



2021 FORUM FOR STATE APPELLATE COURT JUDGES

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

JUDICIAL RULEMAKING FOR JURY TRIAL FAIRNESS

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Executive Summary

In Professor Diamond's Introduction, she provides the major premise for her examination of the role of judicial rulemaking in assuring fair legal proceedings: "Our ability to produce a fair jury trial depends on an attentive and responsive court system." Her purpose in this article is to describe and evaluate methods that courts are starting to use, or might consider using, to promote fair trials.

In Part II, she identifies three themes that guide her inquiry: (1) achievement of a representative jury pool; (2) the selection of an impartial jury that will actually hear the case; and (3) efforts to control the ways (some overt, some not) in which bias may infect the proceedings.

In Part III, Professor Diamond identifies the key players in rulemaking for fairness: state supreme courts, which have the authority to establish commissions to examine jury operations; individual judges, who can use their opinions to spotlight jury system problems and potential solutions; and legislators, who can respond to judicial guidance by enacting legislative reforms.

In Part IV ("Increasing the Representativeness of Jury Pools"), Diamond describes strategies for achieving jury pools that are more representative of the community the court serves: (a) expanding jury service eligibility through eliminating historic exclusionary rules based on occupation, lack of English proficiency, non-citizenship, and felony convictions; (b) expanding juror source lists beyond the usual voter registration records; (c) updating sources lists annually; (d) using follow-up techniques to contact non-responders; (e) sending replacement summonses

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to potential jurors in the same ZIP codes or census tracts as those of non-responders; and (f) dealing flexibly with the hardships jury service inevitably imposes on some jurors.

In Part V (“Preserving Representativeness and Fairness in the Courtroom”), Professor Diamond reviews five approaches to the conduct of trials that can improve the fairness quotient: (a) jury selection that includes attorney participation and case-specific juror questionnaires; (b) “giving Batson teeth” by measures like adopting an “objective observer” standard for resolving allegations of bias; (c) requiring involvement of judges during voir dire; (d) reducing the number of peremptory challenges allowed; and (e) returning to the traditional jury of 12 members.

In Part VI (“Instructing Jurors on Bias”), Diamond considers the problem of bias, both conscious and unconscious (“implicit bias”) and the prospects for combatting it through the use of “informational interventions” such as orientation videos for jurors and well-crafted jury instructions.

In Part VII, Professor Diamond underscores the four reforms that, in her judgment, offer the “best prospects for optimizing fairness”: expansion of eligibility for jury service; the use of comprehensive, up-to-date juror lists with follow-up and replacement to deal with non-response; adoption of the “objective observer” standard for judging Batson challenges; and limiting peremptory challenges and increasing the size of juries.

I. Introduction

Our ability to produce a fair jury trial depends on an attentive and responsive court system. The parties and the public turn to the courts for a fair trial. The citizens who appear in court in response to their jury summonses expect that the court will see that they are treated with respect and will ensure that the proceedings are fair. Although our best evidence is that jury trials generally succeed in reaching these goals, courts do encounter obstacles that can undermine the fairness of a trial.

In recognizing these challenges, a number of state courts in recent years have taken a proactive approach to protecting the rights of parties, prospective jurors, and the public at large to a fair jury trial. The purpose of this article is to describe and evaluate those policies and procedures, as well as to consider some additional measures that might be taken. The ultimate question in the end is whether these efforts are likely to be effective.

II. Three Themes

Three key themes guide this inquiry. Although at an abstract level all three may seem to describe uncontroversial goals for a fair jury system, agreement on what steps courts should take to achieve these goals is a different matter. Thus, we will consider both innovations that courts have implemented and suggested reforms they have declined to adopt, as well as procedures that have not yet received attention.

The first theme, discussed in Part IV, focuses on achieving a representative jury pool. A representative jury pool is recognized as the optimal starting point for a fair jury trial. That goal was explicitly recognized in *Taylor v. Louisiana*, when the U.S. Supreme Court considered the make-up of the jury pool and specified that “a fair cross section of the community is fundamental to the American system of justice.”² Similarly, this goal was captured in Principle 10 of the 2005 ABA *Principles for Juries and Jury Trials*: “Courts Should Use Open, Fair, and Flexible Procedures to Select a Representative Pool of Prospective Jurors.”³

Our second theme, which is the focus of Part V, analyzes the fairness of procedures used to determine which of the prospective jurors who are summoned to serve will actually serve on a jury. The procedures that lead from being a member 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. 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 period of 2020-21. Courts must also determine whether a prospective juror cannot be fair in a particular trial. In addition to these decisions on whether to excuse a juror for cause, courts are charged with monitoring the peremptory challenges that attorneys propose for removing prospective jurors from a panel during jury selection. The principle enunciated in Principle 11 of the 2005 ABA *Principles* is that “Courts Should Ensure That the Process Used to Empanel Jurors Effectively Serves the Goal of Assembling a Fair and Impartial Jury.”⁴

Our third theme, covered in Part VI, focuses on potential bias that can infect court proceedings. Exclusion of potential jurors based on race, ethnicity, or gender is not the only way that bias can creep into court proceedings and undermine the promise of a fair trial. Another reason is that individuals, including jurors, judges, parties, and court personnel, may harbor biases that they are not even aware they have, so-called implicit biases.⁵ The challenge for courts is how to provide guidance that minimizes the effects of these biases. Since the 2005 ABA *Principles* were written, 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.⁶ In addition to focusing on attorney behavior during jury selection, the primary thrust of this effort has been on educating jurors through jury instructions. The operative principle might be characterized as:

² 419 U.S. 522, 530 (1975); see also *Duren v. Missouri*, 439 U.S. 357 (1979).

³ American Bar Association, *PRINCIPLES FOR JURIES & JURY TRIALS* (2005). The ABA’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.

⁴ *Id.*

⁵ Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1196, 1221 (2009) (finding that judges harbor the same kinds of implicit biases as the general American population).

⁶ Examples include California, Connecticut, New Jersey, and Washington State.

Courts Should Attempt to Minimize the Impact of Bias, both Explicit and Implicit, on Jurors and Juries.

So far, so good, but of course the devil is in the details.

III. Key Players

Judicial rulemaking authority is substantial and courts are the dominant players in achieving fair jury trials. It is not surprising that the National Center for State Courts (NCSC) State-of-the-States survey found that three-quarters of the states (38) had appointed a statewide commission or task force to examine issues related to jury operations and trial procedures, and that “The vast majority of these commissions were established by the chief justice or under the authority of the court of last resort.”⁷ More recent efforts by states show a similar pattern. For example, in 2019 the New Jersey Supreme Court established an internal Working Group on Juror Impartiality “to focus on practical steps that can be implemented to improve fairness in the jury selection and deliberation process.”⁸

Individual judges can be influential as well. For example, in two opinions in 2019, California Supreme Court Justice Goodwin Liu⁹ and Court of Appeal justice Jim Humes¹⁰ urged the California Supreme Court to rethink its *Batson* framework in order to eliminate racial discrimination in jury selection. Although it is unclear precisely what led California to add Section 231.7 to its statute governing peremptory challenges, the changes included in the bill passed in 2020 track some of the judicially proposed reforms.¹¹

Some steps can be taken by judges and judicial rule changes; others require legislation. As the Arizona Supreme Court Committee on More Effective Use of Juries learned, legislative support may need to be cultivated as part of a move for change.¹² Although the Arizona Committee was able to implement a number of major procedural reforms, several were not implemented because legislative action was not obtained. Judge Michael Dann, chair of the 22-member committee, suggested that failure to include a state legislator on the committee contributed to a lack of legislative support for increasing juror pay. Although it may be advisable to formally include legislative participation on Judicial Task Forces and Commissions, judges on their own can

⁷ 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), https://www.ncsc-jurystudies.org/data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf (hereinafter State-of-the-States Survey) at 9.

⁸ New Jersey Supreme Court, NOTICE TO THE BAR: SUPPORTING JUROR IMPARTIALITY BY ADDRESSING IMPLICIT BIAS—PROPOSAL FOR (1) NEW MODEL VOIR DIRE QUESTIONS AND (2) UPDATES TO MODEL CIVIL AND CRIMINAL JURY CHARGES—PUBLICATION FOR COMMENT, <https://www.njcourts.gov/notices/2021/n210204a.pdf>.

⁹ *People v. Rhoades*, 8 Cal. 5th 393 (2019) (Liu, J., dissenting),

¹⁰ *People v. Bryant*, 40 Cal. App. 5th 525 (2019) (Humes, J., with Banke, J., concurring).

¹¹ Assembly Bill No 3070 (approved by Governor Sept. 30, 2020) (to add Section 231.7 to the Code of Civil Procedure).

¹² B. Michael Dann & George Logan III, *Jury reform: the Arizona experience*, 79 JUDICATURE 280 (1996).

play an influential role in informing legislative change, so the full range of potential actions—both rule-making and statutory changes—are included here.

IV. Increasing the Representativeness of Jury Pools

The pool of potential jurors was historically composed exclusively of white male property owners, but is now drawn from the citizenry at large, including the women and minorities who were not eligible to serve as jurors when the country was founded.¹³ Even in the past century, courts have come a long way from the days when local officials selected citizens for jury service based on their community ties and status.¹⁴ Nonetheless, 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 (and legislatures) could take a number of steps to fully realize, or at least more closely approach, the fair cross-section goal.

A. Expanding Jury Eligibility

1. Removing 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.¹⁵ Other efforts to expand jury representation have led to the elimination of most occupational exemptions. For example, as of July 2006, Indiana eliminated all automatic exemptions. 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.¹⁶

This move toward eliminating occupational exemptions is likely to have the desired effect of increasing wider participation in the jury system. When occupational exemptions were available in New York, a report indicated that “5 to 10% of New Yorkers who return their qualification questionnaires claim an occupational exemption.”¹⁷ After these exemptions were eliminated, 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%.”¹⁸

¹³ Valerie P. Hans, *Challenges to Achieving Fairness in Civil Jury Selection*. Paper to be presented at the Pound Civil Justice Institute’s 2021 Forum for State Appellate Court Judges (July 2021); see also Shari Seidman Diamond & Mary R. Rose, *The Contemporary American Jury*, 14 ANN. REV. LAW & SOC. SC. 239 (2018); Neil Guzy, *Citizen participation in juries*. In Wilbur R. Miller (ed.) THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA (2012).

¹⁴ *Id.*

¹⁵ 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.

¹⁶ Ind. Pub. L. No. 1-2005 § 216 (2005) (amending IND. CODE § 33-28-4-8).

¹⁷ OFFICE OF THE CHIEF ADMINISTRATIVE JUDGE, NEW YORK UNITED COURT SYSTEM, JURY REFORM IN NEW YORK STATE: A SECOND PROGRESS REPORT ON A CONTINUING INITIATIVE, 33 (March 1998).

¹⁸ *Id.*

Despite the value of this expansion, almost half of the states still have professional exemptions.¹⁹ While all have tended to reduce the number of occupations covered, some states still maintain exemptions for occupations like law enforcement or clergy.²⁰ It is unclear how much those remaining exemptions undermine the representativeness of the jury pool on 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 from civil juries. In addition, if jury service is viewed as a responsibility and opportunity that all able-bodied citizens should share, it is hard to justify excluding citizens from service based on occupation.²¹

It is unlikely that the elimination of professional exemptions has the effect of increasing representation from minorities. It does, however, increase the diversity of the jury pool on other dimensions.

2. 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. 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.²² This provision has been interpreted to require reasonable efforts to accommodate the non-English speaking juror by providing an interpreter.²³ With an eye toward maximizing representativeness, the 2005 ABA Principles for Juries and Jury Trials endorsed eligibility of non-English speaking jurors “unless the court is unable to provide a satisfactory interpreter.”²⁴ 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.²⁵ There have been reports of as many as four non-English speaking citizens serving on the same jury panel in recent years,²⁶ but the effect of these jurors on decision making and how people respond to translation in the jury room has received only nascent empirical attention.²⁷ Thus far, no other state has followed New Mexico’s lead. A sub-committee of the Connecticut Jury Selection Task

¹⁹ See National Center for State Courts compendium at <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz>.

²⁰ *Id.*

²¹ Shari S. Diamond, Mary R. Rose, & Beth Murphy, *Embedded Experts on Real Juries: A Delicate Balance*, 55 WILLIAM & MARY LAW REV. 885 (2014).

²² N.M. Constit. Art. VII, §3 1911.

²³ *State v. Rico*, 52 P. 3d 942 (N.M. 2002)

²⁴ American Bar Association, PRINCIPLES FOR JURIES & JURY TRIALS (2005) Principle 2.A.4.

²⁵ Edward Chávez, *New Mexico’s Success with Non-English speaking Jurors*, J. COURT INNOV. 1:303 .

²⁶ 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 (2014).

²⁷ Hilda Lyssette Chavez, *Examining the Effects of the Inclusion of Non-English Speaking Jurors on Jury Verdicts and Juror Experiences*, University of Nevada, Reno, 2012, ProQuest Dissertations Publishing 3550209 (2012).

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.²⁸ 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.

Citizenship is a standard requirement for jury service that excludes the estimated 13.1 million lawful permanent residents in the United States.²⁹ 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.³⁰ Then Governor Brown vetoed the bill, characterizing jury service as “quintessentially a prerogative and responsibility of citizenship”.³¹ 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.³² The idea of including permanent residents on juries is still on the table. At the end of 2020, the Connecticut Jury Selection Task Force revisited the issue and its Jury Summoning Sub-Committee has proposed permitting permanent residents to serve on juries.³³

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, and in light of the recent history of mass incarceration in the U.S., strongly affects the representation of persons of color. A majority of states exclude convicted felons for life from serving on a jury, which has the effect of disproportionately excluding Black adult males. While people with felony convictions account for 8 percent of all adults, they account for 33 percent of the African American adult male population.³⁴ 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.³⁵ To the extent that felon exclusion is justified by

²⁸ Connecticut Jury Selection Task Force, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON (December, 2020) 42-43.

²⁹ Bryan Baker & Nancy Rytina, *Estimates of the Lawful Permanent Resident Population in the United States: January 2013*. Population Estimates. Office of Immigration Statistics, Department of Homeland Security (2014), <https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202013.pdf>

³⁰ AB-1401, 2013 Leg. (Cal. 2013).

³¹ Edmund Gerald Brown, Letter to the members of the California State Assembly. Lett., Off. Gov., Oct. 7 (2013).

³² Amy R. Motomura, *The American jury: Can noncitizens still be excluded?* 64 STANFORD L. REV. 1503 (2012).

³³ Connecticut Jury Selection Task Force, *supra* note 28 at 7.

³⁴ 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 (2017).

³⁵ Darren Wheelock, *A jury of one's "peers": the racial impact of felon jury exclusion in Georgia*. 32 JUSTICE SYS. J. 335 (2011).

presumed anti-prosecution bias among felons, that presumption may not be justified. Binnall found that convicted felons and law students did not differ on a measure of pretrial bias.³⁶ The 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, 2019.³⁷ 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. 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.³⁸ Previously, persons with felony convictions had to wait ten years after they completed their sentence to serve on a jury. 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.”³⁹

B. Expanding Source Lists

At the federal court level, the 1968 Jury Service and Selection Act broke ground by requiring the use of voter registration rolls as juror source lists, as well as a plan for summonses to be sent randomly.⁴⁰ 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.⁴¹

Voter registration and drivers’ licenses are the dominant source lists that states currently use.⁴² 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. For example, minorities tend to have lower voter registration rates. While 77 percent of citizens identifying as White non-Hispanic were registered in 2020, only 69 percent of those identifying as Black and 61 percent of those identifying as Hispanic were registered.⁴³

³⁶ James M. Binnall, *A field study of the presumptively biased: Is there empirical support for excluding convicted felons from jury service?* 36 LAW & POLICY 1 (2014); JAMES B. BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM (2021).

³⁷ Amended California Code of Civil Procedure §203.

³⁸ COUNCIL FOR COURT EXCELLENCE, D.C.’S JUSTICE SYSTEMS OVERVIEW 2020 at 17.

³⁹ DC SUPERIOR COURT CHANGES JURY PLAN TO REDUCE TIME BEFORE RETURNING CITIZENS CAN SERVE AS JURORS, press release issued 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>.

⁴⁰ 28 U.S. Code §§ 1861-1863.

⁴¹ Vincent L. McKusick & Daniel E. Boxer, *Uniform Jury Selection and Service Act*, 8 HARV. J. ON LEGIS. 280 (1971).

⁴² NCSC State of the States Dashboard, <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz> (click on the box labeled Juror Selection and Service Terms).

⁴³ U.S. Census Bureau, Current Population Survey, November 2020 (Table 4b, which also provides breakdown by state), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>.

Supplementing this list with drivers' licenses can help,⁴⁴ but states differ in the extent to which drivers' 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.⁴⁵ Residents of urban areas are underrepresented in the group of drivers. Moreover, drivers do not have to renew their drivers' licenses annually (e.g., every four years in Illinois; every five years in California; every eight years in Michigan), so the addresses available from drivers' 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 18 states and, unlike voting rolls and drivers' licenses, has the advantage of being updated annually. Nine states do not have a state income tax,⁴⁶ but income tax rolls could be a valuable additional source list in the remaining 23 states that do not yet use them. California is one example. In 2022 California will add income tax rolls to its master jury list.⁴⁷ 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.⁴⁸ 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.⁴⁹ More broadly, the NCSC announced it will be working with court leaders in Missouri, New Jersey, Tennessee and Maricopa County, Arizona, to create diverse master jury lists for courts there and nationwide. According to the plan, "The project involves determining how courts compile their jury lists and how accurately those lists mirror the demographics of their communities, and then coming up with ways to help courts make their lists better."⁵⁰

C. Updating Source Lists Annually

The state of Massachusetts has required, since colonial times, that each city and town compile a numbered resident list, on an annual basis, of all residents 17 or over. As a result, the Office of the Jury Commissioner in Massachusetts has what is probably the most complete list of potential

⁴⁴ See studies described in Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 U. MICH. J. L. REFORM 1, 36-37 (2018).

⁴⁵ U.S. Dept. of Transportation, Federal Highway Administration, Highway Statistics 2019, Table 6.3.1, <https://www.fhwa.dot.gov/policyinformation/statistics/2019/>.

⁴⁶ AARP, 9 States that don't have an income tax, April 8, 2021, <https://www.aarp.org/money/taxes/info-2020/states-without-an-income-tax.html>.

⁴⁷ Senate Bill No. 592 (Approved by Governor September 28, 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB592.

⁴⁸ Evan Symon, jury Rolls Expanded to Include Taxpayers under Renewed Bill (July 17, 2020), <https://californiaglobe.com/section-2/jury-rolls-expanded-to-include-taxpayers-under-renewed-bill/>.

⁴⁹ Jury Managers' Toolbox, Ctr. for Jury Studies, Best Practices for Duplicate Removal, https://www.ncsc-jurystudies.org/data/assets/pdf_file/0021/7851/duplicate-removal-techniques-report-mjl.pdf,

⁵⁰ NCSC, Are all of the right people making it into your jury pools? (Jan. 13, 2021), <https://www.ncsc.org/newsroom/at-the-center/2021/are-all-of-the-right-people-making-it-into-your-jury-pools>.

jurors in any state. 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 percent, with higher rates of mobility for minorities, people with lower socioeconomic status, and renters as opposed to homeowners.⁵¹ 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.

D. Maintaining Diversity Through Follow-up

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.”⁵² The estimate is that the national rate is on average 12 percent.⁵³ The loss is not random because the rate of undeliverable summonses tends to be higher in communities of color. As the NCSC reports, “undeliverable . . . rates tend to disproportionately decrease minority representation,”⁵⁴ noting that “undeliverable rates . . . are strongly correlated with lower socio-economic status and, in turn, correlated with minority status.”⁵⁵ 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.⁵⁶

Potential jurors who receive a qualification questionnaire or a summons do not always respond. Nationally, eight percent of all individuals summoned for jury duty fail to appear (FTA), but rates can be much higher. Lower-socioeconomic-status individuals are less likely to appear, 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 that sending prospective jurors a reminder postcard one week before the reporting date reduced FTA rates by at least 5 percentage points.⁵⁷ Although postcards that describe penalties that would result from FTA reduced FTA rates by 10 percentage points, courts may be reluctant to threaten such

⁵¹ Judge William Caprath (ret.), Paula Hannaford-Agor, Stephanie McCoy Loquvam, and Shari Seidman Diamond, *Assessing and Achieving Jury Pool Representativeness*, 55 THE JUDGES’ JOURNAL 16, 18; based on U.S. Census Bureau, <http://www.census.gov>, which provides detailed information about state and local migration rates. U.S. Census Bureau, Table B07001 (Geographic Mobility in the Past Year by Age for Current Residents in the United States, 2009–2013 American Community Survey 5-Year Estimates).

⁵² National Center for State Courts, Jury Manager’s Toolbox, Center for Jury Studies, Best Practices to Decrease Undeliverable Rates 1 (2010), https://ncfsc-web.squiz.cloud/_data/assets/pdf_file/0020/6806/undeliverable-best-practices.pdf.

⁵³ Paula Hannaford-Agor, “Neither Snow, nor Rain, not Heat, nor Gloom of Night Stays These Couriers from the Swift Completion of Their Appointed Rounds” *Jury News*, 25 CT. MANAGEMENT, No. 3, at 65 (2010).

⁵⁴ National Center for State Courts, Jury Manager’s Toolbox, Center for Jury Studies, A Primer on Fair Cross Section JURISPRUDENCE, 1, 3 (2010), https://www.ncsc-jurystudies.org/_data/assets/pdf_file/0026/7478/a-primer-on-fair-cross-section.pdf.

⁵⁵ *Id.* at 5.

⁵⁶ Hannaford-Agor, *supra* note 53 at 66.

⁵⁷ Shaun Bowler, Kevin Esterling, & Dallas Holmes, *Get Out the Juror*, 36 POLIT. BEHAVIOR 515 (2013).

penalties. The NCSC has found that, when courts sent a second summons, nonresponse/FTA rates were 24 percent to 46 percent lower than when no follow-up summons was sent. Actual follow-up Order-to-Show-Cause proceedings or other aggressive approaches (e.g., fines) had only a marginal effect.⁵⁸

Some courts now use the Internet to qualify and schedule jury service.⁵⁹ This innovation can be remarkably efficient and convenient for users, but it may inadvertently undermine representativeness by reducing non-response 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 likely to be less of an issue in some jurisdictions⁶⁰ and 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.

E. Supporting Diversity Through Replacement Summonses

Both undeliverable summonses and non-responses reduce the diversity of the jury pool. One approach that 18 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 “missing juror.” 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. 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 Blacks in the wheel, that is, the jury pool of qualified jurors, used in the district.⁶¹

Some states are moving in this direction as well. Connecticut, following the recommendation of the Connecticut Jury Task Force, has a bill pending in the legislature that would institute this follow-up procedure in response to undeliverable summonses.⁶²

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 less than 43,000 zip codes in the U.S.⁶³ and census tracts are more homogeneous in the number of persons they

⁵⁸ Caprathe et al., *supra* note 51, at 19.

⁵⁹ Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century* (symposium), 66 BROOK. L. REV. 1257 (2001).

⁶⁰ Mary R. Rose & Michelle Brinkman, *Crossing the ‘Digital Divide’: Using the Internet to Impanel Jurors in Travis County, Texas*, 1 J. OF CT. INNOV. 5 (2008).

⁶¹ Mary R. Rose, Carmen Gutierrez, Jeffrey Abramson, & The Hon. Beth Jantz, What’s a Court to Do? The Problem of Summons Non-Response and Jury Representativeness, paper presented at the Law & Society Assoc. Annual Meeting (2021).

⁶² Bill 2021HB-06548-R000577-FC.docx, available at <https://search.cga.state.ct.us/r/basic/>, would add the following text: “On 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.”

⁶³ ProximityOne, 10 Reasons to use Census Tract Versus ZIP Code, http://proximityone.com/tracts_zips.htm.

cover, with census tracts tending to cover 4,000+ individuals, while the population of a single ZIP code can exceed 100,000.⁶⁴

F. 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 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 percent to 46 percent within a year.⁶⁵ 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 to cover even travel costs. Courts with higher-than-average-compensation policies report excusal rates of 7 percent compared to 9 percent for courts with lower-than-average-compensation policies.⁶⁶

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 percentage point increase in the deferral rate is associated with a decreased excusal rate of 0.7 percent.⁶⁷

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 percent, while in courts with longer terms of service the average is 9 percent.⁶⁸

In sum, addressing the hardships potential jurors face when a jury summons appears can increase participation. To the extent that these hardships differentially affect minorities, reducing those burdens may also improve representativeness.

⁶⁴ *Id.*

⁶⁵ Robert C. Walters, Michael D. Marin, & Mark Curriden, *Jury of our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 350 (2005).

⁶⁶ Caprathe et al., *supra* note 51 at 19.

⁶⁷ *Id.*

⁶⁸ *Id.*

V. Preserving Representativeness and Fairness in the Courtroom

A. Allowing Attorney Participation and Case-Specific Juror Questionnaires as Part of Jury Selection

Individual questioning of potential jurors by the judge can be revealing,⁶⁹ 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.”⁷⁰ 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.⁷¹

When attorneys are given only a limited role in conducting voir dire, as they often are in federal courts, 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.⁷² 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.

B. Bolstering *Batson* (a.k.a. Giving *Batson* Teeth)

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 discriminatory behavior could remove potential jurors from sitting on a trial based on the behavior of an attorney during jury selection.⁷³ In the cases that followed, the Court expanded this prohibition to cover attorneys in civil cases.⁷⁴ 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.⁷⁵ 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.⁷⁶ Finally, the trial court judge must decide whether the

⁶⁹ See discussion of voir dire in Hans, *supra* note 13, at 14-16, including the empirical research by Gregory Mize showing how detailed individual juror questioning can be revealing in disclosing potential juror bias).

⁷⁰ 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. REV. 149, 160 (2010).

⁷¹ Susan Jones, *Judge versus Attorney Conducted Voir Dire*, 11 LAW & HUM. BEHAV. 131 (1987).

⁷² Shari Seidman Diamond, Leslie Ellis, & Elisabeth Schmidt, *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J. OF LAW & PUB. POLICY 77, 93 (1997).

⁷³ 476 U.S. 79 (1986).

⁷⁴ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

⁷⁵ *Id.* at 94 (citing *Washington v. Davis*, 426 U.S. 229, 239-42, (1976)).

⁷⁶ *Id.* at 97.

offered explanation is sufficient to rebut the claim that the challenge was racially motivated.⁷⁷ If persuaded, 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.⁷⁸ Time and empirical research have provided evidence that his expectation was correct.⁷⁹ One reason may be that because a challenge need not be reasonable, or even plausible, 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. 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 in *Batson* have not succeeded in removing race from jury selection.

State courts have been grappling with the deficiencies of *Batson* for 35 years. In recent years, however, the research on implicit racism and the growing awareness that race (and gender) stereotypes can influence all of us 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 below, show precisely that bias.⁸⁰ 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*,⁸¹ 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.⁸²

Several state courts have explicitly taken on the perceived failure of *Batson* and have instituted, or are considering implementation of, changes that aim at protecting the fair use of peremptory challenges that *Batson* failed to achieve. The changes have taken four primary forms: 1) finding that a *prima facie* case has been made if a party strikes the last member of a racially cognizable

⁷⁷ *Id.* at 96-98.

⁷⁸ *Id.* at 102-03 (Marshall, J., concurring).

⁷⁹ See, e.g., Albert 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 Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 503 (1996); Karen Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 564-66 (1992).

⁸⁰ Sam R. Sommers & Michael I. Norton, *Race-based Judgments, Race-neutral justifications: Experimental Examinations of Peremptory Use and the Batson Challenge Procedure*. 31 LAW AND HUMAN BEHAVIOR 261 (2007).

⁸¹ 178 Wn.2d 34, 309 P.3d 326 (2013).

⁸² *Id.* at 35-36.

group; 2) eliminating the first step in the *Batson* procedure; 3) 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 4) identifying a series of juror characteristics that presumptively indicate a discriminatory basis for removal of that juror.

1. 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 of 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. [citations omitted]. See *Snyder v. Louisiana*, 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.⁸³

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*.⁸⁴ 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.”⁸⁵

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*.⁸⁶ 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. The Washington Supreme Court disagreed and set out a more demanding framework for evaluating potentially discriminatory peremptory challenges.⁸⁷ The result was that the decision of the trial court was reversed, and the case was remanded for a new trial.

2. The First Step in the *Batson* Procedure Constitutes an Unnecessary Obstacle to Showing that a Peremptory Strike Is Discriminatory.

⁸³ *Commonwealth v. Robertson*, 480 Mass. 383, 393, 105 N.E.3d 253, 263 (2018).

⁸⁴ *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

⁸⁵ *Id.* at 724.

⁸⁶ 192 Wn. 2d 225, 429 P.3d 467 (2018).

⁸⁷ *Id.* at 249.

Some courts have determined that the first step in the *Batson* procedure is an unnecessary obstacle to a claim that a strike has a discriminatory purpose. Thus, once a party makes the claim, the opponent should 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). California took this position in its new legislation governing peremptory challenges, which will go into effect in 2022 for criminal cases and 2026 for civil cases.⁸⁸ The amended statute applies to a broad range of groups that might experience discrimination in jury selection. It prohibits a party from using a peremptory challenge to remove a prospective juror 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.⁸⁹ Either a party or the trial court may raise an objection to the use of a peremptory challenge based on these criteria.⁹⁰ Although "no reason need be given for a peremptory challenge,"⁹¹ 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."⁹²

Other states too have eliminated or recommended eliminating *Batson*'s first step. In fact, Connecticut adopted this approach in 1989. 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. 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 also aid in expediting any appeal."⁹³ It is significant that the Connecticut Supreme Court's *Batson* Task Force that issued its report in 2020 determined that further action was required to fulfill the promise of *Batson*.⁹⁴

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. An appellate court is therefore in a better position to evaluate the reason for the strike.

⁸⁸ Assembly Bill No 3070 (approved by Governor Sept. 30, 2020) (to add Section 231.7 to the Code of Civil Procedure).

⁸⁹ *Id.* at 231.7(a).

⁹⁰ *Id.* at 231.7(b).

⁹¹ California Code of Civil Procedure - CCP § 226(b) (2019).

⁹² California Code of Civil Procedure Section 231.7(c) (2020).

⁹³ *State v. Holloway*, 209 Conn. 636, 646 (1989).

⁹⁴ Connecticut Jury Selection Task Force, *supra* note 28 at 16-20.

3. 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 behavior. Modern research has revealed that people can make judgments that are systematically influenced by race or gender without any awareness that those features affect their judgments. People can even justify those judgments in terms of factors other than race or gender without being aware that it is race and gender that is actually explaining their choices. Sommers and Norton demonstrated this effect when they gave practicing lawyers two potential juror profiles in a hypothetical case of robbery and assault with a Black defendant.⁹⁵ One juror profile depicted the photo of a journalist who wrote stories about police misconduct, and the other showed the photo of a business executive who was skeptical of forensic evidence. Half of the respondents saw the photo of the journalist presented as a Black juror and the photo of the business executive presented as a White juror. For the other half of respondents, the photos were reversed. That is, the journalist was presented as White and the executive was presented as Black. Respondents were asked to act as prosecutors and to choose which of the two potential jurors to strike peremptorily. The lawyer respondents struck the journalist 79% of the time when he was shown as Black but just 43% of the time when he was presented as white. Yet they generally explained their decisions as based on race-neutral reasons in the juror's background and attitudes. Although it is possible that the participants were dissembling, their behavior is also consistent with a lack of awareness of what actually motivated their choice.

A variety of studies have demonstrated that students, nurses, doctors, police officers, employment recruiters, and many others exhibit implicit biases with respect to race, ethnicity, nationality, gender, social status, and other distinctions.⁹⁶ If we are concerned about bias in the exercise of peremptory challenges, it makes sense to recognize that unconscious bias 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."⁹⁷ Washington State has similarly set aside the requirement that discrimination be purposeful. 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

⁹⁵ Sommers & Norton, *supra* note 80.

⁹⁶ John T. Jost et al., *The existence of implicit bias is beyond reasonable doubt: A refutation of ideological and methodological objections and executive summary of ten studies that no manager should ignore*, 29 RESEARCH IN ORGANIZATIONAL BEHAVIOR 39 (2009).

⁹⁷ Cal. Assembly Bill No. 3070, Sec. 2, 231.7, Code of Civil Procedure.

not find purposeful discrimination to deny the peremptory challenge.”⁹⁸ 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.”⁹⁹ 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 proposed new rule for jury selection to a large extent mirrors Washington’s General Rule 37, using the objective observer as the reference point:

The court shall then evaluate from the perspective of an objective observer, as defined in section (f) 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.¹⁰⁰

Section (f) of the proposed Connecticut rule further specifies: “For the purpose of this rule, an objective observer (1) 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.”¹⁰¹

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.¹⁰² The changes in California’s new statute, Washington State’s new rule, and Connecticut’s proposed new rule offer a potential remedy for this cramped interpretation of bias: to recognize implicit bias as a basis for rejecting a peremptory challenge. 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. Instead, the court is charged with asking a broader, more neutral, question: whether an objective observer would view the explanation for the challenge as plausibly non-discriminatory or, alternatively, the result of implicit or explicit bias. 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.

⁹⁸ Washington State General Rule 37(e) (2018).

⁹⁹ *Id.* at Section (f).

¹⁰⁰ Connecticut Jury Selection Task Force, *supra* note 28 at 16.

¹⁰¹ *Id.*

¹⁰² 514 U.S. 765 (1995).

4. 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. To avoid their inappropriate use in jury selection, General Rule 37 listed them as:

presumptively invalid reasons for a peremptory challenge: (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.¹⁰³

To the extent that some of these characteristics are correlated with race, the effect of enforcing these presumptions should make it easier to mount a successful *Batson* challenge to a peremptory strike exercised on 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. California began with the same seven factors included in Washington State's General Rule 37, but listed six additional characteristics. 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 factfinder 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."¹⁰⁴

Finally, Connecticut is proposing a similar approach, adopting the seven Washington State factors with a single addition: having been a victim of a crime.¹⁰⁵ 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."¹⁰⁶

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

¹⁰³ Washington State General Rule 37(h) (2018).

¹⁰⁴ California Code of Civil Procedure Section 231.7(f) (2020).

¹⁰⁵ Connecticut Jury Selection Task Force, *supra* note 28 at 16.

¹⁰⁶ *Id.* at 17.

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 some 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 juror in the courtroom.¹⁰⁷ Attorneys may explain a challenge by alleging 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."¹⁰⁸ This list in Washington State's General Rule 37 was included in the California statute.¹⁰⁹ Connecticut proposes to include all but "provided unintelligent or confused answers" on its list of presumptively invalid behavioral reasons.¹¹⁰ 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.¹¹¹ California further requires that counsel offering the reason explain why the conduct of the prospective juror matters.¹¹² 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.¹¹³

C. Requiring Judicial Presence During Voir Dire

In most trials, the judge is present from jury selection through the end of the trial. The Connecticut Jury Selection Task Force Peremptory Challenge Working Group, however, was charged with considering whether judges should preside over jury selection in civil trials. The group concluded that the presence of a judge was unnecessary, and unnecessarily costly, and inefficient. In the absence of empirical evidence that the presence of a judge was associated with

¹⁰⁷ Washington State General Rule 37(i) (2018).

¹⁰⁸ *Id.*

¹⁰⁹ California Code of Civil Procedure Section 231.7(g) (2020).

¹¹⁰ Connecticut Jury Selection Task Force, *supra* note 28 at 16.

¹¹¹ *Id.* at 17-18.

¹¹² California Code of Civil Procedure Section 231.7(g)(2) (2020).

¹¹³ California Code of Civil Procedure Section 231.7(j) (2020) ("if an objection is denied, it may be given *de novo* review by an appellate court. The trial court's factual findings will be reviewed for substantial evidence."); Connecticut Jury Selection Task Force, *supra* note 28 at 16. ("The denial of an objection to a peremptory challenge made under this rule shall be reviewed by an appellate court *de novo*, except that the trial court's express factual findings shall be reviewed under a clearly erroneous standard.").

a reduction in bias (and the observation that 25 years of judicial presence in criminal cases during jury selection had not eliminated bias), the group found that such a rule requiring the presence of a judge was not worth pursuing (and would likely encounter judicial resistance). Yet when attorneys conduct voir dire outside the judge's presence, judges are left to rule on challenges without the benefit of direct observation of jurors' initial reactions to the questions asked of them. If a juror's behavior becomes the basis for a peremptory challenge, the judge cannot verify what objectionable behavior the proponent of the challenge claims to have observed. The presence of the judge may also set a tone in the courtroom that encourages the attorneys to handle the selection process with greater professionalism. Although the opportunity to waive the presence of the judge is sometimes available, it is unknown how often judicial presence is in fact waived. According to California's Bench Handbook for 2013, in practice, waiver of a judge's presence in civil trials rarely occurs "because of the opportunity for abuse," and most judges allow such waiver only "when they know and trust the integrity of all the attorneys and are engaged in extremely pressing business." While it would be useful to have empirical research that examines how the presence of a judge affects jury selection, until that research is conducted, it seems prudent for the default to include judicial presence.

D. Eliminating or Reducing the Number of Peremptory Challenges

Some observers, beginning with Justice Marshall in *Batson*,¹¹⁴ have proposed an easy way to avoid bias in exercising peremptory challenges: simply eliminate them. No peremptory challenges would mean no race-based exclusions.¹¹⁵ But would that 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 make-up of the jury.

The other approach, which would also reduce the potential effect of racial and ethnic bias in jury selection, would be to *reduce* the number of peremptory challenges to, for instance, three or four per side for a 12-member jury. Currently, eight states with 12-person civil juries allow each side to exercise at least six peremptory challenges.¹¹⁶ A reduction to three or four per side, currently the number in the majority of states, would treat the peremptory challenge as a safety

¹¹⁴ 476 U.S. at 105 (Marshall, J., concurring).

¹¹⁵ See *Miller-El v. Dretke*, 545 U.S. 231, 273 (Breyer, J. concurring); 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 (2011); Mark W. Bennett, *supra* note 70; 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 (1995); Melilli, *supra* note 79.

¹¹⁶ G. Thomas Munsterman, Paula L. Hannaford-Agor, & G. Marc Whitehead (editors) *JURY TRIAL INNOVATIONS* (Second Edition) (2006), Appendix 1 at 182; updated at <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz>.

valve to control non-discriminatory bias rather than an invitation to attorneys to try to mold the composition of the jury along a pathway that facilitates discrimination.

States have periodically considered reducing the number of peremptory challenges they allow, but those proposals have not met with much success.¹¹⁷ It may be that the recent attention to implicit bias will cause a renewed interest in re-examining whether reductions should be pursued. It is interesting that the COVID pandemic led at least one state to reduce, at least temporarily, the number of peremptory challenges provided to each side in both criminal and civil cases (from 4 to 2 in civil cases).¹¹⁸ Follow-up research on the effects would be welcome.

E. Returning to Larger Civil Juries

A remarkably straightforward structural change to the civil jury trial in many states would directly and dramatically increase diversity on the jury: a return of the civil jury to its original size of twelve. 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 12. 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 12 than with a jury of 6.

Contrary to the U.S. Supreme Court's assumption in 1970,¹¹⁹ larger and smaller juries are not functionally equivalent. 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 and seat twelve-member juries in civil cases.¹²⁰ 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.¹²¹ 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.¹²² 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."¹²³

¹¹⁷ Kathleen Shambaugh, Reducing Peremptory Challenges in California, Institute for Court Management Fellows Program, 2013-2014, <https://ncsc.contentdm.oclc.org/digital/collection/juries/id/274> (reviewing failed efforts in New Jersey, Tennessee, and California).

¹¹⁸ Supreme Court of Idaho, Order of July 24, 2020, <https://isc.idaho.gov/EO/FINAL-Order-In-Re-Jury-Trials-with-attachments.pdf>.

¹¹⁹ *Williams v. Florida* 399 U.S. 78 (1970); see also *Colgrove v. Battin*, 413 U.S. 149, 157-56 (1973).

¹²⁰ 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).

¹²¹ *Id.* at 52 ("Greater unpredictability is the predictable result when courts use shrunken juries.").

¹²² See *Williams*, at 102; *Colgrove*, 413 U.S. at 159-60 & nn.15-16.

¹²³ Higginbotham, *supra* note 120, at 52.

In collaboration with Destiny Peery, Emily Dolan and Cook County judge Francis Dolan, I conducted one of the studies cited by Higginbotham, Rosenthal, and Gensler. The impact we found of jury size on Black juror representation was indeed striking.¹²⁴ While only 2.1 percent of the 12-member juries lacked a single Black member, 28.1 percent of the 6-member juries were entirely without Black representation.¹²⁵ 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 percent of the jury pool both before and after attorneys exercised their peremptory challenges.¹²⁶ The difference is attributable entirely to jury size.

The initial move to reducing jury size was justified as a cost-saving measure. Judge Higginbottom 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 jury. Civil jury trial rates, both federal and state, have declined significantly so that the total budget for jury trials, whether 6-member or 12-member, has declined as well. The authors suggest that we can “afford to invest in the few civil jury trials we are fortunate enough to still have.”¹²⁷

VI. Instructing Jurors on Bias

Courts across the country have attempted to ameliorate potential bias on the jury by educating jurors on the effects of bias, both implicit and explicit, on judgments. The efforts have included preparing a specially created video presented to jurors at the beginning of jury service,¹²⁸ as well as writing detailed preliminary instructions and final instructions that remind the jurors that bias can infect all of us, consciously or unconsciously. The legal system depends on jury instructions to provide jurors with guidance on the relevant law they should apply. Although the jury instructions are sometimes challenging for jurors to understand, efforts to create understandable instructions have paid off.¹²⁹ Nonetheless, applying an instruction to control unconscious bias presents a particularly hefty challenge.

In one of the most intensive individual efforts, recently retired Judge Mark W. Bennett of the U.S. District Court in the Northern District of Iowa would spend approximately twenty-five minutes

¹²⁴ Shari Seidman Diamond, Destiny Peery, Francis J. Dolan, & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMP. LEG. STUD. 425, (2009).

¹²⁵ *Id.* at 442.

¹²⁶ 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.

¹²⁷ Higginbotham, *supra* note 120, at 54.

¹²⁸ 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.”

<https://www.wawd.uscourts.gov/jury/unconscious-bias>.

¹²⁹ Shari Seidman Diamond, Beth Murphy, & Mary R. Rose, *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures and Next Steps*, 106 NORTHWESTERN U. LAW REV. 1537 (2012).

discussing implicit bias during jury selection.¹³⁰ 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.”¹³¹ 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 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.¹³²

Other instruction efforts have been less intensive, but instructions offer a relatively low- cost way to address what has been recognized as a problem that needs attention. Yet although many informational interventions have been proposed to address implicit bias in the legal system (e.g., the American Bar Association’s “Achieving an Impartial Jury” Toolbox),¹³³ their effect is uncertain at this point. In 2013, Jennifer Elek and Paula Hannaford-Agor wrote: “It is not yet known whether a well-crafted jury instruction could help to mitigate the effect of implicit racial bias in juror decision making.”¹³⁴ That statement is still true. Although we have substantial evidence that bias,

¹³⁰ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1182, n. 250 (2012). The authors, who include Judge Bennett, describe the clip he 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), available at <http://www.youtube.com/watch?v=ge7i60GuNRg>.”

¹³¹ *Id.*

¹³² *Id.* at 1182-1183.

¹³³ https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.pdf.

¹³⁴ Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 COURT REVIEW 190 (2013). In a follow-up article, Elek and Hannaford-Agor published the results of an online experiment in which they attempted to test the impact of an implicit bias instruction; the experiment

conscious and unconscious, is common, 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 research to be done to determine both the extent of the bias in all trial participants—jurors, attorneys, and judges—and measures that can reduce it.

VII. Best Prospects for Optimizing Fairness (and What We Don't Know)

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 far more heterogeneous and representative than it has ever been, systematic underrepresentation of minorities on juries persists, threatening to undermine the fairness of the jury trial. Given research demonstrating that greater diversity of background and experience brings benefits not only of greater legitimacy of the jury system¹³⁵ but of more robust fact-finding and deliberation, courts are wise to take up the challenge of expanding their jury pools. Greater representativeness 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.

Similarly, modern courts are recognizing that unconscious sources of bias can affect the jury selection process and the behavior of the jurors in deciding the case. Fairness demands that steps be taken to cabin those biases.

The variety of procedural modifications discussed here are likely to have different costs and different payoffs, and the payoffs may differ for different jurisdictions. Each of them offers a contribution to the fairness of the jury trial. Some, however, are particularly likely to have a substantial impact. Here are the four I would single out:

- 1. Expansion of eligibility to include convicted felons who have completed their sentences.** Of all categories of ineligible individuals, reinstating felon inclusion on jury lists is likely to have the greater effect in increasing racial diversity on the jury. Service on civil trials is particularly likely to be unproblematic.
- 2. Use of up-to-date (and comprehensive) juror lists.** A stale jury list disproportionately misses minorities and increases the percentage of summonses that cannot be delivered, making it both unrepresentative and inefficient. To monitor the quality of the list in obtaining a representative pool, it is important that the qualification questionnaire to

did not show the usual racial bias in the control condition, making the results ambiguous, but the experiment also did not find an effect of the implicit bias instruction. *Implicit Bias and the American Juror*, 51 COURT REVIEW 522 (2015).

¹³⁵ Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003).

require the respondent to indicate their race and ethnicity. Follow-up and replacement of undeliverable summonses are key supports to ensuring a representative jury pool.

3. **Adoption of the objective observer standard to judge a *Batson* challenge.** Several jurisdictions have made or are making this change. In principle the change in standard, which drops the need to label the strike as the result of purposeful discrimination, makes it easier to identify it as discriminatory, whether 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 standard. It will be important for the jurisdictions making this change to trace its effects. The evaluation needs to track three possible effects: a drop in discriminatory peremptory challenges if the change affects the behavior of the attorneys who exercise them, a change in judicial rulings on challenges to proposed strikes, and a change in the composition of the jury if the new standard reduces discriminatory removals that reduce the extent to which the resulting juries are representative of the community.
4. **Limited availability of peremptory challenges and increased jury size to increase diversity.** In jurisdictions where the parties have more than four peremptory challenges or where the jury is less than twelve, diversity on all dimensions, even in the face of bias, will be increased by these changes. Although state courts can support these changes, they will generally require legislative action. They are worth pursuing because they offer a clear path to a more representative jury.

The focus to this point has been on the procedures that produce and structure the jury. But if all of us have 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 those instructions has not yet emerged. In the end, despite the jury's remarkable performance, the toolbox of the modern court for producing the ideal jury trial is not yet full.