



2021 FORUM FOR STATE APPELLATE COURT JUDGES

**JURIES, VOIR DIRE, BATSON, AND BEYOND: ACHIEVING FAIRNESS IN CIVIL JURY TRIALS**

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## **CHALLENGES TO ACHIEVING FAIRNESS IN CIVIL JURY SELECTION**

*Valerie P. Hans*<sup>1</sup>

### **Executive Summary**

*In her Introduction, Professor Hans proposes that “Achieving representative cross-sections of the community in jury venires, and ensuring that our civil juries reflect the community as well, are essential components contributing to the fairness and legitimacy of our civil justice system.” She warns, however, that “the courts encounter substantial difficulty in achieving this important goal.” An analysis of the problems the courts face in this regard is the purpose of her paper.*

*In Part II, Hans briefly notes that the representativeness of juries is not merely an aspiration but a guarantee under state and federal constitutions and statutes. She continues, in Part III, to describe the benefits of jury representativeness, which include aid to decision-making, enhanced legitimacy of judicial outcomes, educational benefits for citizen jurors, increased regard for the courts, and greater overall civic engagement after jury service (e.g. through voting). These are benefits of representative juries that strengthen democracy, and they provide additional reasons for courts to take care in their jury selection procedures.*

*In Part IV, Professor Hans reviews the jury venire—the selection processes that occur in the courthouse but outside the courtroom: summoning and qualifying prospective jurors; the use of source lists; the impact of qualifications, exemptions, and nonresponsiveness to jury service*

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*surveys and summonses; the special challenges of the COVID-19 pandemic; and legal challenges to the representativeness of jury pools.*

*Hans then turns, in Part V, to the in-courtroom jury selection procedures, discussing research on how they can address juror bias (including implicit bias). She considers voir dire procedures that can be used to uncover attitudes and views that can affect a prospective juror's fact finding, with attention to negative consequences of limiting voir dire and reasons why limited voir dire is not effective for jury selection. She gives particular attention to voir dire in the pandemic era, including use of expanded jury questionnaires to minimize in-person collection of information, social distancing during voir dire, and virtual voir dire proceedings. Although some attorneys have been concerned about lost opportunities to observe juror behavior in person during voir dire, research indicates that the actual content of responses is a better indicator of their truthfulness than is nonverbal behavior.*

*In Part VI, Professor Hans considers juror challenges, both for-cause and peremptory, and reviews the research on conscious and unconscious bias in lawyers making the latter challenges. Expanding the scope of both virtual and in-person voir dire would help to offset the effect of pandemic-related health precautions.*

## **I. Introduction**

This paper identifies multiple challenges that courts face to achieving fairness in the selection of juries in civil cases. Achieving representative cross-sections of the community in jury venires, and ensuring that our civil juries reflect the community as well, are essential components contributing to the fairness and legitimacy of our civil justice system. Although legal rules and practices attempt to maximize fair and representative juries, the courts encounter substantial difficulty in achieving this important goal. Problems arise in summoning citizens for jury service, in questioning them during voir dire, and in exercising peremptory and for-cause challenges. Systematic empirical research on representativeness and new psychological studies on implicit and unconscious bias raise questions about the efficacy of current jury selection procedures. This paper identifies these problems and the challenges they present for producing representative and fair juries. Shari Seidman Diamond's companion piece explores the desirability and feasibility of potential solutions.<sup>2</sup>

## **II. Jury Representativeness: Legal Framework**

The importance of jury representativeness has long been appreciated in the criminal jury context. It is also a crucial contribution to the fairness of civil juries. Federal and state constitutions and

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<sup>2</sup> Shari Seidman Diamond, Judicial Rulemaking for Jury Trial Fairness. Paper to be presented at the Pound Civil Justice Institute's 2021 Forum for State Appellate Court Judges (July 2021).

laws insist on the right to trial by juries drawn from fair cross-sections of the community. 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>3</sup>

The Sixth Amendment to the U.S. Constitution guarantees litigants the selection of a criminal jury drawn from a representative cross-section of the community.<sup>4</sup> Many justifications for the right to a criminal jury drawn from a representative group from the community apply to civil juries as well.<sup>5</sup> Although the Seventh Amendment, pertaining to civil juries, does not mention a cross-sectional requirement, the Equal Protection clause of the Fourteenth Amendment forbids discrimination on the basis of membership in protected classes.<sup>6</sup> The federal Jury Selection and Service Act of 1968 established statutory rights to a civil jury drawn from a representative cross-section, and many states adopted similar provisions.<sup>7</sup>

### **III. Benefits of Jury Representativeness: Research Evidence**

There are sound reasons for maximizing the chances for a representative jury by requiring that jurors be randomly selected from a community cross-section. Empirical research over the past several decades identifies a host of benefits that result from representative juries. Although the empirical work to date has largely focused on criminal juries, the results are informative for civil juries. The benefits of representativeness include strengthening fact finding, increasing legitimacy, promoting education about the law, improving views of the courts, and encouraging civic engagement.

#### **A. Decision-Making Benefits**

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>8</sup> Jurors with diverging interpretations of the evidence test one another’s construals of the evidence during deliberation.

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<sup>3</sup> New York Consolidated Laws, Judiciary Law—JUD § 500.

<sup>4</sup> U.S. Const. Amend. VI; *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

<sup>5</sup> NANCY GERTNER, JUDITH H. MIZNER & JOSHUA DUBIN, *THE LAW OF JURIES* 34-35 (11th ed. 2020).

<sup>6</sup> U.S. Const. Amend. VII; U.S. Const. Amend. XIV.

<sup>7</sup> GERTNER ET AL., *supra* note 5, at 35. The Jury Selection and Service Act of 1968 was codified as 28 U.S.C.A. §§ 1861 to 1878 (1988).

<sup>8</sup> 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 (2003) (summarizing research), <https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss3/5>.

Samuel Sommers conducted a mock jury experiment in which he asked participants to arrive at a decision in a racially-charged case.<sup>9</sup> Half of the mock juries were composed of all white jurors, whereas the other half were racially diverse juries of four whites and two blacks. Comparing the deliberations of all-white and racially-mixed juries, Sommers discovered that diverse jury deliberations were more accurate, more expansive, and longer. 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. They made fewer factual mistakes, and raised more issues and evidence, during the deliberation. In short, they appeared to be more careful in their decision making in a diverse, as opposed to an all-white, jury.

Another mock jury experiment compared all-white and diverse juries deciding a murder case, examining how they responded to differences in the race of the parties.<sup>10</sup> All-white juries mentioned more case facts when the defendant and victim were white compared to 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>11</sup> Thus, jury diversity reduced the disparity in facts discussed during the deliberation between cases with black and white parties.<sup>12</sup>

The presence of racial minorities on the jury is likely to limit the expression of prejudice during deliberation. The University of Michigan psychology and law professor Phoebe Ellsworth observed, “White 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>13</sup> Concern about being considered racially prejudiced appears to lead to greater self-monitoring.<sup>14</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, even more so in civil cases, but in most cases a hung jury is an unsatisfactory outcome. However, an in-depth study of hung juries in criminal cases in state courts analyzed the factors associated with hung juries, and found that the jury’s diversity bore *no* relationship to the likelihood of a hung jury.<sup>15</sup>

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<sup>9</sup> Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. & SOC. PSYCHOL. 597 (2006).

<sup>10</sup> 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 (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.

<sup>11</sup> *Id.* at 241.

<sup>12</sup> *Id.*

<sup>13</sup> Quoted in Steve McGonigle, Holly Becka, Jennifer LaFleur & Tim Wyatt, *A Process of Jury Elimination*, DALLAS MORNING NEWS, Aug. 21, 2005.

<sup>14</sup> M. C. Stevenson, B. L. Lytle, B. J. Baumholser & E. W. McCracken (2017). *Racially Diverse Juries Promote Self-monitoring Efforts During Jury Deliberation*, 3 TRANSLATIONAL ISSUES IN PSYCHOL. SCI. 187 (2017).

<sup>15</sup> Instead, evidentiary factors, the perceived fairness of the legal outcome, and jury dynamics were associated with hung jury outcomes. PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, ARE HUNG JURIES A PROBLEM? (National Center for State Courts, 2002), <https://ncsc.contentdm.oclc.org/digital/collection/juries/id/27/>.

Therefore, there is no evidence that improving the jury's diversity would make it more difficult for juries to arrive at a verdict.

## **B. Legitimacy Benefits**

In addition to salutary effects on their decision making, representative juries are more likely to be seen as legitimate decision makers, which in turn contributes to public confidence in the justice system.<sup>16</sup> A jury's racial representativeness appears to be especially important. U.S. Supreme Court Justice Thomas observed in one case 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>17</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>18</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. Overall, the study participants thought a not guilty verdict was the fairest outcome in the case, based on the evidence they read. 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 heterogeneous mixed-race jury. However, when the jury reached a guilty verdict, the verdict reached by the racially-mixed jury was seen as more fair than the verdict of the all-white jury. 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. However, 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.

## **C. Educational Benefits**

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>19</sup> Jury service allows members of the public a close-up view of what happens in our legal system.

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<sup>16</sup> Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003).

<sup>17</sup> 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, concurring).

<sup>18</sup> Ellis & Diamond, *supra* note 16.

<sup>19</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252-53 (J. P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1848).

#### D. Increased Regard for the Courts

Reassuringly, most jurors come away with enhanced regard for the legal system, the judiciary, and the jury system.<sup>20</sup> That is especially important because preexisting views of government institutions, including the jury system, differ by race and ethnicity.<sup>21</sup> Mary Rose, Christopher Ellison, and Shari Seidman Diamond surveyed Texas residents and found that non-Hispanic whites expressed greater preference for trial by jury over trial by a judge than did African-American residents and Hispanic residents. However, jury service more robustly boosted the positive regard for the jury among minority residents. 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>22</sup>

#### E. Civic Engagement Benefits

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>23</sup> In a study of seven U.S. jurisdictions, they obtained jury service data and voting history records. 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>24</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. 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

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<sup>20</sup> 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, Janet Munsterman and her colleagues surveyed 8,468 jurors in 16 federal and state courts, finding that 63 percent of the jurors reported that their views of jury service were more positive following their service. JANET T. MUNSTERMAN ET AL., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE (National Center for State Courts, 1991).

<sup>21</sup> 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 ethnic minorities' lower positivity toward government institutions, and surveying 1,465 Texas residents and finding racial and ethnic differences in support for jury trial).

<sup>22</sup> *Id.* at 384-85.

<sup>23</sup> 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. POLITICS 585 (2002); John Gastil, E. Pierre Deess, Phil Weiser, & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POLITICS 1 (2008); JOHN GASTIL, E. PIERRE DEESS, PHIL WEISER & CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010).

<sup>24</sup> GASTIL ET AL., THE JURY AND DEMOCRACY, *supra* note 23.

history.<sup>25</sup> Jurors who decided cases with organizational (as opposed to individual) defendants also increased their voting after jury service.<sup>26</sup>

## F. Summary

Representative civil 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. For all these reasons, courts should ensure that jury selection procedures serve the goal of maximizing the representativeness of jury pools and civil juries.

## IV. Jury Selection Procedures: The Jury Venire

In contrast to some other countries that require the jury that decides the case be composed of a specific demographic makeup,<sup>27</sup> in the U.S. there is no guarantee that the trial jury itself be representative of the community. The assumption is that “the laws of statistics will produce representative juries most of the time.”<sup>28</sup> And therein lies the rub.<sup>29</sup> The American Bar Association’s *Principles for Juries and Jury Trials* lists as a key principle that “Courts should use open, fair and flexible procedures to select a representative pool of prospective jurors.”<sup>30</sup> But multiple steps in the jury selection process undermine the representativeness of sitting juries.

### A. Summoning and Qualifying Prospective Jurors

It is undisputed that jury pools and juries are more representative of the community than in previous times. Historically, jury duty was limited to white men. Even as legal barriers to the

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<sup>25</sup> Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 710-12 (2014).

<sup>26</sup> *Id.* at 710-12.

<sup>27</sup> 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* (Sanja Kutnjak Ivković, Shari Seidman Diamond, Valerie P. Hans & Nancy 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).

<sup>28</sup> JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 18 (1977).

<sup>29</sup> Misquoting Hamlet, “aye, there’s the rub.” In *Taylor v. Louisiana*, the Court emphasized that: “in holding that petit juries must be drawn from a source fairly representative of the community, we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition [citations excluded]; but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community, and thereby fail to be reasonably representative thereof.” *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

<sup>30</sup> AM. BAR ASS’N, *PRINCIPLES FOR JURIES AND JURY TRIALS* (2005),

[https://www.americanbar.org/content/dam/aba/administrative/american\\_jury/principles.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf).

participation of racial and ethnic minorities and women fell,<sup>31</sup> 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>32</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. He compiled then-current data about jury venires and jury representativeness from multiple federal and state jurisdictions.<sup>33</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>34</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. Nonetheless, the states differ in the specific approaches they take to forming the list of residents to qualify and summon for jury service.

## **B. The Importance of Source Lists**

Summoning prospective jurors begins with the source lists. To assess national practices with respect to jury selection, I sought out systematic information about current procedures in the different states. The National Center for State Courts *State-of-the-States Survey of Jury Improvement Efforts* is an especially valuable resource.<sup>35</sup> Table 1, based on NCSC data, shows both overlap and divergence in the approaches that states take to the developing their jury pools. The most frequent source list is the voter registration list, followed by the drivers’ license list. A majority of states require each of these lists. A minority of states also include non-drivers’

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<sup>31</sup> For example, *Strauder v. West Virginia*, 100 U.S. 303 (1880) (Fourteenth Amendment prohibits race-based exclusions from jury duty). A number of states gave automatic exemptions to women or required that they affirmatively register to serve, dramatically reducing their representation on juries in these states. *Taylor v. Louisiana*, 419 U.S. 522 (1975), declared these special practices unconstitutional.

<sup>32</sup> VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 53-54 (1986).

<sup>33</sup> VAN DYKE, *supra* note 28.

<sup>34</sup> *Id.* at 24.

<sup>35</sup> GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS* (National Center for State Courts, 2007) (hereinafter *STATE-OF-THE-STATES SURVEY*), [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). See also <https://www.ncsc-jurystudies.org/state-of-the-states/state-of-states-survey>. 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>.



identification cards and tax rolls. No more than a handful of states require the use of any other source. Many states do permit courts to rely upon additional source lists, although their use is not mandatory.

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 drivers' licenses and own cars, compared to residents in rural areas where car ownership is higher. Some states are also able to draw upon unique and relatively comprehensive lists of community residents. For example, by statute, localities in Massachusetts conduct an annual census; Alaska relies on a list of residents who receive benefits from the Alaska Permanent Fund.

However, 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 drivers' license holders, do not fully capture the entire community of jury-eligible voters. Hence it is good practice to include multiple source lists to maximize the representativeness of the jury list.<sup>36</sup> Indeed, Paula Hannaford-Agor, Director of the Center for Jury Studies at the National Center for State Courts, asserts that: "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>37</sup>

### **C. Additional Difficulties in Obtaining Representative Jury Venires: Qualifications, Exemptions, and Differential Nonresponse**

In addition to source lists that do not fully represent the jury-eligible population, factors that contribute to a lack of jury pool representativeness include qualifications, exemptions, and failures to respond to qualification questionnaires and summonses.

**Qualifications.** Citizenship, residency, an age of 18 or above, absence of a serious criminal record, and fluency in English are basic qualifications for jury service in virtually all states.<sup>38</sup> A handful of states have explored allowing noncitizen residents to participate as jurors, but those states remain in the minority.<sup>39</sup>

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<sup>36</sup> 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 34, at 13, recommends "that the master jury list include at least 85 percent of the total community population."

<sup>37</sup> 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 (2011).

<sup>38</sup> In New Mexico, both English and Spanish speakers serve on juries; 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. Constitution of New Mexico, art. VII, § 3.

<sup>39</sup> A 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. Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson 7 (December 31, 2020). 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 (Oct. 7, 2013),

One common disqualification has become the subject of recent debate: felony disenfranchisement. In James Binnall's recent 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>40</sup> Eight percent of U. S. residents have felony convictions. The majority of states continue to ban from jury service these residents, and many impose the ban even if their punishment has concluded and they are no longer under supervision.

Just one state, Maine, currently has no restrictions. 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>41</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. Two states provide for lifetime for-cause challenges for prospective jurors who are felons.<sup>42</sup> Because of the racially disproportionate existence of felony records, the disqualification makes it more difficult to assemble representative juries.<sup>43</sup>

Recent research by Binnall and others suggests that traditional justifications of the felon-juror exclusion are not well supported.<sup>44</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>45</sup> He also surveys attitudes toward the courts, finding 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>46</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.

**Exemptions and Excuses.** Most states include 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

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<https://www.npr.org/sections/thetwo-way/2013/10/07/230242924/calif-gov-brown-vetoes-bill-giving-non-citizens-jury-duty>.

<sup>40</sup> JAMES BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM 20 (2021). See also NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 80 (2007).

<sup>41</sup> BINNALL, *supra* note 40, at 19-20, 149-59 (Appendix A, Felon-Juror Exclusion Policies by Jurisdiction). See also Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013).

<sup>42</sup> BINNALL, *supra* note 40, at 19-20, 149-59.

<sup>43</sup> Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LOUISIANA L. REV. 55 (2020), <https://digitalcommons.law.lsu.edu/lalrev/vol81/iss1/7/>; Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Juror Exclusion in Georgia*, 32 JUST. SYS. J. 335 (2011) (using U.S. census data and Georgia Department of Corrections data to calculate that the felon-juror exclusion reduces the number of African Americans eligible for jury service statewide by a third).

<sup>44</sup> BINNALL, *supra* note 40, 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, felon-jurors participated proportionately more and mentioned more novel case facts. *Id.* at 71-73.

<sup>45</sup> *Id.* at 30-45.

<sup>46</sup> *Id.* at 50-61.

occupation, with political office holders, law enforcement officers, and judicial officers being the most frequent statutory exemptions.<sup>47</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>48</sup>

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 child care reasons) more frequently than members of other racial groups, increasing departures from representativeness.<sup>49</sup>

***Nonresponse to Qualification Questionnaires and Summonses.*** 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>50</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>51</sup> I was one of the external consultants on the Monroe County study.

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. 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. The study confirmed that the mailings went to a geographic cross-section of the county, as intended. However, mailings sent to the geographical areas of the county with higher proportions of racial and ethnic minorities and poorer residents were disproportionately more likely to be returned as undeliverable or did not result in responses. According to census figures, black residents constituted 12% of the Monroe County jury-eligible population,<sup>52</sup> but they were 9.7% of those who responded to the jury

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<sup>47</sup> STATE-OF-THE-STATES SURVEY, *supra* note 35, at 14-15.

<sup>48</sup> *Id.* at 22-23.

<sup>49</sup> See, for example, Jury Representativeness: A Demographic Study of Juror Qualification and Summoning In Monroe County, New York. (Office of Court Research for Chief Administrative Judge Ann Pfau, Aug. 25, 2011) (hereinafter Monroe County Study).

<sup>50</sup> Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?* 52 U. MICH. J. L. REF. 1 (2018).

<sup>51</sup> Monroe County Study, *supra* note 49. See discussion in Valerie P. Hans, *It's No Joke: Jury Representativeness in the State of New York*, THE ISSUE SPOTTER, CORNELL J. L. & PUB. POL'Y, January 20, 2012, <http://ilpp.org/blogzine/jury-representativeness-its-no-joke-in-the-state-of-new-york/>.

<sup>52</sup> Census data were adjusted to exclude non-citizens, non-English speaking people, and those under 18, none of whom are eligible for jury service in New York. Monroe County Study, *supra* note 49.

qualification questionnaires. This pattern of greater nonresponse in areas with lower incomes and higher racial and ethnic minorities has been observed in a number of other jurisdictions.<sup>53</sup>

To address differential responses to qualification questionnaires, some federal district courts, including the Eastern District of Massachusetts, the District of Kansas, and the Northern District of California have put special procedures in place. When jury qualification questionnaires are returned as undeliverable, or there is no response from the individual who is sent a questionnaire, the district sends a replacement questionnaire to another randomly selected individual who resides within the same zip code.<sup>54</sup> Some strongly endorse the approach;<sup>55</sup> others object to the zip code replacement procedure as a departure from fully random selection of the jury venire.<sup>56</sup>

#### D. Pandemic-Era Jury Selection

The COVID-19 pandemic has created new challenges in the selection of citizens for jury service. After a pause at the start of the pandemic, a number of state and federal courts have resumed trials, including jury trials. I am aware of no systematic studies of how pandemic-era jury pools compare to the pre-pandemic-era jury pools (or how the composition of petit juries themselves differ). State trial court judges who have presided over virtual jury trials during the pandemic have reported that they have seen jury pools that are at least as diverse and perhaps even more diverse than pre-pandemic jury pools.<sup>57</sup> Statistical analyses are reportedly underway.<sup>58</sup> Presumably, courts have not modified the basic source lists they use to recruit jury pools as a result of the pandemic. However, it seems possible, even likely, that the response rates to jury qualification questionnaires and summonses have changed. In addition, jury commissioners and judges have undoubtedly been more generous in their willingness to accept requests to be excused from jury duty.

During the pandemic era, jury trials have been conducted in person and virtually.<sup>59</sup> Each of these provide particular challenges to jury representativeness. Commissioned by the National Center

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<sup>53</sup> *Id.* (citing other projects). See also Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *Unequal Jury Representation and its Consequences* (NBER Working Paper Series, March 2021), [https://www.nber.org/system/files/working\\_papers/w28572/w28572.pdf](https://www.nber.org/system/files/working_papers/w28572/w28572.pdf).

<sup>54</sup> MASS. GEN. LAWS ANN. ch. 234A, § 11 (West 2000); U.S. DIST. CT. R. D. KAN. 38.1(g)(2); Plan for the Random Selection of Grand and Petit Jurors, U. S. District Court for the Northern District of California, General Order No. 6, [https://www.cand.uscourts.gov/wp-content/uploads/general-orders/GO\\_06\\_8-7-2017.pdf](https://www.cand.uscourts.gov/wp-content/uploads/general-orders/GO_06_8-7-2017.pdf). See discussion in Hannaford-Agor, *Systematic Negligence*, *supra* note 36, at 795-96.

<sup>55</sup> Abramson, *supra* note 50. See also discussion in GERTNER ET AL., *supra* note 5.

<sup>56</sup> Hannaford-Agor, *supra* note 37, at 795-96.

<sup>57</sup> King County, Wash., Superior Court Judge Matthew Williams and Administrative Judge Jennifer Bailey of Florida both reported their experiences that pandemic-era jury pools were equally or more diverse than pre-pandemic jury pools. *The Online Courtroom Now and Post-Pandemic: Skills and Tools for Remote Advocacy*. NITA online seminar, April 23, 2021.

<sup>58</sup> *Id.*

<sup>59</sup> The National Center for State Courts has an excellent collection of materials related to coronavirus and the courts: <https://www.ncsc.org/newsroom/public-health-emergency>.

for State Courts, a national poll of 1,000 U.S. registered voters in June 2020 asked questions about their views about serving on a jury during the pandemic.<sup>60</sup> Over half identified one or more obstacles to reporting for jury duty, including childcare, elder care, or health conditions.<sup>61</sup> Many expressed concern about jury service, although the majority indicated they would feel more comfortable if protective measures such as mask wearing, social distancing, and coronavirus testing were in place.<sup>62</sup> Twice as many respondents said they would be more comfortable with remote (virtual) jury service than in-person jury service.<sup>63</sup>

One serious concern about the potential drawback of virtual jury trials has been inequality in access to the technology required to connect to the internet. However, the survey found that 85% subscribed to the internet at their homes, and 95% of respondents had a cell phone (with 85% having a smartphone). Just 2.4% of the respondents had no home internet and no cell phone.<sup>64</sup> States that have conducted virtual jury trials include alternative options for those without existing reliable technology, including participating at alternate locations such as courthouse kiosks or library carrels, and providing tablets for those without the technology.

The reported concerns about in-person jury service are hypothetical responses taken at one point in time, of course. The pandemic situation in the United States is shifting, particularly with the widespread availability of vaccination. Now that the majority of people in older age groups are fully vaccinated, they face lower health risks, and could be more willing than younger age groups to serve on an in-person jury.

### **E. Legal Challenges to Jury Pool Representativeness**

*Duren v. Missouri* lays out a well-known three-step procedure for challenging the representativeness of the jury pool.<sup>65</sup> First, the litigant must show that a group that is claimed to be underrepresented or excluded is a distinctive or cognizable group in the community; second, the group's representation in the pool is not fair and reasonable considering its numbers in the community; and third, the underrepresentation is the result of systematic exclusion during the jury selection process.<sup>66</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>67</sup> The requirements for the third step differ for criminal and civil cases. In a civil case, "the Equal Protection question is what percentage

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<sup>60</sup> *State of the State Courts in A Post Pandemic World*, National Center for State Courts webinar (March 26, 2020). The link to slides reporting the poll results were updated on June 18, 2020, and may be found at:

<https://nationalcenterforstatecourts.app.box.com/s/n7w8zu89tbayfjr0qz6h7mn6nrg0x6qh/file/680542851103>.

<sup>61</sup> *Id.* at Slide 6.

<sup>62</sup> *Id.* at Slide 8.

<sup>63</sup> *Id.* at Slide 13.

<sup>64</sup> *Id.* at Slide 12.

<sup>65</sup> *Duren v. Missouri*, 439 U.S. 357 (1979). For a critique that argues that the three-step process unfairly undermines the jury, see David M. Coriell, *An (Un)Fair Cross Section: How the Application of Duren Undermines the Jury*, 100 CORNELL L. REV. 463 (2015).

<sup>66</sup> *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

<sup>67</sup> GERTNER ET AL., *supra* note 5, at 41.

makes out a prima facie case of purposeful exclusion.”<sup>68</sup> Once the prima facie case is made out, the burden shifts to the state to justify its practice.

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>69</sup> Paula Hannaford-Agor and Nicole Waters of the NCSC point out serious limitations with both absolute and comparative disparity measures. They observe that, for many jurisdictions, jury pool sizes are too small to be confident that variations have not occurred by chance.<sup>70</sup>

Even though the possibility exists 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, 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>71</sup> She makes a compelling argument 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.<sup>72</sup>

## V. Jury Selection Procedures: In the Courtroom

Courtroom jury selection procedures, including voir dire, peremptory challenges, and challenges for cause, may also influence the representativeness of the trial jury. Once a randomly-selected subgroup of potential jurors is chosen from the source list and summoned for service in a specific case, the focus turns to courtroom procedures that are designed to assess the individual prospective jurors’ ability to serve as fair and impartial fact finders. In the courtroom, during voir dire questioning 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 the attorneys’ peremptory challenge. Here, the need for impartiality may eclipse the desire to seat a representative jury.

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<sup>68</sup> *Id.* at 50.

<sup>69</sup> *Berghuis v. Smith*, 559 U.S. (2010). To obtain a measure of absolute disparity, one subtracts the percentage in the jury pool from the percentage in the jury-eligible population. To obtain comparative disparity, one divides the absolute disparity percentage 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.

<sup>70</sup> 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 (2011) (concluding that absolute and comparative disparity tests would lead to immunity from fair cross-section challenges in the majority of U.S. jurisdictions).

<sup>71</sup> Nina W. Chernoff, *No Records, No Rights: Discovery and the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719 (2016). See also Nina W. Chernoff & Joseph B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, 33 JUST. SYS. J. 47 (2012).

<sup>72</sup> Chernoff, *supra* note 71.

Jury selection procedures were developed in earlier times, and appear to be based on several key assumptions which 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>73</sup> Yet, given what we now know about the often unconscious or implicit biases that influence decision making, the traditional approaches to these jury selection procedures for detecting bias and removing prejudiced prospective jurors are likely to fall short.

### A. Juror Bias, including Implicit Bias, in Civil Trials

Although juror bias, especially racial bias, has been the focus of great concern in criminal trials, the preexisting backgrounds, experiences, and attitudes of prospective jurors can also undermine the fairness of decisions in civil jury trials. 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>74</sup> Jurors' characteristics shape their perceptions of evidence, which feed into their construction of a narrative account of what happened in the dispute at the center of the litigation.<sup>75</sup> Evidence that is inconsistent with expectations and with the juror's developing narrative account may be minimized or even ignored.

Speaking specifically about potential juror biases in civil cases, 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>76</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>77</sup> These prior beliefs predicted their evaluations and verdicts in a hypothetical civil case. In other research studies that my students and I conducted with actual civil juries, mock civil juries, and opinion surveys, we found that general views about plaintiff credibility and the existence of a litigation crisis affected civil jury

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<sup>73</sup> 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* (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3733136](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733136).

<sup>74</sup> Jennifer K. Elek & Andrea L. Miller, *The Evolving Science on Implicit Bias* (National Center for State Courts Report, March 2021). The substantial body of research on jury decision making is summarized in VIDMAR & HANS, *supra* note 40; BRIAN H. BORNSTEIN & EDIE GREENE, *THE JURY UNDER FIRE* (2017); and DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* (2012).

<sup>75</sup> 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 40, at 132-35.

<sup>76</sup> 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 CHI.-KENT L. REV. 1179, 1181-82 (2003).

<sup>77</sup> Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL.: APPLIED 91 (2001).



decisions.<sup>78</sup> Other researchers have discovered that preexisting views about businesses can influence civil case judgments.<sup>79</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>80</sup> My collaborators and I developed short scenarios (many based on famous tort cases, such as *Brown v. Kendall*<sup>81</sup>) and presented them to participants. We experimentally varied the names of the plaintiff and the defendant in the scenarios, using stereotypically black (Tyrone, Malik) or white (Brendan, Art) names. After the participants made judgments about liability and deserved damages, participants went to the Project Implicit website and completed an Implicit Association Test (IAT) for black and white races. Overall, we found that race, and implicit racial bias, affected how participants judged the defendant's responsibility and how they assessed damages. 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. They also recommended higher awards for plaintiffs who sued black defendants. Dollar awards for black plaintiffs were lower than dollar awards for white plaintiffs who experienced the same negligently-caused injuries.

These results converge with the findings of a recent field study, which examined the effects of a plaintiff's race on pain and suffering decisions in tort cases in three states.<sup>82</sup> The researchers used U.S. Census information to impute the race and ethnicity of parties through their surnames.<sup>83</sup> They analyzed the economic and noneconomic damage awards for plaintiffs of different (imputed) races and ethnicities. For economic damages such as medical expenses and lost income, no race differences in awards emerged. However, black plaintiffs received less than white plaintiffs in noneconomic (pain and suffering) damages, even when the researchers controlled for the amount of economic damages that the plaintiffs were awarded.<sup>84</sup> The study offers suggestive evidence of arguments that the injuries of racial and ethnic minorities are devalued relative to whites.<sup>85</sup> As the IAT study found, implicit racial bias might shape this differential perception of the seriousness of a plaintiff's injury.

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<sup>78</sup> VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 58-78, 222-49 (2000).

<sup>79</sup> 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 (1998).

<sup>80</sup> Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 SO. CAL. L. REV. 507 (2020), [https://southerncalifornialawreview.com/wp-content/uploads/2020/07/Hans\\_Website.pdf](https://southerncalifornialawreview.com/wp-content/uploads/2020/07/Hans_Website.pdf).

<sup>81</sup> 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. It became famous for introducing the reasonable person standard.

<sup>82</sup> Erik Girvan & Heather J. Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. AGGRESSION, CONFLICT & PEACE RES. 247 (2016). The states were Florida, Illinois, and New York.

<sup>83</sup> *Id.* at 248.

<sup>84</sup> *Id.* at 252-53.

<sup>85</sup> 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 et al., *supra* note 80, at 510-11 (summarizing commentary in task force reports and elsewhere of disadvantages of African-American plaintiffs and defendants in civil case outcomes).



A juror's gender may also affect civil jury decision making. 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>86</sup> Although there is substantial overlap between women and men, women define a broader range of behaviors as constituting harassment.<sup>87</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>88</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 civil jury trial, as the example of gender differences in sexual harassment cases indicates. However, 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>89</sup> Instead, attitudes—especially attitudes that are specifically relevant to case issues—are more successful predictors of a prospective juror's likely biases. A fair jury selection process should provide an opportunity for the court and the parties to explore these potential sources of bias, and should take into account the fact that prospective jurors may be unaware of the potentially biasing effects of their backgrounds, experiences, and attitudes.

## **B. Voir Dire Procedures**

The sections above provide 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. A 50-state survey of the legal rules governing jury selection practices in civil jury trials illustrates the considerable variation across the states in the methods used to examine jurors, and in the number and method of exercising peremptory challenges.<sup>90</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>91</sup>

One dimension that typically differentiates limited and expansive voir dire is who conducts the voir dire. The 50-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. Instead, most states give

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<sup>86</sup> Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33 (1998); Maria Rotundo, Dung-Hanh Nguyen & Paul R. Sackett, *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCHOL. 914 (2001).

<sup>87</sup> Rotundo et al., *supra* note 86.

<sup>88</sup> *Id.*

<sup>89</sup> Hans & Jehle, *supra* note 76, at 1180 (summarizing research).

<sup>90</sup> 50 State Statutory Surveys: Civil Laws: Civil Procedure. Selection of Jurors (Westlaw, April 2020).

<sup>91</sup> STATE-OF-THE-STATES SURVEY, *supra* note 35, at 27-31 (reporting variation).

that authority to the judge—it is within the judge’s discretion to allow or not allow voir dire participation by the parties and their attorneys. Not surprisingly, judicially-controlled voir dire tends to be shorter, on average.<sup>92</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. 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. The questions will be specific to the trial; one or more questions will ask prospective jurors to indicate whether they will be impartial. Prospective jurors will indicate, by raising hands or another method, whether they have a positive response to any of the questions. Thus, the identification of juror bias depends largely upon the prospective juror’s self-assessment as potentially biased.

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 questioning in the courtroom. 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. In an expansive voir dire, questioning is wide-ranging, and includes both closed-ended and open-ended questions. 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. In this approach, rather than relying on the prospective juror’s self-assessment of bias, the judge and attorneys are able to make independent judgments about the possibility of juror bias.

A recent civil mock jury experiment that I undertook with colleagues demonstrated the benefits of expanded and case-relevant questions over a traditional limited set of questions.<sup>93</sup> We recruited participants online and randomly assigned them 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. We presented each participant one of three different civil cases and asked them to make judgments about liability and damages. 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

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<sup>92</sup> *Id.* at 30 (showing that when judges had an exclusive or primary role in voir dire questioning, voir dire took less time).

<sup>93</sup> Salerno et al., *supra* note 73. The minimal voir dire questions were drawn from Susan Oki Mollway, *Sample voir dire subjects covered by Judge Susan Oki Mollway in civil trials*, [https://www.hid.uscourts.gov/reqrmts/SOM/SOM\\_standard\\_civil\\_voir\\_dire.pdf?pid=19&mid=63](https://www.hid.uscourts.gov/reqrmts/SOM/SOM_standard_civil_voir_dire.pdf?pid=19&mid=63). See Salerno et al., *supra* note 73, for the list of sources of the extended voir dire questions.

liability and damages. 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. The results reinforce our sense about the benefits of expansive voir dire in civil jury trials.

Attorney participation in voir dire may be especially helpful. A Massachusetts study of attorney participation in voir dire, undertaken by the National Center for State Courts, found that when attorneys participated (which they tended to do in more complex cases), the empanelment time was slightly longer than judge-conducted voir dire, less than one minute per juror.<sup>94</sup> Approximately a quarter of the challenges (26%) for cause took place during attorney questioning; 62% of these challenges were allowed.<sup>95</sup> These findings suggest that attorney questioning had a valuable effect on the identification and removal of biased prospective jurors.

### C. The Negative Consequences of Limited Voir Dire

Numerous commentators agree that limited voir dire poses significant difficulties for identifying bias in prospective jurors.<sup>96</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 American jury trial.<sup>97</sup> Dale Broeder was a member of the famous Chicago Jury Project that started in the 1950s. He conducted post-trial interviews with 225 jurors, and discovered that a number of jurors failed to tell the court about relevant information bearing on their ability to serve as fair and impartial jurors. 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>98</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>99</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>100</sup> His routine practice was to begin voir dire with a panel (usually about 60 prospective jurors) with an introduction about the purpose and importance of voir dire. 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. Those prospective jurors with

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<sup>94</sup> Supreme Judicial Court [Massachusetts], Committee on Juror Voir Dire, *Final Report to the Justices* 7 (July 12, 2016).

<sup>95</sup> *Id.* at 7-8.

<sup>96</sup> Hans & Jehle, *supra* note 76. 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, 4 (Will Rountree, Elissa Krauss & Beth Bonora eds., 2<sup>nd</sup> ed., 2004).

<sup>97</sup> Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 SO. CAL. L. REV. 503 (1965).

<sup>98</sup> *Id.* at 505.

<sup>99</sup> See Hans & Jehle, *supra* note 76, at 1188-90 (summarizing studies).

<sup>100</sup> Gregory E. Mize, *On Better Jury Selection—Spotting UFO Jurors Before They Enter the Jury Room*, 31 CT. REV. (1999) (experience with criminal trials); Gregory E. Mize, *Be Cautious of the Quiet Ones*, VOIR DIRE, Summer 2003, at 1 (experience with both criminal and civil trials).

affirmative responses would then be individually questioned outside the presence of other members of the jury panel. The whole approach was quite efficient—but, Judge Mize wondered, at what cost?

Judge Mize noticed a fair number of prospective jurors who did not respond “yes” to any of the questions. He decided to interview each one individually, in a nearby jury room. He would ask, “I notice you did not respond to any of my questions. I just wondered why. Could you explain?” As a follow-up, he would further inquire, “Is it because the questions did not apply to you?” 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 excusals for cause.<sup>101</sup>

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.” 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.” Yet another indicated that the plaintiff’s attorney in the current case had previously represented him in a personal injury case. Another silent juror could not speak English. 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>102</sup> These clear examples underscore the benefits that can come from even a fairly modest expansion of voir dire practice.

Expanded voir dire procedures, particularly using jury questionnaires and open-ended questioning that allows prospective jurors to speak in their own words, are also valuable because they help attorneys ground their peremptory challenges on relevant experiences and attitudes rather than merely on demographic information, a point relevant to our later topic of peremptory challenges.<sup>103</sup>

#### **D. Reasons for Ineffectiveness of Limited Voir Dire**

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 were confronted in an individual setting with Judge Mize. Although some prospective jurors may purposefully lie, either to get out of jury duty or to serve, I suspect the numbers are low. It is likely more often the case that prospective jurors are unaware of or underestimate the effects of their own biases. They may be concerned about

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<sup>101</sup> In civil trials, 44 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. Mize, *Be Cautious of the Quiet Ones*, *supra* note 100, at 13. Mize reports that he discovered a greater number of silent juror candidates with problematic responses in his expanded criminal voir dire interviews.

<sup>102</sup> *Id.* at 13.

<sup>103</sup> Barbara Allen Babcock, *Jury Service and Community Representation*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 460, 480 (Robert E. Litan ed., 1993).

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 concern about privacy, and these concerns may undermine their willingness to share relevant information.<sup>104</sup> Mary Rose interviewed jurors about their experiences of voir dire, and found that a quarter of them felt that the questions they were asked seemed to them to be "too private" or otherwise objectionable.<sup>105</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. Jurors thought these questions were irrelevant to their performance as jurors.

### **E. Pandemic-Era Voir Dire**

Conducting voir dire in a pandemic environment, including socially-distant in-person voir dire and virtual voir dire, has posed unique challenges. For courts who proceeded with in-person juries, assembling a panel of prospective jurors for in-person voir dire during the pandemic had the potential to create a significant health threat because of the typically large size of jury panels. Even setting that aside, some attorneys were concerned about their inability to judge the credibility of juror candidates who were masked and socially distant.<sup>106</sup>

Courts adapted in several ways. To minimize the information that had to be collected in person, some states expanded their use of jury questionnaires during the pandemic so that attorneys came to the jury selection better informed about the backgrounds, experiences, and views of prospective jurors and could more efficiently target their questioning. Other courts decided that the health risks were not worth bringing substantial numbers of citizens to the courthouse, and decided they would proceed with voir dire in a virtual format and bring the six or twelve jurors to participate in the trial in person. Perhaps recognizing the increased difficulty that attorneys faced in assessing the suitability of juror candidates in virtual voir dire, courts in at least one state reportedly became more generous in allowing attorney participation in the questioning.<sup>107</sup>

The jury is still out on the relative effectiveness of virtual voir dire, masked and socially distant in-person voir dire, and traditional in-person voir dire. Some attorneys put great stock in observing the nonverbal cues of prospective jurors during questioning. Research on the detection of deception indicates that the content of a person's response is a much better indicator of their truthfulness than their nonverbal behavior. Allowing questionnaires and expansive questioning

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<sup>104</sup> Mary R. Rose, *Jurors' Views of Voir Dire Questions*, 85 JUDICATURE 10 (2001); Paula Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18 (2001).

<sup>105</sup> Rose, *supra* note 104, at 13.

<sup>106</sup> Robert A. Clifford, Valerie P. Hans & Richard Jolly, *Jury Trials in the Era of COVID19*, Civil Justice Research Initiative webinar (May 22, 2020), <https://civiljusticeinitiative.org/berkeley-boosts-jury-trials-in-the-era-of-covid-19/>.

<sup>107</sup> *The Online Courtroom Now and Post-Pandemic*, *supra* note 57.

during voir dire should help to counteract whatever limitations the virtual environment or masking and distance create.

## VI. Challenges for Cause and Peremptory Challenges

Challenges to individual prospective jurors, either peremptory challenges or challenges for cause, create additional avenues for departure from jury representativeness. Even if the source lists fairly 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 when they are challenged for cause and the attorneys' peremptory challenges can significantly alter the composition of the sitting jury.

### A. Challenges for Cause

Judges have the ability to remove an unlimited number of prospective jurors if they conclude that the individuals are unlikely to meet the standard of being a fair and impartial juror. Attorneys have a limited number of peremptory challenges. In state civil cases, the most common number of peremptory challenges is three. A line of U.S. Supreme Court cases concludes that challenges may not be based on race and gender.<sup>108</sup>

A number of issues discussed above bear on the ability of judges and lawyers to exercise fully-informed challenges. Unconscious and implicit biases that shape jurors' decision making can also influence legal professionals.<sup>109</sup> My Cornell Law School colleague Jeffrey Rachlinski and his collaborators have undertaken a series of studies of judicial decision making.<sup>110</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. To cite one illustrative research finding, they presented municipal court judges with a case involving a nightclub's noise violation. Some judges were told that the nightclub's name was Club 11,866 (after its street address); others were given the name Club 58. In line with the anchoring heuristic, the judges fined Club 11,866 three times as much as Club 58.<sup>111</sup> More concerning, Rachlinski and collaborators have also found that judges have implicit racial biases that can affect their judgments in hypothetical scenarios.<sup>112</sup>

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<sup>108</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986); *Flowers v. Mississippi*, 588 U.S. \_\_\_\_ (2019), 139 S. Ct. 2228 (2019). *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), held that *Batson* applies in civil trials.

<sup>109</sup> Elek & Hannaford-Agor, *supra* note 74. See also Jeffrey J. Rachlinski, Sheri L. Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195 (2009).

<sup>110</sup> Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203 (2017).

<sup>111</sup> *Id.* at 215. Anchoring refers to the "process 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 (2016).

<sup>112</sup> Rachlinski et al., *supra* note 109. 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.

There is relatively little systematic empirical research on how judges decide challenges for cause in the civil context, and how the sum total of their challenges affect the civil jury's representativeness.<sup>113</sup> In one study using criminal cases, Mary Rose and Shari Seidman Diamond examined for-cause challenges in an inventive scenario experiment.<sup>114</sup> They presented to judges and lawyers a number of voir dire scenarios in which 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"). The juror candidate's likely bias was also varied. For example, one was described as either a member of the church also attended by one of the lawyers in the case (low likely bias), or as a police officer (high likely bias). Judges were asked about their perceptions of the juror's impartiality. Judges' views relied strongly on the subjective certainty of the juror.<sup>115</sup> As we noted earlier, 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.

The civil jury experiment I discussed above that showed the benefits of extended voir dire included another set of conditions.<sup>116</sup> After the voir dire questions, but before they heard and decided the civil lawsuit, half the participants were randomly assigned to either watch a short judicial rehabilitation video or not. At the end of the experiment, we asked our participants to assess their own biases in decision making. We then compared those who had heard the rehabilitation video with those who had not. You'll recall that the extended voir dire questions revealed decision making biases. They were just as strong for those who received the rehabilitation video and those who did not. But, those who heard it were more likely to say they had been unbiased in their decision making. Thus, the judge's exhortation to the jurors, encouraging them to reflect on their biases, and urging them to be unbiased, had a paradoxical effect—it did not reduce decision making bias, but the jurors thought it had!

## B. Peremptory Challenges

In contrast to challenges for cause, there has been extensive research on attorneys' use of peremptory challenges, and in particular the role of race and gender in exercising those challenges. Reliance on race and gender is banned in both criminal and civil cases. However, virtually all of the empirical research has examined peremptory challenges in criminal cases rather than civil cases. The research has routinely shown prosecutors exercising peremptory challenges against racial and ethnic minorities, and defense attorneys taking the opposite tack.<sup>117</sup>

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<sup>113</sup> A substantial amount of research on capital jury selection finds that challenges for cause disproportionately eliminate women and African American prospective jurors from capital juries, at least in part because of their greater opposition to the death penalty. 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 21<sup>ST</sup> CENTURY: PSYCHOLOGICAL SCIENCE AND THE LAW* 41 (C. Najdowski & M. Stevenson eds., 2019).

<sup>114</sup> Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 *LAW & SOC'Y REV.* 513 (2008).

<sup>115</sup> *Id.* Interestingly, the lawyer participants generally did not show this same reliance.

<sup>116</sup> Salerno et al., *supra* note 73.

<sup>117</sup> See VIDMAR & HANS, *supra* note 40, at 97-99 for a summary.

An experimental study suggests how stereotypes and unconscious biases can operate in the peremptory challenge context in criminal trials. Samuel Sommers and Michael Norton gave students, law students, and practicing lawyers a hypothetical case of robbery and assault with a black defendant.<sup>118</sup> They also gave them two juror profiles including pictures: a journalist who wrote stories about police misconduct, and a business executive who was skeptical of forensic evidence. The black or white race of the jurors was varied through the photographs such that for half the participants, the journalist was shown as a black person and the executive was shown as a white person; for the other half, the races were reversed. The researchers asked the participants to assume the role of a prosecutor and choose one of the potential jurors to strike peremptorily. The juror candidate's race affected these hypothetical peremptory strikes. 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. 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.

The extent to which implicit racial biases might operate in civil cases is interesting to contemplate. 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. Jurors of different races and ethnicities may well take different views in civil cases, but their preexisting attitudes and views may be less sharply distinguished. This could have multiple effects, my Cornell Law School colleague 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>119</sup>

Johnson's intuitions are borne out. In a small study of *Batson* challenges in 36 criminal and civil cases, Anna Roberts found that just four of them were in civil cases.<sup>120</sup> A 2008 survey of attorneys about their 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 that they made them infrequently.<sup>121</sup> Most had not raised such challenges. Among the reasons, some noted that it was difficult with a small number of peremptory challenges in civil cases to

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<sup>118</sup> 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 (2007).

<sup>119</sup> Sheri Lynn Johnson, Personal communication, April 26, 2021.

<sup>120</sup> Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359 (2012).

<sup>121</sup> 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 (4<sup>th</sup> ed. & Supp. 2016).



show a pattern of discriminatory strikes.<sup>122</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>123</sup> The low likelihood of success given the significant burden of proof that they faced also militated against raising a *Batson* challenge.

Peremptory challenge patterns in civil jury selection, however, suggests that civil attorneys may be influenced by conscious or unconscious biases. In Chicago civil jury trials, civil defendants were about twice as likely as civil plaintiffs to remove blacks through peremptory challenges. In contrast, plaintiff attorneys exercised their challenges disproportionately against white prospective jurors.<sup>124</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>125</sup>

### C. Exercising Challenges in Pandemic-Era Jury Trials

The decision to remove a prospective juror for cause or peremptorily has never been easy; it is difficult to estimate with certainty how jurors will be influenced by their background, experiences, and attitudes. However, judges and attorneys face additional difficulty when the cues they have traditionally relied upon, including in-person observation of responses and nonverbal behavior during voir dire, are muted or even absent through masking and social distancing, or virtual questioning. As noted above, research on the ability to detect deception suggests that a focus on the verbal content as opposed to the nonverbal aspects of responses is more informative. Considering the fact that masking and social distancing or virtual voir dire provide unfamiliar settings for obtaining information on which to base challenges for cause and peremptory challenges, it seems prudent to expand the scope and content of both in-person and virtual voir dire.

## VII. Conclusion

This paper has surveyed some of the difficulties that courts face in meeting the objective of representative, fair, and impartial civil juries. Empirical research has demonstrated the value of diverse juries. However, problems in attaining jury diversity begin with attempting to assemble representative cross-sections of the population using source lists that do not fully represent the

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<sup>122</sup> “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.* at § 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.

<sup>123</sup> *Id.* at § 17.08(E).

<sup>124</sup> 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, 441 (2009). 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.”

<sup>125</sup> Judicial Branch of Arizona, Maricopa County, Racial and Ethnic Representation through the Jury Selection Process: An Analysis of 2019 Jury Data from the Superior Court of Arizona in Maricopa County (May 2021).

community. These problems are further exacerbated by differential nonresponse to jury summonses and the disproportionate effects of disqualifications, exemptions, and excuses. Even so, litigants face substantial barriers to raising successful objections to the representativeness of jury venires. Many jurisdictions take a limited approach to voir dire 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. Holding jury trials during the pandemic, taking place either virtually or in person with masking and social distancing, has been accompanied by new challenges to effective jury selection in civil trials. Despite these difficulties, empirical research also points to a variety of ways that courts may address them to achieve the important goal of representative, fair, and impartial civil juries.