.

180. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 22 tbl.16 (showing that 9.2% of individuals are excused in “one-step” courts that combine a qualification questionnaire and a summons, and 5.9% of individuals are excused in “two-step” courts that send separate qualification and summons mailings).



### 5. *Nonresponse to Qualification Questionnaires and Summonses*

There are two distinct steps to the summons process: qualifying prospective jurors, and summoning them to serve on a specific case or for a particular period of time.<sup>181</sup> The “one-step” courts combine the two tasks by sending both a qualification questionnaire assessing eligibility for jury duty and a summons for service on a particular date.<sup>182</sup> Other jurisdictions use two steps, first sending a qualification questionnaire to all the prospective jurors on the master list; and second, at the appropriate time, sending a jury summons to the pool of qualified jurors.<sup>183</sup>

Differential rates of response to jury qualification questionnaires and summonses can dramatically undermine the ability to achieve representative jury venires. Nationally, the undeliverable rate is estimated to be 12%, and up to 15% in large urban areas.<sup>184</sup> The problems of nonresponse persist even if best practices are followed by frequently updating the source lists and sending multiple follow-ups to nonresponders.

Observing that its jury pools did not appear to reflect census data, the jury commissioner in Monroe County in upstate New York undertook a comprehensive study of the multiple stages of qualification and summoning of prospective jurors.<sup>185</sup> The project compared the Monroe County census figures with information about: (1) people responding to the qualification questionnaires and summonses; (2) people who requested excuses; and (3) people who reported to jury duty.<sup>186</sup> Monroe County, like most other counties in New York, uses a two-step summoning system, with an initial mailing of jury qualification questionnaires and a second mailing of jury summonses.<sup>187</sup> The study confirmed that the mailings went to a geographic cross-section of the county, as intended.<sup>188</sup> But mailings sent to the geographical areas of the county with higher proportions of poorer residents and racial and ethnic minorities were disproportionately more likely to be returned as undeliverable or did not result in responses.<sup>189</sup> According to census figures, Black residents constituted 12% of the Monroe County jury-eligible population,<sup>190</sup> but they were only 9.7% of those who responded to the jury qualification questionnaires.<sup>191</sup> This pattern of greater nonresponse in areas

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181. *Id.* at 15–16.

182. *Id.* at 15.

183. Paula L. Hannaford-Agor & Nicole L. Waters, *Tripping Over Our Own Feet: Two Steps are One Too Many in Jury Operations*, 1 CT. MANAGER 112, 112 (2010) (advocating for one-step approaches to qualification and summoning).

184. Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 U. MICH. J.L. REFORM 1, 37 (2018).

185. Monroe County Study, *supra* note 177, at 1, 4.

186. *See id.* at 2.

187. *Id.* at 5.

188. *See id.* at 1–2.

189. *Id.* at 2.

190. *Id.* at 3. Census data were adjusted to exclude noncitizens, non-English speaking people, and those under eighteen, none of whom are eligible for jury service in New York.

191. *Id.*

with lower incomes and higher racial and ethnic minorities has been observed in a number of other jurisdictions.<sup>192</sup>

*B. Legal Challenges to Jury Pool Representativeness*

For all these reasons, jury pools often fail to fully reflect their communities. Yet it remains extraordinarily difficult to mount a successful challenge to the representativeness of the jury pool. *Duren v. Missouri* lays out a three-step procedure for challenging the representativeness of the jury pool.<sup>193</sup> The litigant must show first that a group that is claimed to be underrepresented or excluded is a distinctive or cognizable group in the community; second, that the group's representation in the pool is not fair and reasonable considering its numbers in the community; and third, that the underrepresentation is the result of systematic exclusion during the jury selection process.<sup>194</sup> Successful legal challenges typically offer proof of substantial underrepresentation of members of a protected class, and point to one or more aspects of the selection process that resulted in underrepresentation.<sup>195</sup> Once the prima facie case is made, the burden shifts to the state to justify its practice.<sup>196</sup>

What counts as underrepresentation? *Berghuis v. Smith* identified multiple measures of underrepresentation, including absolute disparity, comparative disparity, and statistical significance, but declined to identify the one best way to measure it.<sup>197</sup> Paula Hannaford-Agor and Nicole Waters of the NCSC point out serious limitations with both absolute and comparative disparity measures.<sup>198</sup> They observe that, for many jurisdictions, jury pool sizes are too small to be confident that variations have not occurred by chance.<sup>199</sup>

Even though it should be possible to conduct empirical research on representativeness, litigants in state courts who attempt to assess whether the jury pool procedures are discriminatory, and whether the pool represents the community,

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192. *Id.* at 2. See also Shamina Anwar, Patrick Bayer & Randi Hjalmarsson, *Unequal Jury Representation and Its Consequences*, NAT'L BUREAU ECON. RSCH., Aug. 2021, at 1, 1.

193. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). See David M. Coriell, *An (Un)Fair Cross Section: How the Application of Duren Undermines the Jury*, 100 CORNELL L. REV. 463, 491 (2015), for a critique arguing that the three-step process unfairly undermines the jury.

194. *Duren*, 439 U.S. at 364.

195. NANCY GERTNER, JUDITH H. MIZNER & JOSHUA DUBIN, *THE LAW OF JURIES* 41 (11th ed. 2020).

196. Gertner and colleagues observe that the question of "how much exclusion is constitutionally significant is arguably different in a Sixth Amendment context than an Equal Protection context. The Equal Protection question is what percentage makes out a prima facie case of purposeful exclusion. The Sixth Amendment question is what percentage indicates systematic exclusion of any sort." *Id.* at 50–51 (footnote excluded). The authors go on to argue that the standard *should* be lower in the criminal context, given the Sixth Amendment's "broader mandate." *Id.* at 51.

197. *Berghuis v. Smith*, 130 S. Ct. 1382, 1390 (2010). The measure of absolute disparity is the percentage of the group in the jury-eligible population minus the percentage in the jury pool. The measure of comparative disparity is the absolute disparity percentage divided by the group's percentage representation in the jury-eligible population. The statistical approach employs significance tests to determine whether the observed underrepresentation could have occurred by chance.

198. Hannaford-Agor & Waters, *supra* note 166, at 762.

199. *Id.* at 767 (concluding that absolute and comparative disparity tests would lead to immunity from fair cross-section challenges in the majority of U.S. jurisdictions).

encounter significant difficulties. Nina Chernoff observes that, although federal courts have recognized litigants' rights to have access to records of jury selection procedures, state courts have not universally followed suit.<sup>200</sup> She points out that the states' failure to grant litigants access to jury selection records makes it close to impossible to mount a successful challenge to the jury pool on representativeness grounds, arguing that states should follow the federal example.<sup>201</sup> We agree.

### C. Fair Jury Pool Selection Procedures

Despite considerable progress, jury pools today fall short of achieving the coverage and representation of the fair cross-section ideal, at times in significant ways that lead to substantial underrepresentation of minorities. Courts, legislatures, and jury commissioners could take a number of steps to fully realize, or at least more closely approach, the fair cross-section goal.

#### 1. Using Multiple Source Lists and Updating Them Annually

As we discussed above, voter registration and driver's licenses are the dominant source lists that states currently use.<sup>202</sup> The difficulty is that they may still fall short of achieving full coverage of the potential jury population in a number of non-random ways. Indeed, Paula Hannaford-Agor, Director of the Center for Jury Studies at the NCSC, asserted, "The use of multiple source lists to improve the demographic representation of the master jury list is perhaps the most significant step courts have undertaken since they abandoned the key-man system in favor of random selection from broadbased lists."<sup>203</sup>

Supplementing voters' lists with driver's licenses can help,<sup>204</sup> but states differ in the extent to which driver's licenses capture a substantial portion of the population. The number of licensed drivers per 1,000 residents ranges from 627 licensed drivers per 1,000 state residents in New York to 905 licensed drivers per 1,000 residents in Vermont.<sup>205</sup> Residents of urban areas are underrepresented

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200. Nina W. Chernoff, *No Records, No Right: Discovery and the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1756 (2016) [hereinafter *No Records*] (conducting a fifty-state survey and finding that "there are 39 states where a defendant has a fair cross-section right, but no clear entitlement to access the records necessary to enforce that right"); see *id.* at 1719. See also Nina W. Chernoff & Joseph B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, 33 JUST. SYS. J. 47 (2012).

201. See *No Records*, *supra* note 200, at 1725, 1760. See also Joseph L. Gastwirth & Qing Pan, *Statistical Measures and Methods for Assessing the Representativeness of Juries: A Reanalysis of the Data in Berghuis v. Smith*, 10 LAW, PROBABILITY & RISK 17, 41 (2011) (observing that "[t]he [respondent's] brief makes an interesting point concerning the lack of proof of the effect of the excusal process as the county did not keep any records. This would allow a state or county that is arbitrary and inconsistent in its procedures to be insulated from court review of its jury selection process because it failed to preserve the information it had or easily could have obtained").

202. See *Comparative Data*, *supra* note 175.

203. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 780 (2011).

204. See Abramson, *supra* note 184, at 36–37.

205. *Licensed Drivers by Sex and Ratio to Population—2019*, U.S. DEP'T. OF TRANSP., <https://www.fhwa.dot.gov/policyinformation/statistics/2019/> (last visited Feb. 9, 2023) [<https://perma.cc/ZDE7-AZXX>].

in the group of drivers.<sup>206</sup> Moreover, drivers do not have to renew their driver's licenses annually (*e.g.*, every four years in Illinois;<sup>207</sup> every five years in California;<sup>208</sup> every eight years in Michigan<sup>209</sup>), so the addresses available from driver's licenses may not be up to date. These variations suggest that limiting jury rolls to these two sources may be insufficient in some jurisdictions to provide good coverage of persons otherwise eligible to serve as jurors.

The state income tax roll is used as an additional list in eighteen states and, unlike voting rolls and driver's licenses, has the advantage of being updated annually.<sup>210</sup> Nine states do not have a state income tax,<sup>211</sup> but income tax rolls could be a valuable additional source list in the remaining twenty-three states that do not yet use them.<sup>212</sup> California is one example. In 2022 California added income tax rolls to its master jury list.<sup>213</sup> This addition is expected to add at least a few million more names to the lists, and the new potential jurors are expected to be largely lower-income and minority.<sup>214</sup>

Supplementary lists can also be obtained from other sources, such as utility rolls. The key follow-up for all jurisdictions is to monitor the effects of the combination of source lists they use on the representativeness of the jury pool.

The NCSC has developed best practices for removing duplicate entries when multiple source lists are combined.<sup>215</sup> More recently, the NCSC worked with court leaders in Missouri, New Jersey, and Tennessee to analyze how their use of jury lists affected the inclusiveness, accuracy, and representativeness of their master jury lists.<sup>216</sup> The result of this analysis is a set of recommendations for effective master jury lists.<sup>217</sup>

Source lists must be updated, at least annually. The state of Massachusetts has required, since colonial times, that each city and town compile a numbered

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206. *Our Nation's Highways: 2011: Chapter 4*, U.S. DEP'T OF TRANSP., <https://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter4.cfm> (last visited Feb. 9, 2023) [<https://perma.cc/3BHB-6SRF>].

207. *License Renewal Procedures by State*, INS. INST. FOR HIGHWAY SAFETY, <https://www.iihs.org/topics/older-drivers/license-renewal-laws-table> (last visited Feb. 9, 2023) [<https://perma.cc/FNA4-R6XT>].

208. CAL. VEH. CODE § 12816(a) (West 2022).

209. *License and ID Information*, MICH. SEC'Y STATE, <https://www.michigan.gov/sos/license-id/license-and-id#:~:text=Credentials,for%20a%20license%20or%20ID> (last visited Feb. 9, 2023) [<https://perma.cc/S2BA-N7LR>].

210. State-of-the-States Survey, *supra* note 145, at 14.

211. John Waggoner, *9 States that Don't Have an Income Tax*, AARP (March 9, 2022), <https://www.aarp.org/money/taxes/info-2020/states-without-an-income-tax.html> [<https://perma.cc/43FR-N8TS>].

212. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 14.

213. S. B. 592 (Cal. 2020) (approved by Governor on Sept. 28, 2020).

214. Evan Symon, *Jury Rolls Expanded to Include Taxpayers Under Renewed Bill*, CAL. GLOBE (July 17, 2020, 6:27 AM), <https://californiaglobe.com/section-2/jury-rolls-expanded-to-include-taxpayers-under-renewed-bill/> [<https://perma.cc/EEP5-4QWG>].

215. *Jury Managers' Toolbox: Best Practices for Duplicate Removal*, NAT'L CTR. FOR STATE CTS. (2009), [https://www.ncsc-jurystudies.org/\\_data/assets/pdf\\_file/0021/7851/duplicate-removal-techniques-report-njl.pdf](https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0021/7851/duplicate-removal-techniques-report-njl.pdf) [<https://perma.cc/BBE5-9WAA>].

216. ELIMINATING SHADOWS AND GHOSTS, *supra* note 155, at 2–9; *Quality, not Quantity, Is the Key to More Diverse Master Jury Lists*, NAT'L CTR. FOR STATE CTS. (Oct. 11, 2022, 11:57 AM), <https://www.ncsc.org/newsroom/at-the-center/2022/more-diverse-master-jury-lists> [<https://perma.cc/U9R9-F36W>].

217. *See id.* at 13–18.

resident list, on an annual basis, of all residents age seventeen or over.<sup>218</sup> As a result, the Office of the Jury Commissioner in Massachusetts may have the most complete list of potential jurors in any state.<sup>219</sup> Even if a complete resident list is not the starting point, all jurisdictions can increase the representativeness of their jury pool by updating the master jury list at least annually to ensure the accuracy of the addresses. The average annual migration rate in the United States is 15%, with higher rates of mobility for minorities, people with lower socioeconomic status, and renters as opposed to homeowners.<sup>220</sup> Updating the master jury list at least annually increases the likelihood that people at all socioeconomic levels and minorities will be included in the jury pool and increases inclusivity because the list will also include people new to the community.

## 2. *Expanding Jury Eligibility*

### a. Remove Occupational Exclusions

Much of the recent push to increase the likelihood that juries will reflect a cross-section of the community has focused on removing racial and gender restrictions, albeit with mixed success.<sup>221</sup> Other efforts to expand jury representation have led to the elimination of most occupational exemptions. Like New York, as described earlier,<sup>222</sup> Indiana eliminated all automatic exemptions in July 2006.<sup>223</sup> Previously, licensed dentists and veterinarians were excused, as well as members of the armed forces in active service, elected or appointed governmental officials, honorary military staff officers appointed by the governor, members of the board of school commissioners of the city of Indianapolis, and members of police or fire departments.<sup>224</sup> These and other moves to eliminate occupational exemptions are likely to have the desired effect of increasing wider participation in the jury system.

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218. MASS. GEN. LAWS ch. 51, § 4 (2022).

219. But note that in *United States v. Green*, 389 F. Supp. 2d 29, 36 (D. Mass. 2005), Judge Nancy Gertner reported that “the duty to prepare and update these lists has remained an unfunded mandate, fulfilled with varying success across the District.”

220. William Caprathé, Paula Hannaford-Agor, Stephanie McCoy Loquvam & Shari Seidman Diamond, *Assessing and Achieving Jury Pool Representativeness*, 55 JUDGES’ J. 16, 18 (2016) (citing U.S. CENSUS BUREAU, GEOGRAPHIC MOBILITY IN THE PAST YEAR BY AGE FOR CURRENT RESIDENTS IN THE UNITED STATES: 2009–2013 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES). This is lower according to the 2020 Census figure of 13.8%, but migration rates were still higher for Blacks (16.1%) and Hispanics (13.7% compared to whites (13.1%). See U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: GEOGRAPHIC MOBILITY BY SELECTED CHARACTERISTICS IN THE UNITED STATES (2020). It is unclear whether migration rates will return to the higher level that existed before the pandemic.

221. Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 915 (2012).

222. See *supra* Subsection III.A.3.

223. Ind. Pub. L. No. 1-2005, § 216, IND. CODE § 33-28-4-8 (amended 2005).

224. *Id.*

Despite the value of this expansion, almost half of the states still have professional exemptions.<sup>225</sup> While all have tended to reduce the number of occupations covered, some states still maintain exemptions for occupations like law enforcement or clergy.<sup>226</sup> It is unclear how much those remaining exemptions undermine the representativeness of the jury pool on the dimensions of race, ethnicity, and gender, but courts may wish to consider whether, for example, a blanket exclusion of medical personnel is justified, or whether there is a rationale for excluding law enforcement officers, at least from civil juries. In addition, occupation-based exclusions are inconsistent with the idea that jury service is a responsibility and opportunity that all citizens should share.<sup>227</sup>

b. Removing Other Traditional Qualification Barriers to Jury Eligibility

Three other traditional requirements for serving as a juror affect the racial and ethnic composition of the jury pool. English language proficiency, citizenship, and lack of a felony record are generally prerequisites for jury service, although there have been some efforts to remove those requirements.<sup>228</sup>

**English language proficiency.** The state of New Mexico permits non-English speaking citizens to serve as jurors, and its constitution explicitly prohibits the exclusion of citizens who are unable to speak, read, or write English.<sup>229</sup> This provision has been interpreted to require reasonable efforts to accommodate the non-English speaking juror by providing an interpreter.<sup>230</sup> With an eye toward maximizing representativeness, the 2005 A.B.A. *Principles for Juries and Jury Trials* endorsed eligibility of non-English speaking jurors “unless the court is unable to provide a satisfactory interpreter.”<sup>231</sup>

Although it is unclear how the presence of a non-English speaking juror (and interpreter) in the deliberation room affects the deliberations, Justice Edward Chávez reports that including non-English speaking jurors in New Mexico has not caused difficulties.<sup>232</sup> There have been reports of as many as four non-English speaking citizens serving on the same jury panel in recent years,<sup>233</sup> but

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225. See *Comparative Data*, *supra* note 175.

226. *Id.*

227. Shari S. Diamond, Mary R. Rose & Beth Murphy, *Embedded Experts on Real Juries: A Delicate Balance*, 55 WM. & MARY L. REV. 885, 888 (2014).

228. See generally, Amy Motomura, *The American Jury: Can Noncitizens Be Excluded?*, 64 STAN. L. REV. 1503 (2012).

229. N.M. CONST., art. VII, § 3.

230. *State v. Rico*, 52 P.3d 942, 943 (N.M. 2002).

231. A.B.A. PRINCIPLES, *supra* note 9, Principle 2.A.4.

232. See generally Edward Chávez, *New Mexico's Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303 (2008).

233. Fernanda Santos, *As the Demand for Court Interpreters Climbs, State Budget Conflicts Grow as Well*, N.Y. TIMES (June 14, 2014), [http://www.nytimes.com/2014/06/15/us/as-the-demand-for-court-interpreters-climbs-state-budget-conflicts-grow-as-well.html?\\_r=1](http://www.nytimes.com/2014/06/15/us/as-the-demand-for-court-interpreters-climbs-state-budget-conflicts-grow-as-well.html?_r=1) [https://perma.cc/CJ4V-234W].

the effect of these jurors on decision-making and how people respond to translation in the jury room has received only nascent empirical attention.<sup>234</sup> What is clear is that problems in language proficiency do affect the likelihood that a prospective juror will be seated on a jury.

Thus far, no other state has followed New Mexico's lead. A subcommittee of the Connecticut Jury Selection Task Force was recently charged with considering whether the statute requiring individuals summoned for jury service to be able to speak and understand English to serve on a jury warranted revision, but decided not to recommend any change in the statute.<sup>235</sup> Jurisdictions with a high percentage of non-English speaking potential jurors are the most reasonable candidates for this accommodation, both because this disqualification has a greater impact on the jury pool and because court interpreters are more likely to be available. A language disqualification in those jurisdictions is also likely to have the greatest impact on underrepresentation of the community at large.

**Citizenship.** Citizenship is a standard requirement for jury service that excludes the estimated 13.1 million lawful permanent residents in the United States.<sup>236</sup> In 2013, the State Assembly in California, where 3.5 million noncitizens are legal permanent residents, passed a bill that would have allowed those noncitizens to serve as jurors.<sup>237</sup> Then Governor Brown vetoed the bill, characterizing jury service as “quintessentially a prerogative and responsibility of citizenship.”<sup>238</sup> The result of the citizenry requirement is that a substantial portion of legal permanent residents in the United States are not included in the population from which jury pools are drawn. This limitation differentially excludes ethnic minorities, which some have argued raises the potential for an equal protection or Sixth Amendment claim.<sup>239</sup> The idea of including permanent residents on juries is still viable. At the end of 2020, the Connecticut Jury Selection Task Force re-visited the issue<sup>240</sup> and on July 12, 2021, Governor Lamont signed the Act permitting permanent residents in Connecticut to serve on juries.<sup>241</sup>

**Felony convictions.** The exclusion of individuals with a felony conviction is the qualification barrier that probably has the largest effect on the representativeness of the jury pool across the United States, and in light of the history of mass incarceration, strongly affects the representation of persons of color.<sup>242</sup> The

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234. See generally Hilda Lysette Chavez, *Examining the Effects of the Inclusion of Non-English Speaking Jurors on Jury Verdicts and Juror Experiences* (Dec. 2012) (PhD. Dissertation, University of Nevada, Reno) (on file with the University of Nevada Library System).

235. CONNECTICUT JURY SELECTION TASK FORCE, *supra* note 157, at 42-43.

236. Bryan Baker & Nancy Ryina, *Population Estimates: Estimates of the Lawful Permanent Resident Population in the United States: January 2013*, OFF. OF IMMIGR. STAT., DEP'T HOMELAND SEC. (2014), <https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202013.pdf> [<https://perma.cc/LKY8-SHJW>].

237. A.B. 1401, 2013–2014 Leg., Regular Sess. (Cal. 2013) (vetoed).

238. See Letter from Edmund Gerald Brown, Governor of Cal., to the Members of the Cal. State Assembly (Oct. 7, 2013) (on file with the Office of the Governor of California).

239. See Motomura, *supra* note 228, at 1505.

240. See CONNECTICUT JURY SELECTION TASK FORCE, *supra* note 157, at 7.

241. *Id.*; Substitute H.B. 6548 (Conn. 2021).

242. Jackson-Gleich, *supra* note 142.

permanent wholesale exclusion of felons undermines the goal of achieving juries that represent a fair cross-section of the larger community. A number of courts have recently recognized this cost and eliminated lifetime or long-term ineligibility for jury service. In California, the “Right to a Jury of Your Peers” bill was signed into law in October 2019.<sup>243</sup> It enables felons who have finished their prison or jail time and are no longer under post-release supervision, including parole and probation, to serve as jurors.<sup>244</sup> In June 2020, the D.C. Superior Court announced it would begin permitting individuals with a felony conviction to serve on trial juries, in both criminal and civil cases, one year after they have completed their sentences.<sup>245</sup> Previously, persons with felony convictions had to wait ten years after they completed their sentence to serve on a jury.<sup>246</sup> As Chief Judge Robert Morin said in announcing the decision: “This change will make juries more representative, advance due process and allow returning citizens to more fully participate.”<sup>247</sup>

### 3. *Addressing Nonresponse with Follow-up and Replacement Summons*

A comprehensive master jury list does not automatically produce a representative jury pool. According to the NCSC, “[u]ndeliverable rates are the single largest factor contributing to decreased jury yields.”<sup>248</sup> In addition to updating the master jury list frequently, and using the most up-to-date address lists, submitting names to the National Change-of-Address (“NCOA”) database operated by the United States Postal Service can improve the quality of the address list used to summons jurors.<sup>249</sup>

Potential jurors who receive a qualification questionnaire or a summons do not always respond. Nationally, 8% of all individuals summoned for jury duty fail to appear (“FTA”), but rates can be much higher.<sup>250</sup> Lower-socioeconomic-status individuals are less likely to appear,<sup>251</sup> which has the effect of reducing appearance rates among minorities. A simple reminder can be surprisingly effective in reducing FTA rates. Riverside County (California) Superior Court found

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243. Nancy Skinner, *Gov. Newsom Signs SB 310, ‘The Right to a Jury of Your Peers’*, NANCY SKINNER (Oct. 8, 2019), <https://sd09.senate.ca.gov/news/20191008-gov-newsom-signs-sb-310-%E2%80%98right-jury-your-peers%E2%80%99> [<https://perma.cc/73TQ-VDMJ>].

244. *Id.*

245. *D.C.’s Justice Systems Overview 2020*, COUNCIL FOR CT. EXCELLENCE 17 (2020).

246. Christopher Nance, *Ex-Felons Can Resume Serving as Jurors in Washington, D.C.*, PAULSON & NANCE, PLLC, <https://www.paulsonandnace.com/ex-felons-can-resume-serving-as-jurors-in-washington-d-c/#:~:text=The%20one%20year%20waiting%20period,juries%20at%20the%20Superior%20Court> [<https://perma.cc/UX4F-79AX>].

247. Press Release, District of Columbia Courts, DC Superior Court Changes Jury Plan to Reduce Time Before Returning Citizens Can Serve as Jurors (June 15, 2020) <https://newsroom.dccourts.gov/press-releases/dc-superior-court-changes-jury-plan-to-reduce-time-before-returning-citizens-can-serve-as-jurors> [<https://perma.cc/C57A-6TPU>].

248. See *Jury Managers’ Toolbox: Best Practices to Decrease Undeliverable Rates*, *supra* note 215.

249. Paula Hannaford-Agor, *Jury News: “Neither Snow, nor Rain, nor Heat, nor Gloom of Night Stays These Couriers from the Swift Completion of Their Appointed Rounds”*, 25 CT. MANAGER 65, 66 (2010).

250. Caprathe, Hannaford-Agor, Loquvam & Diamond, *supra* note 220, at 19.

251. *Id.*



that sending prospective jurors a reminder postcard one week before the reporting date reduced FTA rates by at least 5%.<sup>252</sup> Although postcards that described penalties that would result from FTA reduced FTA rates by 10%, courts may be reluctant to threaten such penalties.<sup>253</sup> The NCSC has found that, when courts sent a second summons, nonresponse/FTA rates were 24% to 46% lower than when no follow-up summons was sent.<sup>254</sup> Actual follow-up Order-to-Show-Cause proceedings or other aggressive approaches (*e.g.*, fines) had only a marginal effect.<sup>255</sup>

Some courts now use the Internet to qualify and schedule potential jurors for jury service.<sup>256</sup> This innovation can be remarkably efficient and convenient for users, but it may inadvertently undermine representativeness by reducing nonresponse rates only among wealthier and better educated prospective jurors who have regular access to and proficiency with the Internet. This potential distortion to the jury pool is less likely to be an issue in some jurisdictions<sup>257</sup> and will become less of a problem over time, but it is incumbent on courts to monitor the effect of these procedures on the composition of the jury pool.

Both undeliverable summonses and nonresponses reduce the diversity of the jury pool. One approach that eighteen federal trial courts have taken to address this issue is to send a replacement summons to a new prospective juror in the same zip code as the zip code of the nonresponding individual.<sup>258</sup> Twelve courts send a replacement summons when either the original summons is returned as undeliverable or there is no response, and an additional six send a replacement when the original summons is returned as undeliverable.<sup>259</sup> Although more research is needed on the impact of these efforts, one study in the Northern District of Illinois showed a modest increase in the percentage of Black prospective jurors in the pool of qualified jurors used in the district.<sup>260</sup> Other studies have produced mixed results.<sup>261</sup>

Some state courts are moving in this direction as well. Connecticut, following the recommendation of the Connecticut Jury Task Force, passed a bill that

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252. Shaun Bowler, Kevin Esterling & Dallas Holmes, *Get Out the Juror*, 36 *POLIT. BEHAV.* 515, 518–519 (2013).

253. *See id.* at 524.

254. *See Jury Managers' Toolbox: Best Practices to Decrease Undeliverable Rates*, *supra* note 215.

255. Caprathe, Hannaford-Agor, Loquvam & Diamond, *supra* note 220, at 19.

256. Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 *BROOK. L. REV.* 1257, 1272 (2001).

257. *See* Mary R. Rose & Michelle Brinkman, *Crossing the 'Digital Divide': Using the Internet to Impanel Jurors in Travis County, Texas*, 1 *J. CT. INNOVATION* 5, 28 (2008).

258. *See* Jackson-Gleich, *supra* note 142.

259. *See id.*

260. JEFFREY ABRAMSON & MARY R. ROSE, *STUDY OF THE REVISED JURY PLAN FOR THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS* 16–17, 19 (2020).

261. *See* PAULA HANNAFORD-AGOR, *ASSESSMENT OF THE JURY PLAN FOR THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA* 12 (Nat'l Ctr. For State Cts., 2021); ADMIN. OFF. OF THE U.S. CTS., *JURY COMPOSITION PILOT PROGRAM DATA ANALYSIS REPORT* (2018). In both studies, results varied by county.

will institute this follow-up procedure in response to undeliverable summonses.<sup>262</sup>

The effect of these efforts on diversity is tied to the extent to which zip codes are homogeneous, and minority membership varies across zip codes in the jurisdiction. It may be more effective to use census tracts for this procedure, because there are 73,000 census tracts, but fewer than 43,000 zip codes in the United States,<sup>263</sup> and census tracts are more homogeneous in the number of persons they cover. Census tracts tend to cover 4,000+ individuals, while the population of a single zip code can exceed 100,000.<sup>264</sup>

These techniques can be combined with targeted community outreach efforts. For example, William Snowden, the director of the New Orleans, Louisiana office of the Vera Institute of Justice, founded The Juror Project, which organizes presentations to community groups to explain the value of jury service and to correct misconceptions about the process.<sup>265</sup>

#### 4. *Addressing Hardships*

Courts attempting to maximize the diversity of the jury pool face a dilemma in dealing with the hardships that fall disproportionately on prospective jurors with financial constraints and family obligations. The strong correlation between socioeconomic status and minority status means that these hardships tend to fall disproportionately on minorities and fuel underrepresentation of minorities in the jury pool. The national average juror fee for the first day of service is \$16.61.<sup>266</sup>

The most direct way to address this problem has long been recognized: greater juror pay. A study in El Paso, Texas, showed that when juror pay was increased from \$6 to \$40 a day, public participation in jury service reportedly climbed from 22% to 46% within a year.<sup>267</sup> Although some courts provide reasonable compensation for the expenses associated with jury duty, and increased compensation during service on longer trials, others provide little or no payment

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262. Act Concerning the Recommendations of the Jury Selection Task Force, Substitute H.B. No. 6548, § 4(f) (Conn. 2021). (adding that “[o]n and after July 1, 2022, and until June 30, 2023, for each jury summons the Jury Administrator finds to be undeliverable, the Jury Administrator shall cause an additional randomly generated jury summons to be sent to a juror having a zip code that is the same as to which the undeliverable summons was sent.”).

263. *10 Reasons to Use Census Tract Versus ZIP Code: Geography & Demographics*, PROXIMITYONE, [http://proximityone.com/tracts\\_zips.htm](http://proximityone.com/tracts_zips.htm) (last visited Feb. 9, 2023) [<https://perma.cc/5T3D-9C2G>].

264. *Id.*

265. See THE JUROR PROJECT, <https://www.thejurorproject.org/> (last visited Feb. 9, 2023) [<https://perma.cc/5SBK-Y9BG>]. The Project’s stated goal: “We aim to change the makeup of juries to better represent the American population and the communities most commonly accused. We pursue this through community and public education about jury eligibility and the jury selection process and the power jurors hold in America’s high stakes criminal justice system.” *Id.* Mr. Snowden described The Juror Project’s community outreach efforts in an NCSC webinar, *Jury Diversity and Its Role in Promoting Confidence in the Court System*, VIMEO (May 26, 2022, 8:29 AM) <https://vimeo.com/714061666> [<https://perma.cc/TE2V-58K5>].

266. BRENDON W. CLARK, JUROR COMPENSATION IN THE UNITED STATES 2 (2022).

267. Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 350 (2005).

to cover even travel costs.<sup>268</sup> This deficiency takes its toll: “Courts with higher-than-average-compensation policies report excusal rates of 7% compared to 9% for courts with lower-than-average-compensation policies.”<sup>269</sup>

Temporary hardships can be addressed by a deferral policy that permits jurors to defer service one time to a future date within six months of the original summons date. “Deferral rates and excusal rates are inversely correlated: a 1% increase in the deferral rate is associated with a decreased excusal rate of 0.7%.”<sup>270</sup>

The length of jury service also affects the burden imposed on jurors. The extent of that hardship in turn appears to affect excusal rates. In courts with a one-day or one-trial term of service the average excusal rate is 6%, while in courts with longer terms of service the average is 9%.<sup>271</sup>

In sum, addressing the hardships potential jurors face when a jury summons appears can increase participation. To the extent that those hardships (*e.g.*, care for young children, people with disabilities, or the elderly) reflect different life experiences, enabling jurors with these hardships to serve will increase the heterogeneity of the jury pool. To the extent that these hardships differentially affect minorities, reducing those burdens may also improve racial and ethnic representativeness.

#### IV. PHASE 2: SELECTING FAIR AND IMPARTIAL JURIES FOR TRIAL

##### A. *Voir Dire Procedures*

Earlier, we offered a justification for voir dire procedures that allow the probing of attitudes and views that could bias a prospective juror’s fact-finding. Voir dire procedures differ substantially across jurisdictions, across judges within jurisdictions, and even across cases. Surveys of the legal rules governing jury selection practices in civil and criminal jury trials illustrate the considerable variation across the states in the methods used to examine jurors, and in the number and method of exercising peremptory challenges.<sup>272</sup> The NCSC *State-of-the-States Survey*, which surveyed both lawyers and judges in different states, also provides a useful summary of the varied jury selection practices in the states.<sup>273</sup>

One dimension that typically differentiates limited and expansive voir dire is who conducts the voir dire. A fifty-state survey shows that only a handful of states have laws or court rules that specifically allocate the questioning to the parties and their attorneys.<sup>274</sup> Instead, most states give that authority to the

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268. *See id.* at 349.

269. Caprathe, Hannaford-Agor, Loquvam & Diamond, *supra* note 220, at 19.

270. *Id.*

271. *Id.*

272. *Selection of Jurors, 50 State Statutory Surveys: Civil Laws: Civil Procedure*, 0020 SURVEYS 13 (Westlaw) (2022) (civil cases); *Comparative Data*, *supra* note 175 (criminal and civil cases).

273. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 27–31 (reporting variation).

274. *Id.* at 27.

judge—it is within the judge’s discretion to allow or not allow voir dire participation by the parties and their attorneys.<sup>275</sup> Not surprisingly, judicially controlled voir dire tends to be shorter, on average.<sup>276</sup>

A second key distinguishing feature in the scope of voir dire is the number and subject matter of questions posed to prospective jurors. Prospective jurors may complete questionnaires to provide information relevant to qualification, potential bases for exclusion, and other matters.<sup>277</sup> Questionnaires, too, may be limited or more expansive.

Voir dire procedures in the states run the gamut. Consider the characteristics of a limited voir dire, conducted by a judge alone. Typically, the judge will conduct questioning with prospective jurors as a group, posing a small number of closed-ended questions requiring only a yes or no answer.<sup>278</sup> The questions will be specific to the trial; one or more questions will ask prospective jurors to indicate whether they can be impartial.<sup>279</sup> Prospective jurors will indicate, by raising hands or another method, whether they have a positive response to any of the questions.<sup>280</sup> Thus, the identification of juror bias depends largely upon the prospective juror’s self-assessment that he or she cannot be fair.

Contrast the limited voir dire with an expansive approach. Prospective jurors may complete a pretrial questionnaire about their backgrounds, experiences, and case-relevant views prior to voir dire in the courtroom.<sup>281</sup> Both the judge and the parties or their attorneys will participate in the questioning, which will benefit from the information obtained in the pretrial questionnaire on potential sources of juror bias.<sup>282</sup> In an expansive voir dire, questioning is wide-ranging, and includes both closed-ended and open-ended questions.<sup>283</sup> If there is a concern about tainting other members of the jury pool, questioning may be conducted individually, outside the presence of other prospective jurors.<sup>284</sup> Using this approach, rather than relying on the prospective juror’s self-assessment of bias, enables the judge and attorneys to make independent judgments about the possibility of juror bias.

Numerous commentators agree that limited voir dire poses significant difficulties for identifying bias in prospective jurors.<sup>285</sup> This is not a novel discovery linked just to recent research on implicit bias; research documenting the inability of limited voir dire goes back to some of the earliest systematic studies of the

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275. *Id.* at 28.

276. *Id.* at 30 (showing that when judges had an exclusive or primary role in voir dire questioning, voir dire took less time).

277. *Id.* at 29.

278. *Id.* at 28.

279. *Id.*

280. *Id.*

281. *Id.* at 29.

282. *Id.* at 28.

283. *Id.*

284. *Id.* at 28–29.

285. Hans & Jehle, *supra* note 85, at 1181; Debora A. Cancado, *The Inadequacy of the Massachusetts Voir Dire*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 81, 83–84 (2000) (criticizing limited voir dire); JURYWORK: SYSTEMATIC TECHNIQUES § 2:33, (Will Rountree, Elissa Krauss & Beth Bonora eds., 2d ed., 2004).

American jury trial.<sup>286</sup> Dale Broeder was a member of the famous Chicago Jury Project that started in the 1950s.<sup>287</sup> He conducted post-trial interviews with 225 jurors and discovered that a number of jurors had failed to tell the court about relevant information bearing on their ability to serve as fair and impartial jurors.<sup>288</sup> He noted, “voir dire was grossly ineffective not only in weeding out ‘unfavorable’ jurors but even in eliciting the data which would have shown particular jurors as very likely to prove ‘unfavorable.’”<sup>289</sup> Subsequent research, most of which has examined voir dire in criminal cases, has confirmed the inadequacy of typical voir dire procedures to identify juror bias.<sup>290</sup>

During his twelve years as a trial judge on the Superior Court of the District of Columbia, Gregory Mize experimented with an expansion of his typical voir dire practice, first in criminal trials and then in civil trials.<sup>291</sup> His routine practice was to begin voir dire with a panel (usually about sixty prospective jurors) with an introduction about the purpose and importance of voir dire.<sup>292</sup> He would then ask a series of questions to the group as a whole and tell individuals that if they answered “yes” to any of the questions they should alert the courtroom staff.<sup>293</sup> Those prospective jurors with affirmative responses would then be individually questioned outside the presence of other members of the jury panel.<sup>294</sup> The whole approach was quite efficient—but, Judge Mize wondered, at what cost?

Judge Mize noticed that a fair number of prospective jurors did not respond “yes” to any of the questions.<sup>295</sup> He decided to interview each one individually, in a nearby jury room.<sup>296</sup> He would ask, “I notice you did not respond to any of my questions. I just wondered why. Could you explain?”<sup>297</sup> As a follow-up, he would further inquire, “is it because the questions did not apply to you?”<sup>298</sup> Most said the questions did not apply, but the individual questioning of these silent jurors resulted in the court obtaining information that resulted in numerous excuses for cause.<sup>299</sup>

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286. See Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1964).

287. *Id.* at 503.

288. *Id.*

289. *Id.* at 505.

290. See Hans & Jehle, *supra* note 85, at 1188–90 (summarizing studies).

291. Gregory E. Mize, *On Better Jury Selection—Spotting UFO Jurors Before They Enter the Jury Room*, 36 CT. REV. 10 (1999) (experience with criminal trials); Gregory E. Mize, *Be Cautious of the Quiet Ones*, VOIR DIRE, Summer 2003, at 8 (experience with both criminal and civil trials).

292. Mize, *Be Cautious of the Quiet Ones*, *supra* note 291, at 10.

293. *Id.* at 10–11.

294. *Id.* at 11.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. In civil trials, forty-four of the 427 silent prospective jurors reported a legally significant piece of information, including information that merited removal by a challenge for cause. That amounted to approximately one legally relevant piece of information for every two civil jury trials. *Id.* at 13. Mize reports that he discovered a greater number of silent juror candidates with problematic responses in his expanded criminal voir dire interviews. In criminal cases, the expansion of voir dire resulted in from one to four prospective jurors struck for cause in twenty-seven of the thirty jury trials, fully 90% of the trials. Mize, *On Better Jury Selection*, *supra* note 291, at 15.

A silent juror candidate in an auto accident case, for example, shared this in the individual interview with Judge Mize: “I was in an auto accident last month. I was a driver, rear-ended, have a sore back still. I have treatment scheduled this afternoon.”<sup>300</sup> Another, whose breath smelled of alcohol, blurted out, “I’ll tell you straight up, I am an alcoholic. I’m starting to shake already today.”<sup>301</sup> Yet another indicated that the plaintiff’s attorney in the current case had previously represented him in a personal injury case.<sup>302</sup> Another silent juror could not speak English.<sup>303</sup> And perhaps the most astonishing admission: “I’m the defendant’s fiancée.”<sup>304</sup> Judge Mize excused all these (and more) prospective jurors for cause; other prospective jurors shared information that led to their removal through an attorney’s peremptory challenge.<sup>305</sup> These clear examples underscore the benefits that can come from even a fairly modest expansion of voir dire practice.

The examples above suggest some of the reasons why limited voir dire is inadequate in uncovering bias. Some silent juror candidates appear to have been unable or reluctant to volunteer their concerns or their biases until they faced Judge Mize in an individual setting. Although some prospective jurors may purposefully lie, either to get out of jury duty or to serve, even assuming that those numbers of intentional deceptions are low, prospective jurors are often likely to be unaware of or underestimate the effects of their own biases.<sup>306</sup> They may be concerned about appearing prejudiced, the very opposite of being the ideal impartial juror. Many juror candidates try hard to achieve that socially desirable state and to gain the judge’s approval.

Prospective jurors also express concerns about privacy, and these concerns may undermine their willingness to share relevant information.<sup>307</sup> Mary Rose interviewed jurors about their voir dire experiences and found that a quarter of them felt that the questions they were asked seemed to them to be “too private.”<sup>308</sup> Rose identified three broad types of concerning questions: their involvement and their family’s involvement in crime or the courts; their personal characteristics such as their marital status or children; and questions about their interests and affiliations, such as hobbies and membership in churches or voluntary organizations.<sup>309</sup> Jurors were thus sensitive to sharing not only potentially stigmatizing information, but also routine facts that they felt might risk their own or their family’s safety and facts that led them to feel profiled or stereotyped. As

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300. Mize, *Be Cautious of the Quiet Ones*, *supra* note 291, at 13.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 12.

305. Mize, *On Better Jury Selection*, *supra* note 291, at 15; Mize, *Be Cautious of the Quiet Ones*, *supra* note 291, at 13.

306. Elek & Miller, *supra* note 79, at 2.

307. Mary R. Rose, *Jurors’ Views of Voir Dire Questions*, 85 JUDICATURE 10, 12 (2001); Paula L. Hannaford, *Safeguarding Juror Privacy—A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18, 18 (2001).

308. Rose, *supra* note 307, at 13.

309. *Id.* at 14–15.

in most jurisdictions, all of these questions were posed to the jurors in open court and they responded orally in front of other jurors and the public. This approach to voir dire does not address any juror concerns about privacy.<sup>310</sup>

### B. *Removals for Cause*

Challenges to individual prospective jurors for cause create additional avenues for departure from jury representativeness. Judges are charged with removing a prospective juror who

has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially.<sup>311</sup>

More generally, the A.B.A. *Principles for Juries and Jury Trials* encourages judges to remove a juror if the court “determines that there is a reasonable doubt that the juror can be fair and impartial.”<sup>312</sup> There is no limit to the number of challenges for cause.<sup>313</sup>

Even if the source lists of prospective jurors fully represent the community, and the group of prospective jurors that appears at the courthouse (or on Zoom) is generally representative, the judge’s decision to remove prospective jurors for cause can significantly alter the composition of the sitting jury. For example, Jacinta Gau examined jury selection in criminal cases in two counties and found that of the one-third of prospective jurors questioned who were removed for cause, 67% were removed for partiality, 30% for financial hardship, and 3% for language difficulty.<sup>314</sup> All minorities were more likely to be excused for hardship; Asian-American and Latinx jurors were more likely to be removed due to language difficulty.<sup>315</sup> In a study of civil jury trials, Diamond and her colleagues found that language difficulty had a similarly disproportionate effect in removing minority jurors for cause, but median income did not.<sup>316</sup> Thomas Frampton also documented racial patterns in successful challenges for cause in two southern states; in Louisiana, for example, although 33% of the jury pool was Black, 59% of prosecutors’ challenges for cause were for Black prospective jurors.<sup>317</sup> In capital cases, challenges for cause disproportionately eliminate women and African

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310. *See generally id.*

311. A.B.A. PRINCIPLES, *supra* note 9, at 78.

312. *Id.*

313. *Id.*

314. Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries*, 39 J. CRIME & JUST. 75, 82 tbl.4 (2016).

315. *Id.*

316. Shari Seidman Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 440 (2009).

317. Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 794 (2020). Similar racial disparities were found in Mississippi. *Id.* at 796–97.

American prospective jurors at least in part because of their greater opposition to the death penalty.<sup>318</sup>

While judges have little discretion in removing jurors who lack the legal qualifications to serve, they exercise substantial discretion in evaluating the impartiality of a prospective juror. It is a difficult task, and a number of factors bear on the ability of judges to exercise fully informed challenges. Unconscious and implicit biases that shape jurors' decision-making can also influence legal professionals.<sup>319</sup> Jeffrey Rachlinski and his collaborators have undertaken a series of studies of judicial decision-making.<sup>320</sup> They find that judges, like the rest of us, are influenced by a variety of heuristics (mental shortcuts) and biases, including implicit racial biases, in their decision-making.<sup>321</sup> To cite one illustrative research finding, they presented municipal court judges with a case involving a nightclub's noise violation.<sup>322</sup> Some judges were told that the nightclub's name was Club 11,866 (after its street address); others were given the name Club 58.<sup>323</sup> In line with the anchoring heuristic, the judges fined Club 11,866 three times as much as Club 58.<sup>324</sup> More concerning, Rachlinski and collaborators have also found that judges have implicit racial biases that can affect their judgments in hypothetical scenarios.<sup>325</sup>

Mary Rose and Shari Seidman Diamond examined for-cause challenges by presenting judges and attorneys with a number of voir dire scenarios based on actual appellate cases.<sup>326</sup> In the scenarios the juror candidates expressed certainty about their ability to be fair and impartial ("I would be fair") or equivocated about their ability ("I'm pretty sure I could be fair").<sup>327</sup> Judges were asked about their perceptions of the juror's impartiality and whether the average judge would

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318. For a summary of the research, see Amelia C. Hritz, Caisa E. Royer & Valerie P. Hans, *Diminishing Support for the Death Penalty: Implications for Fair Capital Case Outcomes*, in *CRIMINAL JURIES IN THE 21ST CENTURY: PSYCHOLOGICAL SCIENCE & THE LAW* 41, 43–44 (Cynthia Najdowski & M. Stevenson eds., 2018).

319. Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 *CT. REV.* 190, 191 (2013); see also Rachlinski, Johnson, Wistrich & Guthrie, *supra* note 15, at 1195.

320. See generally Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 *ANN. REV. L. & SOC. SCI.* 203 (2017).

321. *Id.* at 213.

322. *Id.* at 215.

323. *Id.*

324. *Id.* Anchoring refers to the "[p]rocess in which irrelevant values provide a starting point for a judgment; adjustments are then made away from the anchor, but are often insufficient." JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 211 (N.Y.U. Univ. Press 2016).

325. Rachlinski, Johnson, Wistrich & Guthrie, *supra* note 15, at 1221. The authors write:

Our research [using scenario experiments] supports three conclusions. First, judges, like the rest of us, carry implicit biases concerning race. Second, these implicit biases can affect judges' judgment, at least in contexts where judges are unaware of a need to monitor their decisions for racial bias. Third, and conversely, when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.

*Id.* at 1221.

326. Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 *LAW & SOC'Y REV.* 513, 519–20 (2008).

327. *Id.* at 521–23.



remove the prospective juror for cause.<sup>328</sup> Lawyers were asked to predict what the average judge would do.<sup>329</sup> Judges' views and lawyers' predictions about what judges would do were influenced by the subjective certainty of the juror.<sup>330</sup> It is understandable that judges use juror confidence as a cue, but people are often unaware of the effects of their experiences and attitudes on their decision-making, making reliance on the juror's subjective certainty a concern. An additional challenge for judges in deciding whether to excuse a juror for cause is the social dimension of the exchange when a juror expresses certainty in her impartiality: judges do not want to tell a juror, "I don't believe you."

One civil jury study that demonstrated this lack of awareness included an experimental test of judicial rehabilitation.<sup>331</sup> After the voir dire questions, but before they heard and decided the civil lawsuit, half the mock juror participants were randomly assigned to either watch a short judicial rehabilitation video or not.<sup>332</sup> In the video, the judge noted that participants might have views that could bias their judgments.<sup>333</sup> He asked whether "they could 'put aside' such views and biases and 'apply the law as it is given.'"<sup>334</sup> The mock juror participants responded either yes or no.<sup>335</sup> At the end of the experiment, participants assessed their own biases in decision-making.<sup>336</sup> The responses of those who had watched the rehabilitation video were compared with those who had not.<sup>337</sup> Study participants revealed in other responses some significant decision-making biases.<sup>338</sup> Those biases were equally strong for those who viewed the rehabilitation video and those who did not.<sup>339</sup> But, those participants who viewed the video were more likely to say they had been unbiased in their decision-making.<sup>340</sup> Thus, the judge's exhortation to the jurors, encouraging them to reflect on their biases, and urging them to be unbiased, had an unsatisfactory effect—although it did not reduce decision-making bias, the jurors thought it had.

How then can we minimize losses in representativeness due to removals for cause? As we described earlier, losses due to lack of language proficiency can be addressed by providing interpreters.<sup>341</sup> Losses due to hardship can be lessened by providing childcare and increasing juror pay.<sup>342</sup> Partiality is a more enduring quality, unlikely to be randomly distributed, and difficult to diagnose reliably.

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328. *Id.* at 524–44.

329. *Id.* at 524.

330. *Id.* at 514–15.

331. Salerno, Campbell, Phalen, Bean, Hans, Spivack & Ross, *supra* note 77, at 336.

332. *Id.* at 339.

333. *Id.* at 341.

334. *Id.*

335. *Id.*

336. *Id.* at 339.

337. *Id.* at 344–45.

338. *Id.* at 347.

339. *Id.*

340. *Id.* at 337.

341. *See supra* Subsection III.C.2.b.

342. *See supra* Subsection III.C.4.

Perhaps that is why American jury systems include a safety valve: the peremptory challenge.

C. *Peremptory Challenges and the Limits of Batson*

Attorneys can remove jurors by exercising peremptory challenges, further molding the composition of the jury. In contrast to challenges for cause, peremptory challenges are limited in number, but jurisdictions cover a wide range in the number permitted. Although some states have reduced their number of peremptory challenges in recent years, the numbers vary in noncapital felony cases from zero per side in Arizona and three per side in New Hampshire and two other states<sup>343</sup> to twenty per side in New Jersey;<sup>344</sup> and in civil cases from zero per side in Arizona and two per side in Rhode Island and two other states<sup>345</sup> to eight per side in North Carolina.<sup>346</sup> There has been extensive research on attorneys' use of peremptory challenges, and in particular on the role played by juror race and gender in exercising those challenges.<sup>347</sup> Reliance on race and gender is constitutionally forbidden in both criminal and civil cases.<sup>348</sup> Nonetheless, research has routinely shown prosecutors in criminal cases exercising a disproportionate number of peremptory challenges against racial and ethnic minorities, and defense attorneys taking the opposite tack.<sup>349</sup>

An experimental study suggests how stereotypes and unconscious biases can operate in the peremptory challenge context. Samuel Sommers and Michael Norton gave students, law students, and practicing lawyers a hypothetical case of robbery and assault with a Black defendant.<sup>350</sup> They also gave them two juror profiles that included pictures of the jurors: a journalist who wrote stories about police misconduct, and a business executive who was skeptical of forensic evidence.<sup>351</sup> For half the participants, the journalist was shown in a photograph as a Black person and the executive was shown as a white person; for the other half,

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343. *Comparative Data*, *supra* note 175.

344. *Id.*

345. *Id.*

346. *Id.*

347. See Whitney DeCamp, *Gender and the Peremptory Challenge: Separating the Effects of Race and Gender in Jury Selection*, 31 *WOMEN & CRIM. JUST.* 159, 159–68 (2021).

348. *Batson v. Kentucky*, 476 U.S. 79, 84–89 (1986) (race); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 129 (1994) (gender).

349. See David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 *CORNELL L. REV.* 1638, 1725 (1998); Shari Seidman Diamond & Joshua Kaiser, *Race and Jury Selection: The Pernicious Effects of Backstrikes*, 59 *HOW. U. L. REV.* 705, 717–18 (2016); Ann M. Eisenberg, Amelia Courtney Hritz, Caisa E. Royer & John H. Blume, *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2014*, 68 *S.C. L. REV.* 373, 379 (2017); Gau, *supra* note 314, at 7–8; Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 *IOWA L. REV.* 1531, 1548 (2012).

350. Samuel R. Sommers & M. I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 *LAW & HUM. BEHAV.* 261, 265 (2007).

351. *Id.*

the races were reversed.<sup>352</sup> The researchers asked the participants to assume the role of a prosecutor and choose one of the potential jurors to strike peremptorily.<sup>353</sup> The juror candidate's race affected these hypothetical peremptory strikes.<sup>354</sup> The practicing lawyers struck the journalist 79% of the time when he was shown as Black but just 43% of the time when he was portrayed as white; in contrast, the business executive was challenged 57% of the time when he was portrayed as Black and 21% when he was portrayed as white.<sup>355</sup> The research participants rarely mentioned race as the motivator for their peremptory strike; instead, they pointed to race-neutral reasons in the juror's background and attitudes.<sup>356</sup>

Attitudinal differences in views of the police, crime, and punishment as a function of race are fairly well-established, and prosecutors and defense attorneys trying criminal cases are likely to be well aware of them. Surveys conducted by the Pew Research Center have routinely found substantial racial differences in attitudes, with Black respondents expressing more concern about crime, more negative assessments of the fairness of the police, and more opposition to the death penalty as a punishment for crime.<sup>357</sup> A tendency to use race in deciding whether to strike a prospective juror may reflect a tendency to generalize from those patterns.

Jurors of different races and ethnicities may take different views in civil cases, but their preexisting attitudes and views may be less sharply distinguished. This could have multiple effects, Sheri Lynn Johnson argues. It could influence: "1) the likelihood that attorneys will want to discriminate in the exercise of their peremptory challenges; 2) the likelihood that attorneys on the other side will be on the lookout for such discrimination; and 3) the stake that opposing counsel has in making a *Batson* challenge."<sup>358</sup>

Johnson's intuitions are borne out. In a small study of *Batson* challenges in thirty-six criminal and civil cases, Anna Roberts found that just four of them were in civil cases.<sup>359</sup> A 2008 survey of attorneys' views and practices with respect to *Batson* challenges in civil trials showed that a number reported serious reservations about raising a *Batson* challenge, and as a consequence they made

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352. *Id.* at 266.

353. *Id.*

354. *Id.* at 269.

355. *Id.* at 267.

356. *Id.* at 267–68.

357. John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in their Views of Criminal Justice System*, PEW RSCH. CTR. (May 21, 2019), <https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/> [<https://perma.cc/LKJ9-VMT4>] (documenting racial differences in attitudes); Lindsey M. Cole, *In the Aftermath of Ferguson: Jurors' Perceptions of the Police and Court Legitimacy Then and Now*, in *CRIMINAL JURIES IN THE 21<sup>ST</sup> CENTURY: PSYCHOLOGICAL SCIENCE AND THE LAW* 109, 110 (Cynthia Najdowski & Margaret Stevenson eds., 2019) (summarizing research on racial differences in distrust in the police and cynicism about the fairness of the justice system); see also Hritz, Royer & Hans, *supra* note 318, at 44, for a discussion of racial differences in attitudes toward the death penalty.

358. E-mail from Sheri Lynn Johnson to Valerie P. Hans, (Apr. 26, 2021, 7:41 PM).

359. Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1374 (2012).

them infrequently.<sup>360</sup> Most had not raised such challenges.<sup>361</sup> Among the reasons, some noted that it was difficult with a small number of peremptory challenges in civil cases to show a pattern of discriminatory strikes.<sup>362</sup> Other civil attorneys were concerned about essentially calling their opponent a racist or angering the judge, and thought their clients would be better served by not raising the challenge.<sup>363</sup> The low likelihood of success given the significant burden of proof that they faced also militated against raising a *Batson* challenge.<sup>364</sup>

Peremptory challenge patterns in civil jury selection, however, suggest that civil attorneys may be influenced by conscious or unconscious biases. In a study of Chicago civil jury trials, civil defendants were about twice as likely as civil plaintiffs to remove Blacks through peremptory challenges.<sup>365</sup> In contrast, plaintiff attorneys exercised their challenges disproportionately against white prospective jurors.<sup>366</sup> In Maricopa County, Arizona, civil defense attorneys were twice as likely as plaintiff attorneys to exercise their peremptory challenges against Hispanic prospective jurors.<sup>367</sup>

#### D. Dealing with Juror Predispositions

The diversity of preexisting backgrounds, experiences, and attitudes of prospective jurors is a strength of the jury, contributing to robust deliberation. It is not that all members will be unbiased, but rather that the biases will be offsetting, and the jurors will not be impervious to evidence and persuasive argument. We recognize in both challenges for cause and peremptory challenges that beliefs and attitudes can sometimes undermine the fairness of jury trials. As we note above,<sup>368</sup> a fair jury selection process should provide an opportunity for the court and the parties to explore these potential sources of prejudice and should take into account the fact that prospective jurors may be unaware of the potentially biasing effects of their backgrounds, experiences, and attitudes.

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360. Approximately two-thirds of the 138 attorneys surveyed reported civil case experience, either exclusively with civil cases (33%) or with both civil and criminal cases (32%). V. HALE STARR & MARK MCCORMICK, *JURY SELECTION*, § 17.08 Attorney Survey (4th ed. & Supp. 2016).

361. *Id.*

362. “Attorneys performing only (or mostly) civil trials stated that being limited to three (or four) peremptory challenges made it nearly impossible to prove a pattern of racially motivated strikes, even with the existence of suspicious strikes.” *Id.* § 17.08(C). A pattern of discriminatory strikes is not required, but it may be relevant to meeting the challenger’s burden of proof of discriminatory intent.

363. *Id.* § 17.08(E).

364. *Id.*

365. Diamond, Peery, Dolan & Dolan, *supra* note 316, at 441.

366. *Id.* The analysis showed that a prospective juror’s race and gender together were linked to civil defense attorneys’ peremptory challenges. “The defense excused 25.3 percent of available black males and 21.5 percent of available black females, but 13.4 percent of available nonblack males and 15.4 percent of nonblack females. Thus, the strong effect of being black on defense challenges was more pronounced for black males than for black females.” *Id.*

367. JUDICIAL BRANCH OF ARIZONA, *RACIAL AND ETHNIC REPRESENTATION THROUGH THE JURY SELECTION PROCESS: AN ANALYSIS OF 2019 JURY DATA FROM THE SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY 2* (2021).

368. See *supra* Sections II.A–B.

### 1. *Using Case-Specific Questionnaires*

A recent civil mock jury experiment demonstrates the benefits of expanded and case-relevant questions over a traditional limited set of questions.<sup>369</sup> Online participants were randomly assigned to answer either no voir dire questions, minimal voir dire questions about demographic characteristics and general background information, or extended voir dire questions that were more specifically focused on views about civil litigation, parties, and laws.<sup>370</sup> Participants received one of three different civil cases and made judgments about liability and damages.<sup>371</sup> The responses to the minimal voir dire questions were unrelated to their case judgments, but responses to many of the extended voir dire questions significantly predicted their decisions on liability and damages.<sup>372</sup> What is more, a significant number of participants gave such extreme answers to the extended voir dire questions that they would likely be candidates for challenges for cause.<sup>373</sup> The results reinforce our sense about the benefits of expansive voir dire in jury trials.

Criminal jury trials can also benefit from case-specific questionnaires that ask about key sources of potential prejudice in multiple ways. Consider pretrial research conducted for the trial of U.S. citizen John Walker Lindh, the so-called “American Taliban” who was captured in Afghanistan by U.S. forces.<sup>374</sup> Pretrial surveys of the public to gauge potential jury bias included a number of closed-ended and open-ended questions.<sup>375</sup> In addition, survey participants were asked to put themselves in the place of a prospective juror in the John Walker Lindh trial, instructed by the judge to follow a juror’s duty to be fair and impartial, and to indicate whether they could be impartial jurors.<sup>376</sup> Three-quarters of the survey participants said that they could be fair and impartial jurors.<sup>377</sup> For example, one explained that “I would be more than fair actually listening to all facts given and presented by the prosecution and defense” and another said that “I feel like it’s my Christian duty to be fair, and listen to all of the things set forth in the courtroom.”<sup>378</sup> The individual who would be “more than fair,” however, said Lindh was probably a “traitor” and a “terrorist,” and said that a not guilty verdict would be very unacceptable since “he is guilty of something.”<sup>379</sup> And the survey

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369. See Salerno, Campbell, Phalen, Bean, Hans, Spivack & Ross, *supra* note 77.

370. *Id.* at 339–42 (listing of sources of the extended voir dire questions). For the minimal voir dire questions used in the study, see Susan Oki Mollway, *Sample Voir Dire Subjects Covered by Judge Susan Oki Mollway in Civil Trials*, [https://www.hid.uscourts.gov/reqmmts/SOM/SOM\\_standard\\_civil\\_voir\\_dire.pdf?pid=19&mid=63](https://www.hid.uscourts.gov/reqmmts/SOM/SOM_standard_civil_voir_dire.pdf?pid=19&mid=63) (last visited Feb. 9, 2023) [<https://perma.cc/TL45-LPMU>].

371. Salerno, Campbell, Phalen, Bean, Hans, Spivack & Ross, *supra* note 77, at 339–40.

372. *Id.* at 346.

373. *Id.* at 351.

374. See generally Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and “Terrorist” Trials*, 78 CHL-KENT L. REV. 1143 (2003).

375. *Id.* at 1174–78.

376. *Id.* at 1159.

377. *Id.* at 1162–63.

378. *Id.* at 1164 tbl.1.

379. *Id.* at 1168 tbl 2.

respondent who referred to the Christian duty also said in response to other questions that “I feel that he was a traitor to our country. And now that he’s been caught, he’s trying to reverse his decision in order to avoid paying the price.”<sup>380</sup> These discontinuities in responses show the benefit of asking about potential prejudices using a variety of questions.

Extensive advice is available on how to design and format case-specific questionnaires and how to phrase questions to maximize accurate and complete responses.<sup>381</sup> For example, trial consultant Jeffrey T. Frederick observes that the introduction to the questionnaire is an opportunity to underscore the importance of candid and complete responses; and telling individuals that “there are no right or wrong answers reduces the pressure to answer in a socially acceptable manner.”<sup>382</sup> In addition to setting these expectations, he recommends that designers develop simple and neutral questions, avoid compound and double-barreled questions, and use a mix of closed-ended and open-ended questions.<sup>383</sup>

The increased use of case-specific questionnaires will better enable the courts and lawyers to identify biased jurors. In some cases, it could lead to a reduction in the diversity of viewpoints on the jury that is ultimately selected, but that is a necessary price to pay.<sup>384</sup> An optimal jury selection process should remove unduly biased jurors but should also preserve viewpoint diversity to the extent possible.

## 2. *Allowing Attorney Participation During Voir Dire*

Individual questioning of potential jurors by the judge can be revealing,<sup>385</sup> but attorney questioning may provide a further window into juror thinking. Indeed, Judge Mark Bennett suggests that “[b]ecause lawyers almost always know the case better than the trial judge, lawyers are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome.”<sup>386</sup> In addition, the normative pressure to give the judge a socially desirable response may be reduced when the attorney is asking the question. One study showed that attorneys were more effective than judges in eliciting candid self-disclosure from potential jurors.<sup>387</sup>

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380. *Id.* at 1166 tbl 2.

381. *See, e.g.*, JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION: SUPPLEMENTAL JUROR QUESTIONNAIRES* (2018).

382. *Id.* at xix.

383. *Id.* at xiv–xviii.

384. *See* Salerno, Campbell, Phalen, Bean, Hans, Spivack & Ross, *supra* note 77, at 338. If attorneys use statistical models or research on the individuals in the jury venire to guide their peremptory challenges, this can also reduce viewpoint diversity on the jury. Courts have tools to protect juror privacy, if so desired, by seating anonymous juries or identifying the members of the venire only at the start of the trial.

385. *See* Mize, *Be Cautious of the Quiet Ones*, *supra* note 291, at 11–12 (showing how detailed individual juror questioning can be revealing in disclosing potential juror bias).

386. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 160 (2010).

387. Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire*, 11 LAW & HUM. BEHAV. 131, 143 (1987).

A Massachusetts study of attorney participation in voir dire found that when attorneys participated (which they tended to do in more complex cases), the empanelment time was only slightly longer than judge-conducted voir dire, less than one minute per juror.<sup>388</sup> Approximately a quarter of the challenges for cause (26%) took place during attorney questioning; 62% of these challenges were allowed.<sup>389</sup> These findings suggest that attorney questioning had a valuable effect on the identification and removal of biased prospective jurors.

When attorneys are given only a limited role in conducting voir dire, as they often are in federal courts,<sup>390</sup> they have fewer bases on which to decide how to use their peremptory challenges. Under those circumstances, they may be more likely to rely on readily available cues and apply snapshot racial, ethnic, and gender stereotypes in their judgments about potential jurors.<sup>391</sup> Further evidence about juror experiences and attitudes that can be gleaned from responses to a case-specific questionnaire or during in-court jury selection should reduce the tendency to turn to demographic characteristics. Thus, to the extent that implicit and explicit biases infect challenge decisions, maximizing other information may act as a countervailing force.

### E. Controlling Attorney Use of Peremptory Challenges

#### 1. Bolstering *Batson*

When the U.S. Supreme Court decided *Batson v. Kentucky* in 1986, it was a victory of sorts for fair jury trials: the Court recognized that discrimination by a prosecutor during jury selection could inappropriately remove potential jurors from sitting on a trial.<sup>392</sup> In the cases that followed, the Court expanded this prohibition of discriminatory use of peremptory challenges to cover defense attorneys in criminal cases and attorneys in civil cases.<sup>393</sup> The Court in *Batson* delineated a three-step procedure for identifying and evaluating a potential *Batson* violation. First, the complaining attorney must establish a prima facie case that “gives rise to an inference of discriminatory purpose” to support the claim that the opposing party has exercised its peremptory challenge in a discriminatory fashion.<sup>394</sup> Second, if the judge believes a prima facie case has been made, the burden shifts to the accused party, who must offer a race-neutral explanation for the contested challenges.<sup>395</sup> Finally, the trial court judge must decide whether the

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388. COMM. ON JUROR VOIR DIRE, SUPREME JUDICIAL COURT OF MASSACHUSETTS, Committee on Juror Voir Dire, *Final Report to the Justices* 7 (2016).

389. *Id.* at 7–8.

390. See Salerno, Campbell, Phalen, Bean, Hans, Spivack & Ross, *supra* note 77, at 337; Jones, *supra* note 387, at 132.

391. Shari Seidman Diamond, Leslie Ellis & Elisabeth Schmidt, *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J. L. & PUB. POL’Y 77, 93 (1997).

392. 476 U.S. 79, 89 (1986).

393. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (applying *Batson* to defense attorneys in criminal cases); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (applying *Batson* to civil cases).

394. *Batson*, 476 U.S. at 93–94 (citing *Washington v. Davis*, 426 U.S. 229, 239–42 (1976)).

395. See *id.* at 97.

offered explanation is sufficient to rebut the claim that the challenge was racially motivated.<sup>396</sup> If persuaded that it was racially motivated, the judge will not permit the peremptory challenge to be exercised.

Justice Thurgood Marshall was skeptical that the procedure introduced by the *Batson* Court to control the use of racially-based peremptory challenges would be effective.<sup>397</sup> Time and empirical research have provided evidence that his expectation was correct.<sup>398</sup> One reason may be that because a challenge need not be merely unreasonable, or even implausible, but must be *pretextual* to warrant a successful rejection of the challenge, the court must essentially call the attorney who wishes to exercise the challenge a liar when the attorney offers an explanation that the court rejects.<sup>399</sup> Even opposing counsel may hesitate to raise a *Batson* challenge that would label their opponent a racist or a liar. It is no wonder the procedures created by *Batson* have not succeeded in removing race from jury selection.<sup>400</sup> The Court has failed to take the goal of its decision seriously.

State courts have been grappling with the deficiencies of *Batson* for thirty-five years and have recently been taking steps to address them. The research on implicit racism and the growing awareness that race (and gender) stereotypes can influence all of us, albeit unconsciously, have opened the door to consider *Batson* from a new perspective. If implicit bias can be found in all of us, we should not expect trial attorneys to be immune. Indeed, the experiments of Sommers and Norton, discussed earlier, show precisely that bias.<sup>401</sup> Courts have used this new lens to motivate and re-evaluate the procedures used to control discriminatory use of peremptory challenges. For example, in *State v. Saintcalle*,<sup>402</sup> the Washington State Supreme Court expressed its concerns that the federal *Batson* test may not provide sufficient protection against biased uses of peremptory challenges, particularly with respect to unconscious prejudice and implicit bias:

Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because *Batson* recognizes only “purposeful discrimination,” whereas racism is often unintentional, institutional, or unconscious. We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination.<sup>403</sup>

The recent trial resulting from the death of Ahmaud Arbery offers a strong illustration of the problem that *Batson* failed to address. The trial involved the killing of Arbery, a Black man who was jogging down a residential street when

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396. *Id.* at 96–98.

397. *Id.* at 102–03 (Marshall, J., concurring).

398. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 209 (1989); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 503 (1996); Karen M. Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 564–66 (1992).

399. See Bennett, *supra* note 386, at 161–65.

400. See *id.*

401. See *supra* text accompanying notes 350–56; see, e.g., Sommers & Norton, *supra* note 350, at 262.

402. See 309 P.3d 326 (Wash. 2013).

403. *Id.* at 35–36.



he was followed by three white men, one of whom shot and killed him.<sup>404</sup> It took place in a Georgia county that is about 27% Black.<sup>405</sup> The attorneys defending the three white men excused eight of the nine Black prospective jurors using peremptory challenges, and the seated jury consisted of eleven white jurors and one Black juror.<sup>406</sup> The judge, as well as numerous media stories, expressed dissatisfaction with the failure to seat a representative jury.<sup>407</sup> The prosecution raised *Batson* challenges in response to each of the defense's peremptory strikes.<sup>408</sup> The judge acknowledged that the pattern of defense peremptory challenges gave the appearance of "intentional discrimination" at play, but nonetheless concluded that "defense lawyers had presented legitimate reasons unrelated to race to justify unseating the eight Black potential jurors. And that, he said, was enough for him to reject the prosecution's effort to reseal them."<sup>409</sup> Enlarging the criteria for identifying a race-infected peremptory challenge in the ways we describe below would have offered the opportunity for a more heterogeneous and representative jury.

Several state courts have explicitly taken on the perceived failure of *Batson* and have instituted, or are considering instituting, changes that aim to safeguard the fair use of peremptory challenges that *Batson* failed to achieve.<sup>410</sup> The changes have taken four primary forms: a) finding that a prima facie case has been made if a party strikes the last member of a racially cognizable group; b) eliminating the first step in the *Batson* procedure; c) removing the requirement that a successful *Batson* challenge can result only if the attorney has engaged in purposeful discrimination in deciding to excuse the juror; and d) identifying a series of juror characteristics that presumptively indicate a discriminatory basis for removal of that juror.<sup>411</sup>

a) A peremptory strike eliminating the last member of a racially cognizable group establishes a prima facie case of a discriminatory purpose.

Although courts often rely on a pattern of strikes to determine that a prima facie case has been made for a discriminatory purpose, they also recognize that a single strike can meet the required standard. For example, as the Massachusetts Supreme Court observed:

We have often noted that a single peremptory strike can be sufficient to support a prima facie case, especially where the juror is the only member of the venire of the particular group. [citation omitted]. See *Snyder v. Lou-*

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404. Fausset, *supra* note 1.

405. *Id.*

406. *Id.*

407. *Id.*; N'dea Yancey-Bragg & Raisa Habersham, 'Complicated Jury Selection' Ends with 'Intentional Discrimination' at Ahmaud Arbery Death Trial: Only 1 Black Person to Hear Case, USA TODAY (Nov. 4, 2021, 12:52 PM), <https://www.usatoday.com/story/news/nation/2021/11/03/ahmaud-arbery-murder-trial-jury-selected-georgia/6266635001/> [<https://perma.cc/UUP8-VRKL>].

408. Fausset, *supra* note 1.

409. *Id.*

410. *See infra* text accompanying notes 413–57.

411. *See infra* Subsection IV.E.1.

isiana, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008), quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (“[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.”). The judge’s reasoning that there was not yet a pattern fails to consider this well-established principle that one peremptory strike can sustain the objecting party’s prima facie case.<sup>412</sup>

In a modest adjustment to the proof required for the first step of the *Batson* test, the Washington State Supreme Court went further in *City of Seattle v. Erickson*.<sup>413</sup> The Court announced a bright-line rule that amended the *Batson* framework, holding that “the peremptory strike of a juror who is the only member of a cognizable racial group constitutes a prima facie showing of racial discrimination requiring a full *Batson* analysis by the trial court.”<sup>414</sup>

Although this approach has merit, if discriminatory strikes are a serious problem, this remedy probably provides at best a minor and incomplete remedy. It is thus not surprising that Washington’s Supreme Court found the minor adjustment insufficient a year later when it decided *State v. Jefferson*.<sup>415</sup> In that case, the trial court had applied the bright-line standard articulated in *Erickson*, but after proceeding through the remaining steps of the *Batson* framework, found that the strike was not discriminatory.<sup>416</sup> The Washington Supreme Court disagreed and set out a more demanding framework for evaluating potentially discriminatory peremptory challenges.<sup>417</sup> The result was that the decision of the trial court was reversed, and the case was remanded for a new trial.<sup>418</sup>

b) The first step in the *Batson* procedure constitutes an unnecessary obstacle to showing that a peremptory strike is discriminatory.

Some courts have determined that the first step in the *Batson* procedure, a prima facie case that the peremptory challenge had a discriminatory purpose, is an unnecessary obstacle to a claim that a strike has a discriminatory purpose.<sup>419</sup> Thus, once a party makes the claim, the opponent should be required to offer an explanation (step two) and the court should then evaluate whether the explanation is sufficient to rebut the charge that the strike had a discriminatory purpose (step three).<sup>420</sup> California took this position in its new legislation governing peremptory challenges, which went into effect in 2022 for criminal cases and will go into effect in 2026 for civil cases.<sup>421</sup> The amended statute applies to a broad range of groups that might experience discrimination in jury selection.<sup>422</sup> It prohibits a party from using a peremptory challenge to remove a prospective juror

412. *Commonwealth v. Robertson*, 105 N.E.3d 253, 263 (Mass. 2018) (citation omitted).

413. *City of Seattle v. Erickson*, 398 P.3d 1124, 1126 (Wash. 2017).

414. *Id.* at 1126.

415. *See, e.g.*, 429 P.3d 467 (Wash. 2018).

416. *Id.* at 476.

417. *Id.* at 470.

418. *Id.* at 481.

419. *See infra* text accompanying notes 421–31.

420. *Batson v. Kentucky*, 476 U.S. 79, 94–97 (1986).

421. *See* A.B. 3070, 2019 Assemb., 2019–2020 Reg. Sess. (Cal. 2019) (approved by Governor Sept. 30, 2020) (adding Section 231.7 to the Code of Civil Procedure).

422. CAL. CIV. PROC. § 231.7(a) (West 2021).

on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.<sup>423</sup> Either party or the trial court may raise an objection to the use of a peremptory challenge based on these criteria.<sup>424</sup> Although "no reason need be given for a peremptory challenge,"<sup>425</sup> a claim that the strike violated this provision is sufficient to move to *Batson*'s second step. Upon "objection to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised."<sup>426</sup>

Other states too have eliminated or recommended eliminating *Batson*'s first step. In fact, Connecticut adopted this approach in 1989.<sup>427</sup> After following the three-pronged *Batson* approach and finding that the trial court correctly found that the defendant had not passed the first step, so that the state appropriately was not required to provide a neutral explanation for the challenge, the Connecticut Supreme Court eliminated the first prong.<sup>428</sup> Thus, once such a challenge has been made,

in all future cases in which the defendant asserts a *Batson* claim, we deem it appropriate for the state to provide the court with a prima facie case response consistent with the explanatory mandate of *Batson*. Such a response will not only provide an adequate record for appellate review but will also aid in expediting any appeal.<sup>429</sup>

It is significant that the Connecticut Jury Selection Task Force that issued its report in 2020 determined that further action was required to fulfill the promise of *Batson*.<sup>430</sup>

It is unclear how large a role the first step of the *Batson* procedure plays in defeating a claim that the opponent has exercised a discriminatory strike. Nonetheless, the elimination of the first step requires a party to offer an explanation for what might otherwise be, or be perceived as, a discriminatory strike.<sup>431</sup> An appellate court is therefore in a better position to evaluate the reason for the strike.

c) A showing of purposeful discrimination should not be required for a successful *Batson* challenge.

Our understanding of discrimination has grown exponentially in recent years. At the time of *Batson*, a rough understanding of discrimination viewed conscious intent and even animus as the motivators that lead to discriminatory

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423. *Id.*

424. *Id.* at § 231.7(b).

425. CAL. C. CIV. PROC. § 226(b) (2019).

426. CAL. C. CIV. PROC. § 231.7(c) (West 2021).

427. *State v. Holloway*, 553 A.2d 166, 171–72 (Conn. 1989).

428. *Id.*

429. *Id.*

430. See CONNECTICUT JURY SELECTION TASK FORCE, *supra* note 157, at 16–20. The Superior Court accepted the recommendation to eliminate *Batson*'s first step. CONNECTICUT RULES FOR THE SUPERIOR COURT, Sec. 5-12 (a)-(c) <https://www.jud.ct.gov/publications/PracticeBook/PB.pdf> (2023).

431. See *id.* at 18–19.

behavior.<sup>432</sup> If we are concerned about bias in the exercise of peremptory challenges, it makes sense to recognize that unconscious bias too can infuse choices about whether to exercise a peremptory challenge and not to limit our attention to conscious discriminatory behavior.

California is one of several courts that have recognized a need to expand the criteria for evaluating whether a challenge is discriminatory from purposeful discrimination to whether “there is a substantial likelihood that an objectively reasonable person would view [membership in a protected class] as a factor in the use of the peremptory challenge.”<sup>433</sup> Washington State has similarly set aside the requirement that discrimination be purposeful.<sup>434</sup> General Rule 37 specifies: “If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge.”<sup>435</sup> Rule 37 further specifies that “an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”<sup>436</sup> Thus, the standard charges the court with considering the impact of unconscious bias on an attorney’s decision to exercise a peremptory challenge.

Connecticut’s rule for jury selection to a large extent mirrors Washington’s General Rule 37, using the objective observer as the reference point:

(d) Determination. The court shall then evaluate from the perspective of an objective observer, as defined in section (e) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror’s race or ethnicity was a factor in the challenge, then the challenge shall be disallowed and the prospective juror shall be seated . . . . The court need not find purposeful discrimination to disallow the peremptory challenge. . . .<sup>437</sup>

Section (e) of the Connecticut rule further defines an objective observer as one who “is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity. . . .”<sup>438</sup>

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432. See *id.* at 19 (“Discriminatory strikes, even those based on facially neutral reasons, can reflect unconscious racism of both lawyers and judges and have been difficult to address under *Batson*’s purposeful discrimination framework. *Batson* has been criticized as failing to prevent racial discrimination in jury selection because courts are unlikely to encounter direct evidence of purposeful discrimination.”); see also *Holloway*, 553 A.2d at 169, 171–72.

433. Assemb. B. 3070 § 2, 2020 Gen. Assemb. (Cal. 2020).

434. Wash. R. Gen. Application 37.

435. *Id.* at 379(e).

436. *Id.* at 379(f).

437. CONNECTICUT RULES FOR THE SUPERIOR COURT, *supra* note 430, at Sec. 5-12(d).

438. *Id.* at 17.

Under the original *Batson* standard, or at least as interpreted in *Purkett v. Elem*, a successful *Batson* challenge requires the court to find that the “neutral reasons” given by the attorney were pretextual, rather than merely implausible.<sup>439</sup> The changes in California’s new statute, Washington State’s new rule, and Connecticut’s new rule offer a potential remedy for this cramped interpretation of bias: to recognize implicit bias as a basis for rejecting a peremptory challenge.<sup>440</sup> Reflecting this broader conception of discrimination, the court does not need to determine whether the peremptory challenge was motivated by bias that the attorney was intentionally hiding in offering a pretextual neutral explanation for excusing the juror.<sup>441</sup> Instead, the court is charged with asking a broader, more neutral, question: whether an objective observer could view the explanation for the challenge as plausibly nondiscriminatory or, alternatively, the result of implicit or explicit bias.<sup>442</sup> Although this change promises to recognize a broader scope of potential bias, and provides a more neutral way to characterize that bias, it is too soon to know whether it will produce measurably different outcomes for *Batson* claims. Nonetheless, in *State v. Tesfasilasye*, the first Washington Supreme Court case to apply GR 37, the court overturned the conviction, making it clear that it was applying the perspective of an objective observer who “could” view the challenge of the two jurors removed on peremptory challenges as based on race or ethnicity—and that the use of “could” was a more stringent standard than “would,” which was a lower standard that would have been equivalent to the standard of *Batson*.<sup>443</sup>

d) Juror characteristics historically associated with discrimination are presumptively invalid reasons for a peremptory challenge.

The Supreme Court in Washington State identified seven juror characteristics that it determined were associated with improper discrimination in jury selection in the state.<sup>444</sup> To avoid their inappropriate use in jury selection, General Rule 37 listed them as:

(i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.<sup>445</sup>

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439. 514 U.S. 765, 767 (1995).

440. See, e.g., CONNECTICUT RULES FOR THE SUPERIOR COURT, *supra* note 430, at Sec. 5-12(e); see also *supra* notes 431–38 and accompanying text.

441. Wash. R. Gen. Application 37(e) (“If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied.”). See also CONNECTICUT JURY SELECTION TASK FORCE, *supra* note 157, at 16; see also *supra* notes 430–38 and accompanying text.

442. See, e.g., CONNECTICUT RULES FOR THE SUPERIOR COURT, *supra* note 430, at Sec. 5-12(e); see also *supra* notes 431–38 and accompanying text.

443. *State v. Tesfasilasye*, 518 P. 3d 193, 199 (Wash. Sup. Ct. 2022).

444. Wash. R. Gen. Application 37(h).

445. *Id.*

To the extent that some of these characteristics are correlated with race and ethnicity, the effect of enforcing these presumptions should make it easier to mount a successful *Batson* challenge to a peremptory strike exercised against a Black or Latinx or foreign-born prospective juror.

California's new statute adopted the approach of identifying presumptively invalid reasons for peremptory challenges used by Washington State.<sup>446</sup> California began with the same seven factors included in Washington State's General Rule 37, but listed six additional characteristics.<sup>447</sup> And while Washington State's General Rule 37 does not specify what it takes to overcome the presumed invalidity of one of the listed characteristics when it is offered as a reason for a peremptory challenge, the California law sets a high standard:

To determine that a presumption of invalidity has been overcome, the fact-finder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.<sup>448</sup>

Finally, Connecticut adopted a similar approach, adding an eighth presumptively invalid reason to the seven Washington State factors: having been a victim of a crime.<sup>449</sup> The presumed invalidity of one of the listed reasons can be overcome

if the party exercising the challenge demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.<sup>450</sup>

The difficulty in implementing these presumptions of invalidity is that some of these characteristics may be quite relevant in a particular case and thus may constitute legitimate bases for concern that a juror may not be unbiased in that case. For example, suppose the case involves a civil suit against a police officer for malicious prosecution involving a wrongly obtained search warrant. Would a prospective juror's prior contacts with, and attitudes toward, law enforcement be legitimate bases for exercising a peremptory challenge? It may be that the presumption that these are invalid reasons for a peremptory challenge would be overcome in this case, but courts are likely to face challenges in distinguishing between relevant and irrelevant characteristics in some cases.

Washington State General Rule 37 includes a separate set of presumptively invalid reasons for peremptory challenges that arise from the conduct of the prospective juror in the courtroom.<sup>451</sup> Attorneys may explain a challenge by alleging

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446. CAL. CIV. PROC. CODE § 213.7(e) (West 2021).

447. *Id.*

448. CAL. CIV. PROC. CODE § 231.7(f) (West 2021).

449. CONNECTICUT RULES FOR THE SUPERIOR COURT, *supra* note 430, at Sec. 5-12(g).

450. *Id.*

451. Wash. R. Gen. Application 37(i).

that “the prospective juror was sleeping, inattentive, staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers.”<sup>452</sup> This list in Washington State’s General Rule 37 was included in the California statute.<sup>453</sup> Connecticut declined to include “provided unintelligent or confused answers” on its list of presumptively invalid behavioral reasons.<sup>454</sup> That omission would avoid requiring the more subjective judgments entailed in assessing the nature of those responses. To overcome the invalidity of any of these conduct reasons, notice to the court and the other parties is required so that the behavior may be verified.<sup>455</sup> California further requires that counsel offering the reason explain why the conduct of the prospective juror matters.<sup>456</sup> That addition may act as a useful check on permitting discriminatory peremptory challenges based on innocuous conduct.

The requirement that the judge be put on notice of any objectionable juror conduct, when linked with the requirement that the judge specify the reasons for any *Batson* ruling, provides an important foundation for appellate review. Similarly, the movement from review under a clearly erroneous standard to review of the denial of an objection de novo strengthens the monitoring of attorney behavior in exercising peremptory challenges.<sup>457</sup>

To sum up, in principle the change in the standard, which removes the need to label the strike as the result of purposeful discrimination, makes it easier to identify it as discriminatory, either conscious or unconscious. Whether it does in fact enlarge the range of peremptory challenges that are deemed discriminatory will depend on the trial court judges and the appellate court judges who review their decisions. The key will be how judges implement the new standards. It will be important for the jurisdictions making these changes to assess their effects. The evaluations need to track three possible effects: a drop in discriminatory peremptory challenges if the new statutes and rules affect the behavior of the attorneys who exercise peremptory challenges, a change in judicial rulings on challenges to proposed strikes, and a change in the composition of the jury if the new standards reduce discriminatory removals that undermine the extent to which the resulting juries are representative of the community.

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452. *Id.*

453. CAL. CIV. PROC. CODE § 231.7(g)(1) (West 2021).

454. Compare CONNECTICUT RULES FOR THE SUPERIOR COURT, *supra* note 430, at Sec. 5-12(h) (omitting the “unintelligent or confused answers” reason as a presumptively invalid reason), with CAL. CIV. PROC. CODE § 231.7(g)(1) (West 2021) (containing the “unintelligent or confused answers” explanation as presumptively invalid).

455. CONNECTICUT RULES FOR THE SUPERIOR COURT, *supra* note 430, at Sec. 5-12(h); see also CONNECTICUT JURY SELECTION TASK FORCE, *supra* note 157, at 17–18.

456. CAL. CIV. PROC. CODE § 231.7(g)(2) (West 2021).

457. See, e.g., CAL. CIV. PROC. CODE § 231.7(j) (West 2021) (“The denial of an objection [to a peremptory challenge] made under this section shall be reviewed by an appellate court de novo, with the trial court’s express factual findings reviewed for substantial evidence.”).

## 2. *Reducing the Number of (or Eliminating) Peremptory Challenges*

Some observers, beginning with Justice Marshall in *Batson*,<sup>458</sup> have proposed an easy way to avoid bias in exercising peremptory challenges: simply eliminate them. No peremptory challenges would mean no race-based exclusions.<sup>459</sup> Arizona recently took the bold step of eliminating peremptory challenges entirely.<sup>460</sup> Anticipating the absence of peremptory challenges, Arizona's Statewide Jury Selection Workgroup recommended a set of best practices for voir dire, including the use of case-specific juror questionnaires; extended voir dire with an emphasis on open-ended questions; and avoidance of judicial efforts to "rehabilitate prospective jurors through leading, conclusory questioning."<sup>461</sup> We note with interest that several of the Workgroup's suggested best practices parallel our recommendations for expansive voir dire and greater use of juror questionnaires.<sup>462</sup> Two in-depth empirical studies of the change are underway.<sup>463</sup>

But would eliminating peremptory challenges entirely be the classic version of "throwing the baby out with the bathwater?" If peremptory challenges do operate to remove potential jurors who claim they can be fair (and thus discourage judicial removal for cause), even though they have backgrounds, experiences, or attitudes that undermine the credibility of those assurances, the peremptory challenge can act as a safety valve in jury selection. As we have learned, jurors, like all of us, can be unaware of biases that may influence their judgments. Moreover, the fairness of the jury trial in the eyes of the parties may depend in part on their ability to exercise some control over the makeup of the jury.<sup>464</sup>

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458. *Batson v. Kentucky*, 476 U.S. 79, 102–03 (Marshall, J., concurring).

459. See *Miller-El v. Dretke*, 545 U.S. 231, 272–73 (Breyer, J. concurring); see generally Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1107 (2011); Mark W. Bennett, *supra* note 386, at 166; Morris B. Hoffman, *Abolish Peremptory Challenges*, 82 JUDICATURE 202, 203 (1999); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1044, 1047 (1995); Melilli, *supra* note 398, at 503.

460. Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, Ariz. Supr. Ct. Or. No. R-21-0020 (Aug. 30, 2021) (removing peremptory challenges from Rules of Civil and Criminal Procedure); Press Release, Arizona Sup. Ct., Arizona Sup. Ct. Eliminates Peremptory Strikes of Jurors (Aug. 30, 2021) (removing peremptory challenges from the Justice Court Rules of Civil Procedure and the Rules of Procedure for Eviction Actions). *But see* H.B. 2413, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (reinstating peremptory challenges in criminal jury trials in Arizona state courts), currently under consideration; Valena Beety, Henry F. Fradella, Jessica M. Salerno, Cassia C. Spohn & Shi Yan, *Arizona Will [sic] Would End an Effort to Stop Racial Bias in Jury Selection Before It Begins*, AZCENTRAL.COM (Feb. 22, 2022 9:00 AM), <https://www.azcentral.com/story/opinion/op-ed/2022/02/22/arizona-bill-allowing-peremptory-challenges-would-stop-reform/6871234001/> [<https://perma.cc/VSG3-SB9V>].

461. STATEWIDE JURY SELECTION WORKGROUP: A WORKGROUP ON THE TASK FORCE ON JURY DATA COLLECTION, PRACTICES, AND PROCEDURES, REPORT AND RECOMMENDATIONS 3 (2021).

462. Compare *id.*, with discussion *supra* Section IV.D.

463. NSF Award Search: Award #2202144–RAPID: The Impact of Bans on Peremptory Challenges on Voir Dire, Jury Composition, and Case Outcomes, NAT' SCI. FOUND., [https://nsf.gov/awardsearch/showAward?AWD\\_ID=2202144&HistoricalAwards=false](https://nsf.gov/awardsearch/showAward?AWD_ID=2202144&HistoricalAwards=false) (last visited Feb. 9, 2023) [<https://perma.cc/ZL9L-8XHF>]; NAT'L CTR. FOR STATE CTS., AN EVALUATION OF THE ELIMINATION OF PEREMPTORY CHALLENGES IN ARIZONA 2 (2022).

464. See generally Barbara Allen Babcock, *Voir Dire: Preserving Its Wonderful Power*, 27 STAN. L. REV. 545, 552 (1975).



An alternative to outright elimination, which would also reduce the potential effect of racial and ethnic bias in jury selection, would be to *reduce* the number of peremptory challenges. States have periodically considered reducing the number of peremptory challenges they allow, but those proposals have been successful in only a few states.<sup>465</sup> Currently, although the modal number of challenges permitted per side is six in noncapital felony cases in the forty-six states with twelve-person juries, fourteen states allow each side to exercise more than six peremptory challenges, with ten of those states permitting at least ten challenges per side.<sup>466</sup> On the civil side, the modal number per side is three, but fifteen states allow more than three challenges per side with twelve-person juries, with eight of them allowing at least six challenges per side.<sup>467</sup> A presumptive ceiling of six per side in non-capital criminal cases involving a single defendant and a presumptive ceiling of three per side in civil cases would be a modest reform in outlier jurisdictions, one that would be consistent with modal practice.<sup>468</sup> This approach would treat the peremptory challenge as a safety valve to control nondiscriminatory bias rather than an invitation to attorneys to try to mold the composition of the jury along a pathway that facilitates discrimination. Note that a reduction in the number of peremptory challenges in the Arbery jury trial might have prevented the removal of eight of the nine Black jurors.<sup>469</sup>

It may be that the recent attention to implicit bias will cause a renewed interest in re-examining whether reductions in the number of peremptory challenges should be pursued. It is interesting that the COVID-19 pandemic led at least two states to temporarily reduce the number of peremptory challenges provided to each side in both criminal and civil cases (from four to two in civil cases).<sup>470</sup> Follow-up research on the effects might provide guidance on whether further reductions beyond those we have suggested are warranted.

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465. KATHLEEN SHAMBAUGH, REDUCING PEREMPTORY CHALLENGES IN CALIFORNIA 17–19, 28–36 (2014) <https://nscs.contentdm.oclc.org/digital/collection/juries/id/274> [<https://perma.cc/PJQ4-GCGA>] (reviewing failed efforts in New Jersey, Tennessee, and California).

466. *Comparative Data*, *supra* note 175 (click on “Peremptory Challenges” heading in interactive “Comparative Data” tool).

467. *Id.*

468. *Id.*

469. See discussion *supra* Subsection IV.E.1.

470. *In re Jury Trials*, <https://isc.idaho.gov/EO/FINAL-Order-In-Re-Jury-Trials-with-attachments.pdf> [<https://perma.cc/4NHZ-2MAA>]; ARIZ. SUP. CT.: ADMIN. OFF. OF THE U.S. CTS., JURY MANAGEMENT SUBGROUP BEST PRACTICE RECOMMENDATIONS DURING THE COVID-19 PUBLIC HEALTH EMERGENCY 5 (2020) (reducing peremptory challenges) (“Until December 31, 2020, to reduce the number of citizens summoned to jury duty, procedural rules (including Rule 18.4(c), Rules of Criminal Procedure; Rule 47(e), Rules of Civil Procedure; Rule 134(a)(1), Justice Court Rules of Civil Procedure; and Rule 9(c), Rules of Procedure for Eviction Cases) are modified to afford litigants only two peremptory strikes for potential jurors per side in all civil and felony cases tried in the superior court, and only one peremptory strike per side in all misdemeanor cases and all civil cases tried in limited jurisdiction courts. This modification does not apply to capital murder cases.”).

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## V. PHASE 3: MAXIMIZING FAIRNESS DURING THE JURY TRIAL

To achieve a fair jury trial, the legal system depends on the judge to ensure that trial procedures focus the jury on the information presented at trial, that the probative value of the evidence outweighs its prejudicial potential, that the jury has the tools it needs to understand, recall, and evaluate the evidence, and that the jury is clearly and accurately instructed on the applicable law governing the particular case.

In recognition that implicit and explicit bias can negatively impact decision-making, a number of courts across the country have attempted to ameliorate potential bias on the jury by educating jurors on the effects of bias on judgments. The efforts have included preparing a specially created video presented to jurors at the beginning of jury service,<sup>471</sup> as well as writing detailed preliminary instructions and final instructions that remind the jurors that bias can infect all of us, consciously or unconsciously.<sup>472</sup> Jury instructions can provide jurors with guidance on the relevant law they should apply, but devising instructions that can control unconscious bias presents a particularly hefty challenge.

### A. *Allowing Only Relevant Evidence That Is Not Unfairly Prejudicial*

The evidence presented in a jury trial goes through a filter that determines the admissibility of any evidence a party wishes to present. The trial court judge, applying rules of evidence, decides whether the evidence will be admitted. Fairness is a primary consideration. Federal Rule of Evidence 102 sets out the purpose of the federal rules: “These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”<sup>473</sup> Although relevant evidence is generally admissible and irrelevant evidence is generally inadmissible,<sup>474</sup> the Rules direct the court to exclude relevant evidence “if its probative value is substantially outweighed by a

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471. A committee of judges and attorneys in the U.S. District Court for the Western District of Washington created a video and jury instructions that were designed to be “presented to jurors in every case with the intent of highlighting and combating the problems presented by unconscious bias.” See W. Wash. D.C., *Unconscious Bias Juror Video*, U.S. DIST. CT. W. DIST. OF WASH. (May 12, 2021), <https://www.wawd.uscourts.gov/jury/unconscious-bias> [https://perma.cc/LKE9-X3KN]. The New York State Unified Court System has also developed a video presentation for jurors on the topic of implicit bias. See generally N.Y. State Ct. Sys., *Jury Service and Fairness: Understanding the Challenge of Implicit Bias*, N.Y. STATE UNIFIED CT. SYS., <https://wowza.nycourts.gov/vod/vod.php?source=ucs&video=2021-JuryServiceFairness.mp4> (last visited Feb. 9, 2023) [https://perma.cc/94VE-ZPG9].

472. Jerry Kang, Hon. Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1182–83 (2012); see generally, e.g., *Criminal Jury Instructions—Unconscious Bias*, U.S. DIST. CT. W. DIST. OF WASH., <https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf> (last visited Feb. 9, 2023) [https://perma.cc/89SE-BLGB].

473. FED. R. EVID. 102.

474. FED. R. EVID. 402.

danger of . . . unfair prejudice [or] confusing the issues . . .”<sup>475</sup> Evidence scholars have identified a number of instances in which courts regularly admit evidence that does in fact pose a threat to the fairness of the trial by exposing the jury to prejudicial information that substantially outweighs its probative value.<sup>476</sup> This misapplication of the rules can threaten the fairness of the trial. We give two examples to illustrate the problem.

The first is the ruling that if the criminal defendant takes the witness stand, his felony criminal record will be admissible.<sup>477</sup> The logic is that in testifying, the defendant is thought to have put his character at issue.<sup>478</sup> Thus, if the prior offense involved “a dishonest act or false statement,” that information is deemed relevant for the jury to use in judging the defendant’s credibility.<sup>479</sup> But the rules of evidence recognize that jurors may use a prior criminal record not merely to assist in assessing the defendant’s credibility, but also as propensity evidence.<sup>480</sup> Thus, a prior criminal record that does not involve a dishonest act or false statement may not be used in cross-examining the defendant “if the probative value of the evidence outweighs its prejudicial effect to that defendant.”<sup>481</sup> In practice, the prior record will be admitted if the defendant testifies. If the prior criminal record is admitted, the jury will receive a limiting instruction, admonishing the jurors that they should consider the prior convictions only in assessing the defendant’s credibility as a witness, not for purposes of deciding whether the defendant is likely to have committed the crimes alleged.<sup>482</sup> This direction to engage in mental gymnastics is not a dependable solution.<sup>483</sup> Not surprisingly, it deters defendants from testifying, depriving them of the opportunity to have their own voices heard in their trials and depriving their juries of potentially useful evidence.<sup>484</sup> If we are serious about preventing misuse of the criminal record as propensity evidence, the real solution is to give greater recognition to its prejudicial danger and generally prohibit mention of the prior record.

The second example from evidentiary rulings is the failure to address the bias that can arise from expert testimony that is not adequately grounded, or is presented in a misleading way that overstates or otherwise distorts the meaning

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475. FED. R. EVID. 403.

476. See *infra* notes 477–89 and accompanying text.

477. FED. R. EVID. 609.

478. See FED. R. EVID. 609 (Advisory Committee’s Note to 1972 proposed rules).

479. FED. R. EVID. 609.

480. *Id.*

481. *Id.*

482. FED. R. EVID. 105.

483. For a review of the literature, see Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH. PUB. POL’Y & L. 677, 678 (2000); see also Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1359 (2009) (collecting research showing that jurors learning of prior convictions use that information for more than credibility assessments).

484. Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 707 (2014) (arguing that the loss of the defendant’s testimony contributes to inaccuracy because of “its tendency to prevent the factfinder from hearing from the defendant, despite the fact that the defendant is probably the single most important source of information about events relating to the offense”).

of what is scientifically justified. Recent studies have revealed the weaknesses of particular types of forensic evidence that have regularly been admitted to provide identification evidence, linking the defendant to the victim or crime scene.<sup>485</sup> These include bite-mark evidence, hair analysis, arson, and ballistics evidence.<sup>486</sup> The judge as gatekeeper generally must decide when to admit such evidence, and when it is admitted, what the expert can say about it.<sup>487</sup> Yet exclusion of such forensic evidence is rare. Jennifer Mnookin reports that “some evidentiary challenges have resulted in modest judicially imposed restrictions or limitations on a forensic examiner’s testimony, typically restricting the language the examiner is permitted to use in describing the strength and meaning of a conclusion.”<sup>488</sup> Research by Joseph Kadane and Jonathan Koehler indicates that such modest restrictions, if they only prevent forensic experts from making the most extreme and exaggerated conclusory claims about the meaning of their results, may be insufficient to properly inform jurors.<sup>489</sup> The need for judges to more closely supervise and restrict the nature of such testimony is clear.

### B. *Facilitating Competent Jury Fact-Finding*

Once we acknowledge that jurors are not passive recipients of the evidence presented in a trial, but rather participants who are actively engaged in problem-solving, we can see that we have available tools that can assist juries in fulfilling their role as effective decision-makers. Although juries as a whole perform well as factfinders,<sup>490</sup> fairness calls for us to put these tools at the jury’s disposal. A variety of those tools have been used in some courts, but an expansion of their use would facilitate competent jury fact-finding, contributing to the fairness of jury trials.

One example of a modest success in this approach has been the move toward permitting juror notetaking. At one time, some worried that the process of writing would necessarily divert the jurors’ attention from other evidence.<sup>491</sup> Concerns were also raised that the notes might be imperfect, and that relying on memory was a better approach.<sup>492</sup> Research found no evidence of negative effects and has indicated that notetaking can aid juror recall.<sup>493</sup> In 2006, notetaking

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485. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 107–08 (2009), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/strengthening-forensic-science-united-states-path-forward> [https://perma.cc/4X4R-9YVU].

486. *Id.*

487. Jennifer L. Mnookin, *The Uncertain Future of Forensic Science*, 147 DAEDALUS 99, 104 (2018).

488. *Id.*

489. Joseph B. Kadane & Jonathan J. Koehler, *Certainty and Uncertainty in Reporting Fingerprint Evidence*, 147 DAEDALUS 119, 119 (2018).

490. See, e.g., Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 206 (1989).

491. Donald S. Buzzard, *Jury Note-Taking in Criminal Trials*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 490, 490 (1951).

492. *Id.*

493. See David L. Rosenhan, Sara L. Eisner & Robert J. Robinson, *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53, 53 (1994); Larry Heuer & Steven Penrod, *Increasing Jurors’ Participation in Trials*,

was permitted in an estimated 69% of state trials and 71% of federal trials.<sup>494</sup> The situation is different today. The last state that had forbidden jurors to take notes—Pennsylvania—changed its law in December of 2021 to permit it in specific portions of the trial.<sup>495</sup>

The practice of allowing juror questions for witnesses during trial was familiar at common law but fell into disuse over time. The 2005 A.B.A. *Principles for Juries and Jury Trials* endorsed it,<sup>496</sup> and in 2006, juror questions during trial were permitted in an estimated 15% of state trials and 11% of federal trials.<sup>497</sup> A few states began to require judges to tell jurors that they were allowed to submit questions during trial.<sup>498</sup> Most jurisdictions, however, still leave the choice to the judge's discretion and several explicitly forbid juror questions during trial.<sup>499</sup> When jurors are permitted to submit questions for witnesses, the judge first reviews the question, consulting with the attorneys to determine whether there is a reason why the question cannot be asked.<sup>500</sup>

Supporters of allowing juror questions argue that juror questions promote juror understanding of the evidence. As the First Circuit noted in *United States v. Sutton*, “[j]uror-inspired questions may serve to advance the truth by alleviating uncertainties in the jurors’ minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration.”<sup>501</sup> Empirical studies have confirmed the wisdom of this view and provided evidence that the fears of critics who worry that the ability to submit questions will turn jurors into advocates were unfounded.<sup>502</sup> Shari Seidman Diamond and her colleagues analyzed the 829 questions that jurors submitted in fifty civil cases and found that the juror questions focused primarily on relevant issues, with the jurors seeking clarification about the witness’s testimony, particularly when the witness was an expert.<sup>503</sup> Their questions did not consume excessive time, adding a total of 33.6 minutes of time per trial, amounting to 1.5 minutes per hour of trial.<sup>504</sup>

12 LAW & HUM. BEHAV. 231, 231 (1988). See B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, CT. REV. 12, 13–14 (2004), for an overview of the research.

494. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 32 tbl.24.

495. 234 PA. CODE § 644 (permitting notetaking during opening statements, the presentation of evidence, and closing arguments, but not during the judge’s charge to the jury).

496. A.B.A. PRINCIPLES, *supra* note 9, at 95.

497. STATE-OF-THE-STATES SURVEY, *supra* note 145, at 32 tbl.24.

498. Hon. David R. Herndon & Hon. N. Randy Smith, *Jurors Asking Questions*, 100 JUDICATURE 68, 71 (2016).

499. *Id.* (describing use of juror questions at the time; seven states require permitting juror questions in civil cases and three require it in criminal cases; numerous states permit use in both civil and criminal cases; five states prohibit in both civil and criminal trials; and four prohibit in criminal trials only).

500. *Id.*

501. *United States v. Sutton*, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992).

502. See, e.g., MARY DODGE, SHOULD JURORS ASK QUESTIONS IN CRIMINAL CASES? A REPORT SUBMITTED TO THE COLORADO SUPREME COURT’S JURY SYSTEM COMMITTEE 2–3 (2002); Nicole L. Mott, *The Current Debate on Juror Questions: “To Ask or Not to Ask, That is the Question,”* 78 CHI.-KENT L. REV. 1099, 1103 (2003); Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window Into Juror Thinking*, 59 VAND. L. REV. 1927, 1971 (2006).

503. Diamond, Rose, Murphy & Smith, *Juror Questions During Trial*, *supra* note 502, at 1962–63.

504. *Id.* at 1941 (consistent with estimate from participants in the New Jersey pilot study, Barbara Byrd Wecker et al., A Report by the Jury Sub-Committee of the Supreme Court’s Civil Practice Committee 6 (2001)).

Long and complex trials present extra challenges for the trier of fact, whether jury or judge. In addition to permitting notetaking and juror questions, a few courts have taken an innovative approach: allowing the attorneys in lengthy trials to give interim statements.<sup>505</sup> These statements are designed to provide jurors with a clearer roadmap than is likely to develop from a succession of witnesses whose order of presentation may not follow the chronological sequence of the events that led to the trial.<sup>506</sup> These interim statements can help jurors draw connections between seemingly unrelated pieces of evidence. Interim statements by counsel were used in seventeen trials during the Seventh Circuit's American Jury Project.<sup>507</sup> At the end of each week of trial or beginning of the following, each side was given ten minutes to summarize the evidence introduced in the previous week and/or preview the evidence anticipated in the coming week.<sup>508</sup> A majority of the judges, attorneys, and jurors who participated in these cases reported that the interim statements were helpful.<sup>509</sup> Moreover, none of the judges felt that there had been any abuse in the attorney use of the interim statements.<sup>510</sup> It is not clear how often interim statements are used, but they are a tool that appears to have some promise for enhancing comprehension and recall.

In sum, we have identified a number of educational tools that can enhance jury performance. We should make sure that we use them.

### C. *Providing Clear Legal Guidance*

What could courts do to ensure that jurors are adequately instructed on the law? A study of deliberations revealed several deficiencies in the way that instructions are written: omissions on topics that jurors are likely to consider (*e.g.*, attorneys' fees and insurance) and structural deficiencies when a patchwork of instructions appears inconsistent.<sup>511</sup> But the research also shows ways in which juror comprehension can be maximized—and yet these ways are not used widely in modern American jury trials.

A first poignant example was revealed in the recent jury trial of Kyle Rittenhouse. A jury was faced with deciding whether Rittenhouse was guilty of murder and other charges or had acted in self-defense when he killed two men and shot a third during protests following a police shooting in Kenosha, Wisconsin.<sup>512</sup> After the judge instructed the jurors on the law, the judge gave them a single copy of the complicated thirty-six-page jury instructions to take with them

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505. Seventh Circuit Bar Association American Jury Project Commission, *Seventh Circuit American Jury Project: Final Report* (Sept. 2008), <https://www.chicagoplitigation.com/files/2008/10/American-Jury-Project.pdf> [<https://perma.cc/2N92-3EY3>].

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. *Kettleful of Law*, *supra* note 129, at 1545.

512. Instructions to the Jury at 2, *Wisconsin v. Rittenhouse*, No. 2020 CF 983 (Circuit Court of Kenosha County Nov. 15, 2021), Doc. No. 341, available at <https://www.nytimes.com/interactive/2021/11/17/us/rittenhouse-trial-jury-instructions.html> [<https://perma.cc/HG3X-2XSS>].

into jury deliberations.<sup>513</sup> Providing that written copy is an improvement over the general past practice when jurors received their instructions only orally; if a question arose about them during deliberations, the jurors had to either submit written questions to the judge or rely on their collective memory.<sup>514</sup> On their first day of deliberations, the Rittenhouse jurors submitted a request to the judge for eleven additional copies of the instructions.<sup>515</sup> They determined that the jury instructions would provide important guidance during their deliberations.<sup>516</sup> The judge complied with the request, but the request should not have been necessary. In Arizona, where Diamond and her colleagues studied real deliberations, each juror receives a copy of the instructions as a matter of course.<sup>517</sup> In twenty-three of the fifty deliberations in these ordinary civil cases, at least half of the members of the jury read an instruction aloud, suggesting that if jury fairness is facilitated when jurors are adequately instructed on the law, the practice should be adopted more generally.<sup>518</sup>

If we are serious about jury comprehension of the law, the pattern jury instructions that guide judges in what instructions they should give the jury should be tested for comprehension by the laypersons who will be applying the instructions. The usual practice, instead, is the development of pattern jury instructions by a committee consisting of judges and attorneys.<sup>519</sup>

Similarly, the judge may give substantive legal instructions at the beginning of the trial that can assist jurors by giving them a preview of the legal issues they will be asked to deal with.<sup>520</sup> And, by giving final legal instructions before closing arguments, the judge provides the jury with a complete legal framework.<sup>521</sup> The attorneys can then refer to the legal instructions that the jurors have already heard from the judge, and the jurors can then place those arguments in the appropriate legal context.<sup>522</sup>

We think there is yet a more radical intervention that could promote optimal fairness in juries through education from jury instructions: facilitate a two-way conversation. Students in a classroom with engaged learners are usually encouraged to ask questions. Many judges in the modern American jury trial permit jurors to submit questions for witnesses during the trial, which the judge assesses

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513. *See generally id.*

514. Even in the recent past, some judges did not give the jury a written copy of the instructions. The NCSC State-of-the-States Survey found that in nearly one out of three jury trials that took place in the previous year in state courts, the jury did not receive a written copy of the instructions (and in one of every five federal jury trials, no copy was provided). STATE-OF-THE-STATES SURVEY, *supra* note 145, at 32 tbl.24.

515. CNN Newswire, *UPDATE: Rittenhouse Jury Asks Judge for Extra Copies of Jury Instructions*, LOCAL 3 NEWS, [https://www.local3news.com/update-rittenhouse-jury-asks-judge-for-extra-copies-of-jury-instructions/article\\_ce1ad516-e226-5749-8dcf-82f9e5a74478.html](https://www.local3news.com/update-rittenhouse-jury-asks-judge-for-extra-copies-of-jury-instructions/article_ce1ad516-e226-5749-8dcf-82f9e5a74478.html) (Dec. 1, 2021) [<https://perma.cc/87E3-R2CR>].

516. *Id.*

517. *Kettleful of Law*, *supra* note 129, at 1548.

518. The jurors in Arizona are permitted to take notes—and they did. Notetaking is another opportunity that juries should be given to maximize the likelihood of a fair jury trial. *Id.* at 1553.

519. *Id.* at 1543–44.

520. Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. APPLIED PSYCH. 220, 226 (1991).

521. *Id.* at 222.

522. *Id.*

before posing them to ensure that they are consistent with the rules of evidence.<sup>523</sup> Yet instructions from the judge are a one-sided communication. The jury can only submit a question about the law after deliberations begin and then wait for the judge to consult the attorneys on the answer.<sup>524</sup> A more effective way to resolve any confusion at the outset would be to permit questions from the jurors before deliberations begin. And of course, as the examples of miscomprehension in Section II.C *supra* indicated, judges should directly answer questions about the law that jurors submit during deliberations, rather than simply directing them back to the written instructions.

#### D. Using Juror Orientation to Address Potential Bias

In one of the most intensive individual efforts, retired Judge Mark W. Bennett of the U.S. District Court in the Northern District of Iowa would spend approximately twenty-five minutes discussing implicit bias during jury selection.<sup>525</sup> At the end of jury selection, Judge Bennett would ask each potential juror to take a pledge, which included making a pledge against deciding the case based on bias: “This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.”<sup>526</sup> He also gave a specific jury instruction on implicit biases before opening statements:

Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to

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523. Diamond, Rose, Murphy & Smith, *Juror Questions During Trial*, *supra* note 502, at 1942–44 (providing an empirical evaluation of the practice).

524. *Id.* at 1942–43.

525. Kang, Bennett, Carbado, Casey, Dasgupta, Faigman, Godsil, Greenwald, Levinson & Mnookin, *supra* note 472, at 1181–82 n.250. The authors describe the clip that Judge Bennett showed during this discussion from *What Would You Do?*, an ABC show that uses hidden cameras to capture bystanders’ reactions to a variety of staged situations. The episode

opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear.

*What Would You Do?* (ABC television broadcast May 7, 2010), <http://www.youtube.com/watch?v=ge7i60GuNRg> [https://perma.cc/6WDG-HNG6].

526. Kang, Bennett, Carbado, Casey, Dasgupta, Faigman, Godsil, Greenwald, Levinson & Mnookin, *supra* note 472, at 1182.



conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and commonsense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.<sup>527</sup>

The committee of judges and attorneys in the U.S. District Court for the Western District of Washington has taken a more systemic approach.<sup>528</sup> The group created an eleven-minute video to be shown at the beginning of each jury trial.<sup>529</sup> The video explains how implicit bias affects everyone, and offers advice on how to control it by urging the jurors to “examine our decisions and judgments as jurors” and to “question our decisions by asking whether they would be different if the witness, lawyer, or person on trial were of a different race, age, or gender.”<sup>530</sup>

Both of these approaches supply the jurors with preliminary instructions designed to educate them before the trial begins, in contrast with the instructions on the law that jurors usually receive only at the end of the trial. The logic is that pre-instruction on bias is needed before the jurors have formed opinions about the case that may be difficult to change.<sup>531</sup> It is a refreshing approach to jury instructions that is frequently advocated, but too rarely followed.<sup>532</sup> The next needed step is to evaluate the effectiveness of these efforts in reducing bias.<sup>533</sup>

### E. Giving Specific Anti-Bias Instructions to Juries

Many courts have responded to concerns about implicit bias by adding an anti-bias instruction to their jury instructions.<sup>534</sup> Adding an anti-bias instruction, if effective, could offer a relatively low-cost way to address what has been recognized as a problem that needs attention. Yet the effect of this suggested remedy is uncertain. In 2013, Jennifer Elek and Paula Hannaford-Agor wrote: “It is not

527. *Id.* at 1182–83.

528. *See* W. Wash. D.C., *supra* note 471.

529. *Id.*

530. *Id.*

531. *See* Smith, *supra* note 520, at 226.

532. A.B.A. PRINCIPLES, *supra* note 9, at 29 (“The court should give preliminary instructions directly following empanelment of the jury that explain . . . the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.”); *see also* Elizabeth Ingriselli, *Mitigating Jurors’ Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690, 1711 (2015).

533. A preliminary effort to evaluate the ability of the Washington video to reduce the impact of prejudicial pretrial publicity was unsuccessful, but it should be noted that the video does not discuss pretrial publicity as a source of implicit bias. *See generally* Angela M. Jones, Kimberly A. Wong, Courtney N. Meyers & Christin Ruva, *Trial by Tabloid: Can Implicit Bias Education Reduce Pretrial Publicity Bias?* 49 CRIM. JUST. & BEHAV. 259 (2022), <https://doi.org/10.1177/00938548211026956> [<https://perma.cc/Q4KZ-9F7F>].

534. *E.g.*, Kathy Wise, *Groundbreaking Implicit Bias Project Takes Shape in Dallas County Civil Courts*, D MAG. (Jan. 16, 2020, 10:56 AM), <https://www.dmagazine.com/frontburner/2020/01/dallas-county-implicit-bias-civil-court-pilot/> [<https://perma.cc/778E-2P4P>] (adding anti-bias instruction to jury instructions in Texas); Kris Olson, *New jury instructions take aim at implicit bias*, MASS. LAWYERS WEEKLY (Jun. 20, 2019), <https://masslawyersweekly.com/2019/06/20/new-jury-instructions-take-aim-at-implicit-bias/> [<https://perma.cc/PS8X-E84Q>] (adding anti-bias instructions to jury instructions in Massachusetts).

yet known whether a well-crafted jury instruction could help to mitigate the effect of implicit racial bias in juror decision making.”<sup>535</sup> Since that time, several researchers have conducted experiments testing the impact of anti-bias instructions,<sup>536</sup> but the uncertainty that Elek and Hannaford-Agor expressed in 2013 still fairly captures our current state of knowledge in the wake of these three experiments. Elek and Hannaford-Agor followed up by conducting an online experiment in which they attempted to test the impact of an implicit bias instruction.<sup>537</sup> The experiment did not show the expected racial bias in the control condition (*i.e.*, a lower conviction rate for the white defendant than the Black defendant when no debiasing instruction was given), making the results ambiguous, but the experiment also did not find an effect of the implicit bias instruction.<sup>538</sup> A second online experiment conducted by Elizabeth Ingriselli included only a scenario with a Black defendant (*i.e.*, no white defendant control), and found that among “aversive racists,”<sup>539</sup> an anti-bias instruction emphasizing egalitarian values<sup>540</sup> produced significantly lower likelihood-of-guilt judgments compared to the guilt judgments of those who received an anti-bias instruction emphasizing procedural justice, but not significantly lower than those in a control group who received no anti-bias instruction.<sup>541</sup> The third experiment in this trio included a more elaborate seventy-minute case presentation (with actors supplying the voices during a 366-photograph slide show) and live participants who deliberated in groups following the trial presentation, after which each privately indicated their personal verdict preference.<sup>542</sup> The analysis of the deliberations did reveal that the mock jurors had attended to the anti-bias instruction: in the implicit bias condition, they were significantly more likely to explicitly discuss bias-related issues in their deliberations.<sup>543</sup> Yet neither pre-deliberation nor post-deliberation verdicts showed effects of either defendant or informant race, or any effect of the anti-bias instruction on either individual or group verdicts, or on post-deliberation measures of individual racial bias.<sup>544</sup> These results indicate that although we have substantial evidence that bias, conscious and unconscious, exists, identifying ways to dispel that bias presents a challenge. What little evidence we have does not inspire confidence that implicit bias is easily countered. There is clearly more

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535. Elek & Hannaford-Agor, *First, Do No Harm*, *supra* note 319, at 197.

536. *See infra*, notes 537–44 and accompanying text.

537. Jennifer K. Elek & Paula Hannaford-Agor, *Implicit Bias and the American Juror*, 51 CT. REV. 116, 116 (2015).

538. *Id.* at 120.

539. Aversive racists were defined as respondents who scored above the median on a measure of implicit bias, but below on explicit racism, in contrast to those who scored above on both measures (“true racists”) and those who scored below on both (“non-racists”). Ingriselli, *supra* note 532, at 1720.

540. The instruction was: “Whatever your verdict may be, it must not rest upon baseless speculations. Nor may it be influenced in any way by bias, prejudice, or sympathy. Research has shown that some individuals have unconscious biases that affect their judgments, so please monitor any such biases you may have and do not let them affect your judgments.” *Id.* at 1718.

541. *Id.* at 1727–28.

542. Mona Lynch, Taylor Kidd & Emily Shaw, *The Subtle Effects of Implicit Bias Instructions*, 44 U. DENV. L. & POL’Y 98, 98 (2022).

543. *Id.* at 110.

544. *Id.* at 107–09.

research to be done to determine both the extent of the bias in all trial participants—jurors, attorneys, and judges—and to develop ways to reduce it.<sup>545</sup>

#### F. *Returning to Twelve-Person Juries*

A remarkably straightforward structural control that can minimize jury bias (and perceptions of bias) even when individual jurors may be biased is to ensure heterogeneity on the jury so that the jury is impartial even if individuals are not. In addition to ensuring representativeness in the jury pool and controlling bias in the removal of prospective jurors in the course of voir dire, the jury needs to include a reasonable sample of voices. When George Zimmerman was on trial for the murder of the young Black man Trayvon Martin, the composition of the jury consisting of six women drew attention.<sup>546</sup> Its racial and gender composition was less diverse than would have been likely if Florida required a twelve-member jury, as we recommend, and as most states do.<sup>547</sup>

Requiring a twelve-person jury in felony jury and civil jury trials would directly and dramatically increase diversity on the jury. Although the federal courts and nearly all states use twelve-person juries in all felony criminal cases, six states do not.<sup>548</sup> Although a majority of states use twelve-person juries in civil cases, a third have between six- and eight-member juries; federal courts have at least six jurors, but may have up to twelve.<sup>549</sup> A smaller jury is quite capable of producing a verdict, just as a jury of one would be. But a verdict is not enough. A *fair* jury verdict requires a set of jurors who bring different perspectives and experiences to their consideration of the evidence. And the diversity represented on the jury is predictably greater with a jury of twelve than with a jury of six.

Contrary to the U.S. Supreme Court's assumption in 1970,<sup>550</sup> larger and smaller juries are not functionally equivalent.<sup>551</sup> In a recent review of the evidence, Judges Patrick Higginbotham and Lee Rosenthal, along with Steven Gensler, called on their federal trial court colleagues to exercise their discretion

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545. Other informational interventions have been proposed to address implicit bias in the legal system (*e.g.*, the A.B.A.'s "Achieving an Impartial Jury" Toolbox), but their effectiveness has not been tested. *See generally* AM. BAR ASS'N, *Achieving an Impartial Jury (AIJ) Toolbox*, [https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire\\_toolchest.pdf](https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf) (last visited Feb. 9, 2023) [<https://perma.cc/62E3-72BG>].

546. *See, e.g.*, Cara Buckley, *6 Female Jurors are Selected for Zimmerman Trial*, N.Y. TIMES (June 20, 2013), <https://www.nytimes.com/2013/06/21/us/6-female-jurors-are-selected-for-zimmerman-trial.html> [<https://perma.cc/A77G-GND5>].

547. *See id.*

548. DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, U.S. DEP'T OF JUST., STATE COURT ORGANIZATION 2004, at 233–36 tbl.42, <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/sco04.pdf> [<https://perma.cc/R6RJ-GVM8>]. The states that provide juries with fewer than twelve members in at least some of their felony cases are Arizona, Connecticut, Florida, Indiana, Massachusetts, and Utah.

549. *Id.*

550. *See Williams v. Florida* 399 U.S. 78, 86 (1970); *see also Colgrove v. Battin*, 413 U.S. 149, 156–57 (1973).

551. *See* Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441, 463–69 (2008) (reviewing the empirical evidence showing greater representativeness and more thorough deliberation by larger juries).

and seat twelve-member juries in civil cases.<sup>552</sup> They pointed to the accumulated evidence that smaller juries are less predictable, more likely to be influenced by a juror with an extreme view to return an outlier award on both the low and high ends, and less likely to express the voice of the community.<sup>553</sup> They noted that the Supreme Court in *Williams* had acknowledged the value of minority representation on juries, but that the Court had wrongly concluded that reducing the size of juries would have at most a negligible impact.<sup>554</sup> Citing evidence from both basic statistical models and empirical field studies, they characterized the Court's conclusion as "glaringly wrong" and observed: "In reality, cutting the size of the jury dramatically increases the chance of excluding minorities."<sup>555</sup>

Shari Diamond, Destiny Peery, Emily Dolan, and Cook County judge Francis Dolan conducted one of the studies cited by Higginbotham, Rosenthal, and Gensler.<sup>556</sup> They recorded the race of members of the jury pool in 89 six-person civil juries and 188 twelve-person civil juries.<sup>557</sup> The impact of jury size on Black juror representation was indeed striking.<sup>558</sup> While only 2.1% of the twelve-member juries lacked a single Black member, 28.1% of the six-member juries were entirely without Black representation.<sup>559</sup> This pattern mirrored what statistical theory would have predicted: the smaller the jury, the less representative it will be, and, in particular, the less likely it will be to include a minority member. This effect cannot be attributed to patterns in the exercise of juror challenges: Black jurors represented 25% of the jury pool both before and after attorneys exercised their peremptory challenges.<sup>560</sup> The difference is attributable entirely to jury size.

The initial move to reducing jury size was justified as a cost-saving measure. Judge Higginbotham and his colleagues cite evidence showing that the time saving is minimal, but also point to another factor that has reduced the cost associated with the twelve-member civil jury.<sup>561</sup> Civil jury trial rates, both federal and state, have declined significantly so that the total budget for jury trials, whether six-member or twelve-member, has declined as well.<sup>562</sup> The authors suggest that "[w]e can afford to invest in the few civil jury trials we are fortunate enough to still have[.]"<sup>563</sup> On the criminal side, a similar argument applies due to the dominance of plea bargaining.<sup>564</sup>

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552. Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 JUDICATURE 47, 48 (2020).

553. *Id.* at 52 ("Greater unpredictability is the predictable result when courts use shrunken juries.").

554. See *Williams*, 399 U.S. at 102 & n.49; *Colgrove*, 413 U.S. at 159–60 & nn.15–16.

555. Higginbotham, Rosenthal & Gensler, *supra* note 552, at 52.

556. Diamond, Peery, Dolan & Dolan, *supra* note 316, at 425.

557. *Id.* at 435.

558. *Id.* at 442 tbl.6.

559. *Id.*

560. As in other research, the challenges by the opposing sides varied by race: plaintiffs were more likely to excuse white jurors and defendants were more likely to excuse Black jurors. *Id.* at 438 tbl.2.

561. Higginbotham, Rosenthal & Gensler, *supra* note 552, at 54.

562. *Id.*

563. *Id.*

564. As Justice Anthony Kennedy recognized in *Lafley v. Cooper*, 566 U.S. 156, 170 (2012), plea bargaining dominates the criminal justice system. ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

### G. Requiring Unanimous Verdicts

Researchers studying the impact of a unanimous jury requirement have found that it strengthens deliberations, reduces the frequency of factual error, fosters greater consideration of minority viewpoints, increases juror satisfaction, and brings greater confidence in verdicts from the public.<sup>565</sup> For example, Reid Hastie, Steven Penrod, and Nancy Pennington found that when juries were required to be unanimous, they discussed more key facts and legal issues, were more likely to correct mistaken assertions, elicited greater participation from minority-view jurors, and were more likely to be “evidence-driven,” delaying their first vote longer while discussing the evidence more thoroughly.<sup>566</sup> In short, they engaged in more robust deliberation.

The response of jurors to their deliberations reveals that they recognize the value of unanimity. Shari Seidman Diamond, Mary Rose, and Beth Murphy studied actual civil jury deliberations operating under a nonunanimous decision rule.<sup>567</sup> On post-trial questionnaires, members of juries that reached a nonunanimous verdict rated their deliberations as less thorough and their fellow jurors as less open-minded than did members of juries that reached unanimous verdicts.<sup>568</sup> Moreover, it was not only the dissenters on the juries with nonunanimous verdicts who rated their deliberations less favorably. Those in the majority, who had prevailed on the verdict, also had more negative perceptions of their deliberations.<sup>569</sup>

The public too recognizes the benefits of unanimous juries. For example, in a survey by Robert MacCoun and Tom Tyler, respondents rated twelve-person unanimous juries as “most accurate (63%), most thorough (62%), most likely to represent minorities (67%), most likely to listen to holdouts (36%), most likely to minimize bias (41%), and fairest (59%),” as compared with twelve-person majority, six-person unanimous, and six-person majority juries.<sup>570</sup>

Consistent with these advantages, the 2005 A.B.A. *Principles for Juries and Jury Trials* endorse unanimity as an optimal decision rule for both criminal and civil jury trials.<sup>571</sup> Juries in criminal cases must reach a unanimous verdict in all federal and state jury trials.<sup>572</sup> In civil jury trials, although federal courts

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565. Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH., PUB. POL'Y, & L. 622, 669 (2001) (examining eleven empirical studies).

566. See REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 29–32 (1983); see also Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1, 24–25 (2001).

567. See Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 204 (2006).

568. *Id.* at 225.

569. *Id.*

570. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 337 (1988).

571. A.B.A. PRINCIPLES, *supra* note 9, at 22.

572. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020).

also require unanimous verdicts, half of the states currently permit nonunanimous verdicts with two or more holdouts.<sup>573</sup> A final move to maximizing fairness in civil jury trials would be to require them to reach unanimous decisions.

## VI. LESSONS FROM HIGH-PROFILE JURY TRIALS

High-profile jury trials have catapulted concerns about the fairness of juries into public discourse. We look here more closely at these recent high-profile jury trials that have occupied so much public attention and find in these cases some encouraging signs and some vivid examples demonstrating the importance of representative juries and fair trial procedures. We also see dramatic evidence of the value of some of the specific reforms that we have advocated.

The greater perceived legitimacy of diverse juries was illustrated well in reactions to the heterogeneous jury seated in the trial of a police officer accused of murdering George Floyd. When news media obtained the juror questionnaires after the trial, they reported, “[t]he questionnaires reveal a diverse range of opinions from the jurors, who were from throughout Hennepin County and ranged in age from their 20s to their 60s. Four of the jurors were Black, six were white and two were multiracial; seven of the 12 were women.”<sup>574</sup> The fact that the jury was a racially diverse group reassured many observers of the highly-publicized trial that multiple points of view would be exchanged and debated in the jury deliberation.<sup>575</sup> But racial heterogeneity was not the only source of diversity on the jury. The questionnaires revealed attitudinal diversity as well.<sup>576</sup>

Another case in point is the jury that convicted then-President Trump’s ally, Paul Manafort, a case that sharply divided observers along political lines.<sup>577</sup> A member of that jury drew attention when she told reporters that she was an ardent Trump supporter and that “I wanted Paul Manafort to be innocent, but he wasn’t.”<sup>578</sup> The outcome illustrates the fact that in most jury trials, the weight of the evidence is the primary determinant of the verdict.<sup>579</sup> The fact that the jury included members with a diversity of political views thus added to the perceived fairness of the jury’s verdict.

There are also encouraging signs of the dedication and conscientiousness and competence of juries both in these high-profile trials and in jury trials that

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573. ROTTMAN & STRICKLAND, *supra* note 548, at 233 tbl.42.

574. Bogel-Burroughs, *supra* note 2.

575. See Adrian Florido, *Half of the Jury in the Chauvin Trial Is Nonwhite. That’s Only Part of the Story*, NPR (Mar. 25, 2021, 9:00 AM), <https://www.npr.org/2021/03/25/980646634/half-of-the-jury-in-the-chauvin-trial-is-non-white-thats-only-part-of-the-story> [<https://perma.cc/XE3D-XSYF>].

576. See Bogel-Burroughs, *supra* note 2.

577. See Ken Dilanian, *Manafort Juror Paula Duncan: Manafort Is Guilty, but Mueller Probe Is a Witch Hunt*, NBC NEWS (Aug. 23, 2018, 12:23 PM), <https://www.nbcnews.com/news/crime-courts/manafort-juror-paula-duncan-manafort-guilty-mueller-probe-witch-hunt-n903201> [<https://perma.cc/6M2H-X9GS>].

578. *Id.*

579. A long line of empirical research on the determinants of jury verdicts confirms the fact that the weight of the evidence is the primary factor explaining jury verdicts. See, e.g., KALVEN, JR. & ZEISEL, *supra* note 6, at 158–63.

are not the subject of unusual public scrutiny.<sup>580</sup> The length of the jury deliberations, the questions jurors asked during their deliberations, and the nature of the verdicts point to juries working hard to solve the complex and controversial problems that the legal system gives them. The jury in the Manafort case deliberated for four days.<sup>581</sup> That complex trial involved eighteen counts.<sup>582</sup> But the Rittenhouse case produced three and a half days of deliberations in a trial that was arguably less complex.<sup>583</sup> The jury reached a verdict on Derek Chauvin in the Floyd case after a day and a half of deliberations.<sup>584</sup> In the federal civil suit against the organizers of the deadly Charlottesville rally, the jury deliberations took nearly three days.<sup>585</sup> Of course, there is no “right” length of time for jury deliberations, and shorter deliberations may simply reflect a lack of disagreement on the jury. While the deliberations in the state trial of the three defendants in the Arbery murder case took a day and a half of deliberations,<sup>586</sup> the follow-up federal trial on hate crimes that involved the same defendants, perhaps aided by text and phone evidence of use of racial slurs by the defendants, resulted in conviction after three hours of deliberations.<sup>587</sup> In all, the times spent by these jurors in deliberations provide no evidence that they were perfunctory or hurried in reaching their decisions.

The juror questions for the judges during deliberations reflected a similar level of juror attention, effort, and involvement. Most of these juries returned to the judge with at least one question that reflected their engagement with the task

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580. E.g., NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 226–33 (2000). See generally Shari Seidman Diamond, *Thoughts on Total Justice*, 30 QUINNIPIAC L. REV. 467, 477 (2012).

581. See Sharon LaFraniere, *Paul Manafort, Trump’s Former Campaign Chairman, Guilty of 8 Counts*, N.Y. TIMES (Aug. 21, 2018) <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html> [<https://perma.cc/MGP2-DC84>]. On August 21, their fourth day of deliberation, the jury found Manafort guilty on eight of the eighteen felony counts, including five counts of filing false tax returns, two counts of bank fraud, and one count of failing to disclose a foreign bank account. Judge Ellis declared a mistrial on the remaining ten charges.

582. See *id.*

583. *Kyle Rittenhouse Trial Live: Jurors Reach Verdict on Fourth Day of Deliberations*, NBC CHI. (Nov. 19, 2021, 5:25 AM), <https://www.nbcchicago.com/news/local/kyle-rittenhouse-trial-live-jurors-head-into-fourth-day-of-deliberations/2688935/> [<https://perma.cc/K5EH-28UM>].

584. Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd’s Murder*, NPR (Apr. 20, 2021, 5:37 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial> [<https://perma.cc/Y2S5-52TY>].

585. Alex Thorson, *What the Jury is Debating in the Charlottesville ‘Unite the Right’ Civil Trial*, ABC8 NEWS (Nov. 22, 2021, 6:10 PM), <https://www.wric.com/news/politics/local-election-hq/what-the-jury-is-debating-in-the-charlottesville-unite-the-right-civil-trial/> [<https://perma.cc/2NUX-WGC7>].

586. Devon M. Sayers, Alta Spells & Travis Caldwell, *What We Know About Jury Deliberations in the Ahmaud Arbery Killing Trial*, CNN (Nov. 24, 2021, 3:17 AM), <https://www.cnn.com/2021/11/24/us/ahmaud-arbery-murder-trial-jury-deliberations/index.html> [<https://perma.cc/5WJP-TN7Q>].

587. See David Nakamura & Margaret Coker, *Greg and Travis McMichael, William Bryan Guilty of Hate Crimes in Ahmaud Arbery Killing*, WASH. POST (Feb. 22, 2022, 6:13 PM), <https://www.washingtonpost.com/national-security/2022/02/22/arbery-verdict-hate-crimes/> [<https://perma.cc/LJ7Q-K37U>].

at hand: in the Rittenhouse case, “Are words a form of violence?”<sup>588</sup> in the Rittenhouse<sup>589</sup> and Arbery<sup>590</sup> cases, a request to view video evidence again; and in the Manafort case, a request for the definition of reasonable doubt, filing rules for foreign bank accounts, and the definition of the term “shelf companies.”<sup>591</sup> As we have suggested, the fairness of jury trials would be bolstered if judges gave more complete responses to juror questions,<sup>592</sup> but the questions themselves in these cases provide further evidence of the level of deliberative engagement on these juries. Daniel Kahneman, in his book *Thinking: Fast and Slow*, contrasts System 1 thinking, which is quick and immediate and susceptible to biasing factors, and System 2 thinking, which is slow and deliberate, providing a chance to overcome initial biased responses.<sup>593</sup> The juries in these trials appeared to take care, engaging in System 2 thinking, as they carefully went about resolving their cases. This same pattern of relevant and engaged juror questions has emerged in more systematic studies of juries in more ordinary cases when jurors are permitted to submit questions during trial.<sup>594</sup>

In assessing the quality of the decision-making by the juries in these high-profile trials, the verdict patterns in the cases in which the juries convicted are also instructive. The Floyd,<sup>595</sup> Arbery,<sup>596</sup> and Manafort<sup>597</sup> cases all involved multiple charges, and the jurors had to reach a verdict on each one, determining whether the evidence supported any or all of the charges. In two of the cases (Arbery, Manafort), the juries differentiated among those charges.<sup>598</sup> As Richard Lempert suggested in responding to the Manafort verdict: “The very fact that the jury convicted on eight charges but could not agree on ten suggests a fair and conscientious jury.”<sup>599</sup> The cases also reveal some principled distinctions between charges that resulted in guilty verdicts. The Arbery criminal case involved

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588. Thorson, *supra* note 585.

589. See Katherine Fung, *Rittenhouse Jury Has Sent Court 5 Questions During Deliberations: What Are They On?*, NEWSWEEK (Nov. 18, 2021, 1:32 PM), <https://www.newsweek.com/rittenhouse-jury-has-sent-court-5-questions-during-deliberations-what-are-they-1650856> [<https://perma.cc/9UEX-YHAD>] (noting that the jury saw the video before receiving instructions on the law).

590. Sayers, Spells & Caldwell, *supra* note 586.

591. AP, *Jury Submits Note with 4 Questions to Manafort Judge*, PBS NEWSHOUR (Aug. 16, 2018, 5:59 PM), <https://www.pbs.org/newshour/politics/jury-submits-note-with-4-questions-to-manafort-judge> [<https://perma.cc/EU2N-NWGA>]. Gates, a key witness, testified that Manafort used shelf companies, companies that had previously been set up, but were not being used, to set up bank accounts in Cyprus and avoid disclosure obligations. Katelyn Polantz, Dan Berman, Marshall Cohen, Liz Stark & Kara Scannell, *Manafort Jury Ends First Day of Deliberations Without a Verdict*, CNNPOLITICS (Aug. 16, 2018, 6:43 PM), <https://www.cnn.com/2018/08/16/politics/paul-manafort-trial-robert-mueller-donald-trump/index.html> [<https://perma.cc/3WEH-HAM4>].

592. See *supra* Part V.

593. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20–21 (2013).

594. Diamond, Rose, Murphy & Smith, *supra* note 502, at 1946–64.

595. See Wamsley, *supra* note 584.

596. Sayers, Spells & Caldwell, *supra* note 586.

597. See LaFraniere, *supra* note 581.

598. See Richard Lempert, *The Manafort Verdict Shows the Jury System at Its Finest*, BROOKINGS INST. (Aug. 24, 2018), <https://www.brookings.edu/blog/fixgov/2018/08/24/the-manafort-verdict-shows-the-jury-system-at-its-finest/> [<https://perma.cc/3C5X-8SJK>]; see also Sayers, Spells & Caldwell, *supra* note 586.

599. Lempert, *supra* note 598.



one count of malice murder, four counts of felony murder, two counts of aggravated assault, one count of false imprisonment and one count of criminal attempt to commit false imprisonment.<sup>600</sup> Travis McMichael, who shot Arbery, was found guilty on all charges.<sup>601</sup> The jury found his father, Gregory McMichael, guilty on all charges except malice murder.<sup>602</sup> The third defendant was found guilty of six of the nine counts, including three counts of felony murder.<sup>603</sup> Thus, although the jury found all three defendants guilty of murder, the jury made relevant distinctions in the verdicts that reflected the facts.

These examples offer palpable evidence of the resilience and strength of trial by jury.

## VII. CONCLUSION: FAIR JURIES TODAY AND IN THE FUTURE

Americans deserve fair juries. Although today's American jury generally fulfills that promise, we have identified hurdles that need to be overcome to obtain an optimally representative and impartial jury in every case. Empirical research has demonstrated the value of diverse juries. Yet problems in attaining jury diversity begin at the start of jury selection when courts rely on source lists that do not fully represent the community. These problems are further exacerbated by differential nonresponse to jury summonses and the disproportionate effects of disqualifications, exemptions, and excuses. Even so, under current law, litigants face substantial barriers to raising successful challenges to the representativeness of jury venues. The factors in a fair cross-section challenge are difficult to prove.<sup>604</sup> In addition, many jurisdictions take a limited approach to the questioning of prospective jurors, often relying on prospective jurors to recognize and volunteer their own biases. Yet psychological research on jury decision-making and implicit bias suggests the importance and value of expansive voir dire that allows for the examination of case-relevant attitudes and experiences.<sup>605</sup> Empirical research also points to a variety of ways that courts can address these deficiencies to achieve the important goal of representative and impartial juries.<sup>606</sup>

The trial jury is not composed of a haphazardly selected set of individuals. Rather, it emerges from the operation of a complex set of requirements and interactions between the legal system and the population of prospective jurors, inside and outside of the courthouse. Although the contemporary American jury is

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600. N'dea Yancey-Bragg & Grace Hauck, *What Were the Charges, What Could Be the Sentences in the Murder of Ahmaud Arbery?*, USA TODAY (Nov. 24, 2021, 5:49 PM), <https://www.usatoday.com/story/news/nation/2021/11/24/what-malice-murder-charges-murder-ahmaud-arbery-explained/8747459002/> [https://perma.cc/Y7TE-9KWT].

601. *Id.*

602. *Id.*

603. *Id.*

604. *See e.g.*, Rose & Abramson, *supra* note 221, at 961.

605. Lynch, Kidd & Shaw, *supra* note 542, at 119; Salerno, Campbell, Phalen, Bean, Hans, Spivack & Ross, *supra* note 77, at 17.

606. Ellis & Diamond, *supra* note 37, at 1055.

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far more heterogeneous and representative than it has ever been, systematic underrepresentation of minorities on juries persists, threatening to undermine the actual and perceived fairness of the jury trial. In light of the research demonstrating that greater diversity of background and experience brings benefits not only of greater legitimacy of the jury system<sup>607</sup> but also of more robust fact-finding and deliberation, courts are wise to take up the challenge of expanding their jury pools. Greater representativeness of the jury pool is a realistic goal in the modern era with its availability of computers that can efficiently gather, organize, combine, sort, and randomly sample large numbers of potential juror names.

But even with a representative jury pool, the impartiality of the jury can be undermined by bias in the later stage of jury selection. Modern courts increasingly recognize that unconscious bias can affect the voir dire process as well as the behavior of the jurors selected for the trial. A key strength of the jury is its ability to draw on the different experiences, perceptions, and values of the jury members, using that diversity of backgrounds and beliefs to provide countervailing perspectives. Thus, it is the jury, rather than individual jurors, that emerges as the impartial decision-maker. At the same time, fairness demands that steps be taken to cabin individual juror biases. But if all of us have biases, albeit differing biases, then members of the jury, even those chosen using optimal procedures, will still harbor conscious and unconscious biases. The jury instructions that attempt to educate jurors about these biases are a step toward addressing this concern. But awareness is only the first step; motivation and ability to control are required as well. Thus far, the evidence on the efficacy of anti-bias instructions has not yet emerged. As a result, ensuring heterogeneity in the composition of juries is currently our most dependable way to control bias.

In this Article, we have identified a number of deficiencies that can undermine fairness in jury trials. We have also identified practices that can overcome them. Thus, two major ways to increase diversity on the jury are to expand jury eligibility and to use up-to-date and comprehensive jury lists. Fairness in the courtroom during jury selection can be bolstered by limiting the number of peremptory challenges and expanding the reach of *Batson* challenges. Fairness during the trial requires the court to actively monitor and exclude prejudicial evidence and to provide the jurors with the tools, like asking questions, that all students (and judges) employ to assist comprehension and recall. The use of twelve-person juries that are required to be unanimous can increase diversity and empower thorough consideration of minority viewpoints. And to maximize jury understanding and application of the law, clear instructions are needed, as well as complete judicial responses to any juror questions.

Our analysis of the jury system as a whole has shown that the performance and the legitimacy of juries depend on persistent and robust attention to representativeness and vigorous efforts to identify and defuse sources of bias in attorneys, judges, and jurors. In the end, we appreciate the jury's fact-finding strengths, but also recognize that the toolbox of the modern court for ensuring

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607. *Id.* at 1058.

fair jury trials is not yet full. We could choose to be passive and remain with the status quo, because we can be confident that most juries will perform well in most cases. Or we can do better, as we propose here, by actively recruiting a diverse pool of jurors and equipping them with a setting and tools that are likely to assist them in producing the fairest results.

