

The Costs to Democracy of a Hegemonic Ideology of Jury Selection

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INTRODUCTION

Dozens of articles document the many ways in which the capital jury selection processes limit expansive jury participation. Black citizens clear their schedules, find transportation or parking, and bide their time in the jury room waiting to participate, only to be sent home time and time again. This daily reality stands in sharp contradiction to the lofty ideals claiming jury participation as one of the most important opportunities for democratic engagement.¹

In this article, we borrow the framework of competing ideologies to illuminate the tensions between the law and practices governing jury selection and longstanding ideals about democratic jury participation.² We argue that the practical law of jury selection derives not from the ideology of juries as fundamental to democracy, but from its own hegemonic ideology. An ideology becomes hegemonic when a majority of the population takes a set of practices and values as given—the

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¹ While civil and criminal juries carry many similarities and serve parallel roles, we limit our discussion here to criminal juries. Juries determine both guilt and sentencing in death penalty cases.

² We borrow the concept of ideology from a rich and varied tradition without engaging fully in the nuances of that discipline. In our use of ideology we refer perhaps simply to “*a coherent and relatively stable set of beliefs or values*,” Kathleen Knight, *Transformation of the Concept of Ideology in the Twentieth Century*, 100 AM. POL. REV. 619, 625 (2006), or to beliefs that are “*idealized, universalized, and detached* expression of actual social relations[.]” John Levi Martin, *What is Ideology?*, 9 SOCIOLOGIA, PROBLEMAS E PRÁTICAS 9, 17-18 (2015). Scholars have noted that law and ideology “partially constitute each other and operate together to generate the internal experience of being subject to a system of law. It is a commonplace that legal doctrine reflects our ideology.” J. M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1138 (1991) (reviewing ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)). Emphasis had been removed [R5.2(d)]

only way of doing things or “just the way things are” in society.³ Hegemonic ideologies present particular concerns in societies that have been marked by inequality and structural racism. The rules of jury selection operate as a hegemonic ideology that ignores the historical context in which juries were conceived and overwhelms the goals of democracy as we understand them in the most expansive and inclusive sense.

We raise the concern that jurisprudence that limits its analysis to effects on individual cases and individual jurors understates the harms to our idealized jury system. Our juxtaposition makes clear that neither ideology honestly interrogates the constrained and limited democracy that was at play when juries were designed. Both essentially accept as normal that Black people will be underrepresented. Both presume as a corollary that the experience and perspective of white people, and white men in particular, is inherently fair and neutral. A significant body of empirical research (including the study presented in this Article) demonstrates that the way we select juries imposes cumulative costs that erode opportunities for people of color to participate and necessitates new approaches.

Section II of this article introduces a widely shared and understood “Ideology of Jury Democracy.” This ideology constitutes part and parcel of our idealized democratic system of government. It also introduces the competing “Ideology of Jury Selection,” reviewing the law and practice of selecting juries, with an emphasis on juries deciding death penalty cases. Sections III and IV review prior research and present a new study from one North Carolina county to demonstrate the impact of the hegemonic Ideology of Jury Selection on jury diversity. Section V considers how those impacts subordinate the values of the Ideology of Jury Democracy. The final section discusses recent reforms and their potential to recenter the Ideology of Jury Democracy in our system.

I. THE COMPETING IDEOLOGIES OF JURY SELECTION

Both our democratic ideals and the specific laws governing the selection of juries rest on unquestioned and contradictory assumptions about which costs are negotiable and which are not. The Court has recognized tension between these ideals and practices.⁴ Ideologies present a useful framework for examining these tensions

³ See Susan S. Silbey, *Ideology, Power, and Justice*, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES 272, 293 (Bryant G. Garth & Austin Sarat eds., 1998) (arguing that a hegemonic ideology makes “[i]magining an alternative system ... not only difficult, not only undesirable, but undesired”). Comma missing [R5.2]

⁴ See, e.g., *Smith v. State of Texas*, 311 U.S. 128, 130 (1940) (noting that racially exclusive jury selection practices were “at war with our basic concepts of a democratic society and a representative government”).

that arise in jury selection.⁵ This Section develops each ideology in turn and highlights ways in which they conflict with each other.

Subsection A presents ways in which our very system of democratic participation relies on juries; juries form part of our core values and are spoken about in an exalted manner as an “Ideology of Jury Democracy.” Subsection B turns to the legal framework for jury selection, especially in cases involving a death sentence, and its entrenched rationale, which reflect the “Ideology of Jury Selection.” Applying this ideological perspective to jury selection both “emphasizes the ways in which law participates in the struggles to create visions of the world that are accepted as true and real”⁶ and provides a framework for “understanding and analyzing the persistent gap between the ideals and practices of law.”⁷

A. *Juries: A Germ of American Freedom*

Few legal institutions are spoken of with more abstract adulation than the criminal jury. Gouverneur Morris, one of the drafters of the Constitution, spoke of John Peter Zenger’s 1735 jury trial as the “germ of American freedom, the morning star of liberty which subsequently revolutionized America.”⁸ Alexis de Tocqueville praised the American jury as a “free public school” where ordinary citizens learned to exercise their political power.⁹ Stephen Landsman described the process by which early American states embraced the right to a jury trial as reflecting “a common allegiance” that “played an important role in drawing the new nation closer together.”¹⁰ The Supreme Court echoed this sentiment in *Powers v. Ohio*, praising the “privilege of jury duty” as the average citizen’s “most significant opportunity to participate in the democratic process.”¹¹ The Supreme Court emphasized as early as 1879 in *Strauder v. West Virginia* that the inclusive composition of juries plays “a very essential part of the protection such a mode of trial is intended to secure.”¹²

⁵ See Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 259 n.30 (2019) (reviewing various ideologies at work in the criminal justice system and stating that “[t]o use the term ideology to describe a conception of procedure underscores the potential of ingrained ideas about the legal and political world to legitimate and normalize systemic injustices”).

⁶ Silbey, *supra* note 3, at 290. Wrong page

⁷ Silbey, *supra* note 3, at 279.

⁸ NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 41 (Prometheus 2007) (quoting WILLIAM PUTNAM, *JOHN PETER ZENGER AND THE FUNDAMENTAL FREEDOM* 4 (McFarland 1997)).

⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 448 (Eduardo Nolla ed., James T. Schleifer trans., The Liberty Fund 2012).

¹⁰ Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS LJ 579, 596-97 (1993); see also Jenny E. Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 829 (2015); William Ortman, *Chevron for Juries*, 36 CARDOZO L. REV. 1287, 1326 (2015).

¹¹ *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (internal citations omitted).

¹² *Strauder v. State of West Virginia*, 100 U.S. 303, 308 (1879) (declaring unconstitutional the West Virginia statute that excluded Black citizens from participation in grand or petit juries, noting

Citizens summoned for jury duty hear the same message. Juror orientation videos extol the fundamental importance of jury service to a functioning democracy.¹³ The gravity of the jurors' task and the importance of their participation are emphasized to reassure them that the time they take away from their daily lives is in service of lofty ideals.

Juries have played an important rhetorical role since the early years of the U.S. democracy as connecting the government to the people, thereby operating as a restraint on power. In this manner, the idea of "juries became one of the agents of change helping to introduce new values into the law and society."¹⁴ While racism, sexism, and classism restricted jury participation from the beginning, its lofty goals persisted. From the start, juries operated as a check on power: "people throughout America were preoccupied with safeguarding the jury right, relying upon the jury to restrain government."¹⁵

The Supreme Court has embraced this conception of juries in modern decisions. For instance, in *Apprendi v. New Jersey*,¹⁶ the Court emphasized the role of juries in determining the scope of criminal punishments, resting its decision "on the historical principle that citizens serving as jurors push the law to account for communal values."¹⁷ Juries create law by forcing it "out of the realm of the theoretical" and "grounding the law in the living world of the citizens whose obedience it commands."¹⁸

Alexis de Tocqueville observed in the 1830s that, in the United States, the "jury is before all else a political institution" that places "the real direction of society in the hands of the governed or a portion of [the governed], and not in the hands of those governing."¹⁹ Jenny Carroll notes that jurors provide this direction—serving this democratic function—by becoming a source of law and governance in the jury

"[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds").

¹³ See e.g., Middle District of Louisiana, *Juror Orientation Video*, at 3:08, <https://www.lamd.uscourts.gov/juror-orientation-video> (Justice Samuel Alito explaining that the framers considered the right to trial by jury "one of the most important safeguards of democracy"); DCCourtsChannel, D.C. Superior Court, *New Juror Orientation Video with Chief Judge Josey-Herring Introduction*, at 9:23 YOUTUBE (Mar. 15, 2022), <https://www.youtube.com/watch?v=owyo0ksJdGtE> [<https://perma.cc/3WZT-Y4LS>] (explaining that the right to serve on a jury "symbolized true equality").

¹⁴ Landsman, *supra* note 10, at 595.

¹⁵ Landsman, *supra* note 10, at 593; see also Carroll, *supra* note 10, at 830 (2015); Ortman, *supra* note 10, at 1326.

¹⁶ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¹⁷ Carroll, *supra* note 10, at 833.

¹⁸ Carroll, *supra* note 10, at 830; see also Ortman, *supra* note 10, at 1327 (arguing that "jury decisions have both majoritarian and deliberative democratic provenance").

¹⁹ Tocqueville, *supra* note 9, at 444-45. Misquoted... actual text reads "a portion of them," [R5.2(a)]

room when they find facts, apply legal standards, and contemplate the fates of defendants.²⁰ Vikram David Amar also recognizes the importance of this role beyond the cases of individual litigants in that “it was a means by which citizens could engage in self-government.”²¹

Under this idealized view, the benefits are reciprocal. Jurors benefit democracy through their service, and their service benefits them. Tocqueville recognized that jury participation teaches jurors “the practice of equity” and, by forcing jurors “to get involved in something other than their own affairs, it combats individual egoism, which is like the rust of societ[y].”²² Valerie Hans and colleagues note that these benefits theoretically arise from “the consequential experience of reasoned discussions among citizens about public concerns.”²³ Research shows that jury participation enhances public engagement, especially participation in criminal trials. Previously reluctant voters took part in subsequent elections at higher rates following jury service.²⁴

The Constitution also recognizes the rights of the accused as part of the great jury project. As Jeffrey Abramson explains, “the institution is simultaneously all about the political, participatory, or democratic rights of citizens to be jurors, and yet all about the rights of the accused to find in the jury of the people the best protection against oppression.”²⁵ This faith in juries rests on the assumption that a “jury of the people” leads to better protection from oppression, in part perhaps because popular participation in justice contributes to its truth-finding mission.²⁶

Ideals of broad citizen participation in governance do not, however, always align with ideals about fairness for litigants. This tension arises from conceptions of bias and impartiality that deem certain opinions and backgrounds as neutral while seeing others as dangerous to the fair administration of justice.²⁷ Professor

²⁰ Carroll, *supra* note 10, at 827-28, 830 (reviewing ways jurors’ decision-making engages in lawmaking).

²¹ Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995).

²² Tocqueville, *supra* note 9, at 447. Misquoted.. actual text reads “societies” [R5.2(a)]

²³ Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMP. L. STUD. 697, 697 (2014).

²⁴ JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SUMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 48 (Oxford University Press 2010); *see generally* Nancy S. Marder, *THE POWER OF THE JURY: TRANSFORMING CITIZENS INTO JURORS* (Cambridge University Press 2022).

²⁵ Jeffrey Abrahamson, *Four Models of Jury Democracy*, 90 CHL-KENT L. REV. 861, 863 n.11 (2015) (citing *Williams v. Florida*, 399 U.S. 78, 100 (1970)) (“the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgement of a group of laymen . . .”).

²⁶ *Id.* at 864-65 (questioning “How does popular participation in justice contribute to the truth?”).

²⁷ *See* Simonson, *supra* note 5, at 283 (observing that “[t]he concept of a ‘neutral’ public in criminal procedure begins by excluding from its definition of the public those with criminal records or

Abramson observes that the rigorous “weeding out” of candidate jurors through both cause excusals and peremptory strikes “constitute[s] a deviation from the ‘all comers’ philosophy of populists” at the same time that it protects litigants’ rights.²⁸ Nonetheless, the rights coexist.

While the actual use of juries has declined in both civil and criminal cases over the last century,²⁹ the ideal of juries remains central to our very system of democracy, as commonly understood and as written in our Constitution.

In sum, the Ideology of Jury Democracy turns on the importance of juries to our democratic system of governance. In this frame, juries serve three democratic objectives. First, jury service educates the public by enlisting ordinary citizens to participate in a critical governmental function in a direct and consequential way. Juries draw the community together by engaging citizens in a shared experience based on common values and the need to engage in reasoned discussion. Second, juries serve as a check on the state’s abuse of power. They do this by holding the state accountable to the law in individual cases, including sometimes very literally in decisions such as refusing to hand down an indictment or to find guilt in the face of overwhelming evidence. Finally, through their deliberations and verdicts, juries become a source of law and a place of self-governance. Juries in this view must be above reproach—sites of fairness, integrity, and truth. Juries embody a “germ of American freedom” in their full complexity and their central role.

B. *The Law and Practice of Jury Selection*

Our second ideology, in contrast, arises from the law governing decisions in actual cases about who is selected to serve on the jury. As we noted in the previous section, the right of each criminal defendant to be tried by a jury of their peers comes from the Constitution.³⁰ The first phase of jury selection arises from local practices for summoning potential jurors.

The U.S. Supreme Court requires only that the people who sit on jury venires represent a fair cross section of the community; it does not require representativeness on the actual seated jury.³¹ To wit, the Sixth Amendment fair cross section right requires that jury summons practices include all distinctive

prior contact with the criminal justice system, labeling them inherently ‘biased.’ The formal exclusion of individuals with criminal records from participating in criminal justice as voters, jurors, and bail bond agents is based, in part, on a belief that people with criminal records are too biased to be neutral.”).

²⁸ Abrahamson, *supra* note 25, at 869 (arguing that peremptory challenges “do not fit easily with the notion that juries should be selected to form a cross-section of the community.”); *see also* Carroll, *supra* note 10, at 850 (“Peremptory strikes are frequently the only method to vindicate a defendant’s perspective and to ensure him some control over the selection of the jury that will determine his culpability.”).

²⁹ Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, 2023 U. ILL. L. REV. 879, 946 (2023) (noting that both civil jury trial rates and criminal jury trial rates have declined significantly).

³⁰ U.S. CONST. amend. VI.

³¹ *See Taylor v. Louisiana*, 419 U.S. 522, 525-26 (1975).

groups in the community and provide them a fair and reasonable representation on venires.³² This requirement is “fundamental to the American system of justice.”³³ In *Taylor v. Louisiana*, the Court identified the inclusion of community members as “a hedge against the overzealous or mistaken prosecutor”³⁴ and essential to “our democratic heritage,” as well as “to public confidence in the fairness of the criminal justice system.”³⁵

Despite the Court’s language extolling the importance of representative juries, enforcing that right is difficult. A defendant claiming a violation of the Sixth Amendment right to a fair cross section must establish “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”³⁶ In practice, this standard has presented a significant barrier to fair cross section challenges to jury pools, particularly in states with less diverse populations.³⁷

Once potential jurors are summoned, the court and attorneys undertake voir dire to examine the qualifications, biases, and opinions of summoned individuals. Jurors may be excused for hardship, bias or other conflicts, or by peremptory challenges. Jury selection in North Carolina—where we conducted the

³² U.S. CONST. amend. XIV.

³³ See *Taylor*, 419 U.S. at 530 (1975) (“[A] fair cross section of the community is fundamental to the American system of justice.”).

³⁴ *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)).

³⁵ *Id.* (“This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.”).

³⁶ See *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (providing the standard for adjudicating Sixth Amendment fair cross-section claims).

³⁷ See generally *Berghuis v. Smith*, 559 U.S. 314 (2010) (affirming Michigan Supreme Court ruling that the defendant failed to state a fair cross section claim); see also Shari Seidman Diamond & Mary R. Rose, *The Contemporary American Jury*, 14 ANN. REV. L. & SOC. SCI. 239, 242 (2018) (“The Supreme Court’s most recent representation decision, *Berghuis v. Smith* (2010), did not endorse the exacting 10% [absolute disparity] rule, but it also failed to prohibit it, implicitly accepting its continued use. This renders many areas safe harbors against jury underrepresentation claims, both because communities with a minority population lower than 10% can never show recognizable underrepresentation (i.e., the [absolute disparity] would always be <10%) and because disparities in any area rarely reach the 10% level.”). Notably, the Fourteenth Amendment’s Equal Protection Clause also prohibits discrimination in this process based on distinct constitutional standards, but courts increasingly elide the standards. See Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 154 (2012) (explaining that fair cross-section protections arise from the Sixth Amendment’s impartial jury guarantee whereas the Equal Protection Clause protects against a jury selected by discriminatory means or biased individuals).

study presented in Section IV—follows the national pattern. Summoned jurors may be excused because they are not qualified to serve³⁸ or because requiring service would impose a “compelling personal hardship” on the summoned juror or “would be contrary to the public welfare, health, or safety.”³⁹ Jurors can also be challenged for cause based on statutory grounds including mental or physical infirmity, prior participation in civil or criminal proceedings, being related to the defendant or the victim, or for facing a felony charge.⁴⁰ Jurors must be able to be fair and impartial, without prior fixed opinions on the guilt or innocence of the defendant, or on the charge at issue generally.⁴¹ Jurors who express disagreement with the law or question its efficacy are often excused as biased.⁴² Jurors who express no disagreement or dissatisfaction with how the state exercises its authority over its citizens are seen as neutral and therefore unbiased.⁴³ Research has documented how the administration of cause challenges produces race and class disparities.⁴⁴

Jurors in capital cases may also face removal because of their opinions about the death penalty. In *Witherspoon v. Illinois*, the Court first restricted death penalty opposition as a basis for removal to situations in which the prospective juror expressly stated that they could not consider returning a death verdict, rather than one in which the juror merely expressed opposition to the death penalty.⁴⁵ Justice White dissented, questioning the authority of the Court to contradict the state law providing that “the death penalty decision should be made in individual cases by a group of those citizens without conscientious scruples about one of the sentencing alternatives provided by the legislature.”⁴⁶ Justice Black, also dissenting, reasoned that the prosecution has “as much right to an impartial jury as

³⁸ N.C. GEN. STAT. § 9-3 (2023) (listing qualification including minimum age, physical and mental competence, comprehension of English language, and prior felonies); *see also* N.C. GEN. STAT. § 15A-1212(1) (2023).

³⁹ N.C. GEN. STAT. § 9-6(a) (2023).

⁴⁰ N.C. GEN. STAT. § 15A-1212 (2-5, 7) (2023).

⁴¹ *Id.* at (6), (8-9).

⁴² Simonson, *supra* note 5, at 274 (stating that “even when juries do deliberate and decide the fate of individual defendants, we select individual jurors amid the illusory ideal of neutrality that leans toward the exclusion of members of the public who might side with the interests of the defendant.”).

⁴³ *Id.*, at 285 (noting that “[r]arely, if ever, do courts engage in the reverse analysis, asking whether people without criminal records might have a different kind of bias, of not understanding what it is like to go through the process of arrest or accusation.”).

⁴⁴ *See generally* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020); Anna Offit, *The Character of Jury Exclusion*, 106 MINN. L. REV. 2173 (2021).

⁴⁵ *Witherspoon v. Illinois*, 391 U.S. 510, 519-20 (1968) (stating that “in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.”).

⁴⁶ *Id.* at 541-42 (White, J., dissenting)

do criminal defendants.”⁴⁷ He argued that permitting jurors with “conscientious or religious scruples against capital punishment” would lead to bias against the prosecution.⁴⁸

Under *Wainwright v. Witt*, the Court broadened the class of excludable jurors from the class that had been set forth in *Witherspoon*, holding that a juror may be removed if “the juror’s views would prevent or substantially impair the performance of his duties as a juror” in a case involving capital punishment.⁴⁹ At the same time, “a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause.”⁵⁰ *Lockhart v. McCree* specified that “those who firmly believe the death penalty is unjust may . . . serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.”⁵¹ Capital defendants can also challenge any juror “who will automatically vote for the death penalty in every case.”⁵²

The Court stated that this requirement advances the state’s “strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes.”⁵³ It removes jurors who “indicate an inability to follow the law and instructions of the trial judge”⁵⁴ and selects those committed to deciding the case “solely on the evidence” presented.⁵⁵

In *Lockhart v. McCree*, the respondents introduced social science evidence and argued that removing jurors based on their death penalty opinions “produced juries that ‘were more prone to convict’ capital defendants than ‘non-death qualified’ juries.”⁵⁶ They argued that this violated the fair cross section requirement and the impartiality requirement of the Constitution.⁵⁷ The Court rejected this claim, first restating the holding that the fair cross section requirement

⁴⁷ *Id.* at 535 (Black, J., dissenting).

⁴⁸ *Id.*; but see Simonson, *supra* note 5, at 282 (arguing that current criminal procedure practices define neutrality “as a subset of the public that buys into the legitimacy of the current system and the general priorities of current policing and prosecutorial practices.”).

⁴⁹ *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

⁵⁰ *Uttecht v. Brown*, 551 U.S. 1, 9 (2007) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968)).

⁵¹ *Lockhart v. McCree*, 476 U.S. 162, 176 (1986).

⁵² *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

⁵³ *Uttecht v. Brown*, 551 U.S. 1, 9 (2007).

⁵⁴ *Lockett v. Ohio*, 438 U.S. 586, 597 (1978); see also *Lockhart v. McCree*, 476 U.S. 162, 178 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985) (stating that “an impartial jury consists of nothing more than ‘jurors who will conscientiously apply the law and find the facts.’”)).

⁵⁵ *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it . . .”).

⁵⁶ *Lockhart v. McCree*, 476 U.S. 162, 167 (1986)

⁵⁷ *Id.* at 167-68.

does not apply to petit juries and rejecting the idea that “*Witherspoon*-excludables” constituted a “distinctive group” under the fair cross section jurisprudence.⁵⁸ The Court also rejected the risk to impartiality posed by the finding that death qualified juries were more prone to convict,⁵⁹ concluding “the removal for cause of ‘*Witherspoon*-excludables’ serves the State’s entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree’s case.”⁶⁰ The Court held at the bottom line that the Constitution permitted the removal for cause, prior to the guilt phase of a bifurcated capital trial, of *Witherspoon*-excludables.⁶¹

Determining whether a potential juror is death and life qualified requires extensive voir dire as trial participants test each juror’s opinions against the standards.⁶² Capital jury selection incorporates this practice typically without challenge.⁶³ Scholars suggest that the lengthy questioning about the death penalty may increase the likelihood that the jury will convict and sentence to death by suggesting repeatedly that the juror must “follow the law,” an expectation that may lead jurors “to infer that a death verdict is actually required by the law.”⁶⁴

Moreover, voir dire in capital cases extends beyond questions about the death penalty into lengthy inquiries into their prior experiences with discrimination, crime or law enforcement, as well as those of their friends or

⁵⁸ *Id.* at 174-75.

⁵⁹ *Id.* at 178-9.

⁶⁰ *Id.* at 180.

⁶¹ *Id.* at 165.

⁶² Wanda D. Foglia & Mara Sandys, *The Capital Jury and Sentencing: Neither Guided Nor Individualized*, in ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT 367 (Robert M. Mohm & Gavin Lee eds., 2018) (noting that prospective jurors are “required to talk about their views of sentencing before they have determined whether the defendant is guilty.”).

⁶³ The ACLU Capital Punishment project brought claims challenging the death qualification process in Florida and Kansas. See Brian Stull, *We’re Challenging the Racist Practice that Excludes Black Jurors from Death Penalty Cases*, ACLU (Apr. 14, 2023) <https://www.aclu.org/news/capital-punishment/were-challenging-the-racist-practice-that-excludes-black-jurors-from-death-penalty-cases> [https://perma.cc/C8GW-VW6D]. The ACLU also challenged the practice in North Carolina. The study presented in this paper formed part of the evidence in that unsuccessful claim. See *North Carolina v. Brandon Xavier Hill*, 16 CRS 223562-63 (N.C. Sup. Ct., 14 Feb. 2023) (denying a motion to omit death qualification from jury selection). The judge raised concerns about how we presented the data and our findings in his order. As is our practice, we provided the full database in discovery so that questions about our presentation of the data could be addressed through alternative analyses. The reported findings are robust to alternative analyses and do not depend on our subjective judgments or decisions about how to present the data. The database is available for review.

⁶⁴ See John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing “Life Qualification” through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1231 (2001) (noting that although voir dire questions may be intended to interrogate a “juror’s capacity to return a death sentence, jurors are likely to infer that a death verdict is actually required by the law, at least under some, as yet unspecified, circumstances.”).

family members.⁶⁵ Throughout this process, Black and brown jurors often face disparate questioning that may be more aggressive or intended to set traps for dismissal.⁶⁶ Scholars have observed that the extensive *voir dire* casts a shadow on how parties exercise their peremptory strikes. Jurors who express hesitation about the death penalty that does not reach the level required for exclusion under *Witherspoon* and its progeny are frequently removed by peremptory strikes.⁶⁷

Attorneys may excuse jurors without cause by exercising peremptory challenges as long as they do not discriminate on the bases of race, ethnicity, or gender.⁶⁸ The number of peremptory challenges available, and the procedure for exercising them varies with jurisdiction and, often, level of criminal charge.⁶⁹ In

⁶⁵ See Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations*, 16 J. EMPIRICAL LEGAL STUD. 515 (2019) (examining capital voir transcripts and documenting pervasive closed and leading questions); Eric R. Carpenter, *Hidden Killers and Imagined Saints: Why Courts Fail to Identify Unconstitutional Jurors in Death Penalty Cases*, 2022 MICH. ST. L. REV. 449, 472 (2022) (reviewing research finding that while extensive, voir dire does not allow for accurately identifying who is or is not death eligible); see also Simonson, *supra* note 5, at 285 (noting that “[r]arely, if ever, do courts engage in the reverse analysis, asking whether people without criminal records might have a different kind of bias, of not understanding what it is like to go through the process of arrest or accusation”); *Turnbull v. Florida*, 959 So.2d 275, 276 (Fla. Dist. Ct. App. 2006) (finding a *Batson* violation in a case where the State asked whether jurors thought police racially profile people during voir dire and used peremptory strikes against four of the five Black venire persons who answered affirmatively); *Love v. Yates*, 586 F. Supp. 2d 1155, 1179-80 (N.D. Cal. 2008) (finding a *Batson* violation after the prosecutor justified striking one Black juror because she thought “the greatest cause of crime in the community is racial prejudice,” gave “money to the Black Adoption Fund,” and felt “she was a victim of racism in the public schools growing up”).

⁶⁶ See *Flowers v. Mississippi*, 588 U.S. 284, 287 (2019) (noting “the State engaged in dramatically disparate questioning of [B]lack and white prospective jurors”); *Miller-El v. Cockrell*, 537 U.S. 322, 344-45 (2003) (noting the use of disparate questions in Miller-El’s case and its relevance to constitutional challenges to jury selection); see also 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, 1079 (2011) (quoting Videotape: Jury Selection with Jack McMahon (DATV Prod. 1987)) (onetime Philadelphia Assistant District Attorney General Jack McMahon’s training video is quoted as saying: “When you do have a [B]lack juror, you question them at length . . . you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race”).

⁶⁷ J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1150 (2014) (noting this pattern); see also Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1556 tbl.5 (2012) (showing the continued importance of a venire member’s reservations about the death penalty in the prosecutors’ post-cause peremptory strikes decisions).

⁶⁸ See *Batson v. Kentucky*, 476 U.S. 79, 79-80 (1986) (prohibiting the exercise of peremptory challenges on the basis of race and establishing a three-step test); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 127 (1994) (prohibiting the exercise of peremptory challenges on the basis of gender).

⁶⁹ Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, *The State-Of-The-States Survey Of Jury Improvement Efforts: A Compendium Report*, NAT’L CTR. FOR STATE CTS., at 27-31 (April 2007), https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf [https://perma.cc/H7P8-Y4ZQ] (reporting variation in state procedures).

North Carolina capital cases, each side receives fourteen peremptory challenges,⁷⁰ and the parties alternate *voir dire*, beginning with the prosecution.⁷¹ Like challenges for cause, peremptory challenges pose a well-documented risk of disproportionate exclusion on the basis of race and gender.⁷²

The Court's enforcement of the constitutional requirement that peremptory challenges not be used to exclude jurors on the basis of race has been ineffective. First, the Supreme Court routinely grants review of cases challenging the influence of race in the exercise of peremptory challenges. In 1965, the Court in *Swain v. Alabama* explained that a prosecutor's systematic exclusion of black jurors was "at war with our basic concepts of a democratic society and a representative government."⁷³ The Court required that jurors "be selected as individuals, on the basis of individual qualifications, and not as members of a race."⁷⁴ The Court revisited this theme more than two decades later in *Batson v. Kentucky* when it noted that purposefully excluding people from jury service based on their race undermines public confidence in our justice system.⁷⁵ The Court has recognized that a discriminatory strike "denigrates the dignity of the excluded juror."⁷⁶ The right not to be discriminated against belongs to the jurors; defendants can challenge decisions to strike because they have third-party standing.⁷⁷ In light of this, the Court has expanded the doctrine to limit defense counsel strikes⁷⁸ and, as noted above, to prohibit gender- as well as race-based strikes.⁷⁹

In *Batson*, the Court established a three-step process for challenging a peremptory strike as based on race (or gender).⁸⁰ In the first stage, the party challenging the strike carries the burden of establishing a *prima facie* case. Second,

⁷⁰ N.C. GEN. STAT. ANN. § 15A-1217(a) (2023).

⁷¹ N.C. GEN. STAT. ANN. § 15A-1214(d) (2023).

⁷² Some jurisdictions have expanded the prohibition on discriminatory strikes to include other protected groups. *See, e.g.*, CAL. CIV. PROC. CODE §231.7 (West 2024) (prohibiting the exercise of peremptory strikes "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"); *United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003) (prohibiting discrimination based on religion).

⁷³ *Swain v. Alabama*, 380 U.S. 202, 204 (1965) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)) (internal quotation marks omitted), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁷⁴ *Id.* (quoting *Cassell v. Texas*, 339 U.S. 282, 286 (1950)) (internal quotation marks omitted).

⁷⁵ *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

⁷⁶ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141 (1994).

⁷⁷ *Powers v. Ohio*, 499 U.S. 400, 414 (1991) (stating that "individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf"); *see also* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618 (1991) (reaffirming that a "race-based peremptory challenge violates the equal protection rights of those excluded from jury service" and that the defendant has third-party standing to seek redress for a wrongfully excluded juror).

⁷⁸ *See generally* *Georgia v. McCollum*, 505 U.S. 42 (1992).

⁷⁹ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 127 (1994).

⁸⁰ *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986).

the burden moves to the striking party to produce a race-neutral explanation for the strike(s). Finally, in the third stage, the movant must prove that the striking party's explanations were pretextual, thereby supporting an inference that one or more strike(s) were racially motivated.⁸¹ Justice Thurgood Marshall questioned the likely effectiveness of this complex procedure from the beginning.⁸²

Over the intervening decades, Marshall's predictions have been substantiated by research demonstrating that striking parties can readily defeat the challenge by proffering a plausible, race-neutral reason for the strike decision.⁸³ Trial courts rarely reject these explanations as disingenuous or "pretextual."⁸⁴ Race has continued to play a significant role in the exercise of peremptory challenges as evidenced by regular interventions by the Supreme Court⁸⁵ and empirical research.⁸⁶ Justice Thomas noted with alacrity that *Batson* should be overturned, thereby permitting all parties to strike prospective jurors on the basis of race because "the racial composition of a jury matters because racial biases, sympathies, and prejudices still exist. This is not a matter of 'assumptions' as *Batson* said. It is a matter of reality."⁸⁷

⁸¹ *Id.*

⁸² *Id.* at 102–03 (Marshall, J., concurring).

⁸³ See generally Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996) (reviewing trial court practices); Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 201 (2021) (reporting ways in which *Batson* has impacted prosecutorial jury selection decision making); ANNA OFFIT, *THE IMAGINED JUROR: HOW HYPOTHETICAL JURIES INFLUENCE FEDERAL PROSECUTORS* (2022) (same); 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, 1092–99 (2011) (reviewing examples of reasons proffered by the prosecution in response to *Batson* challenges that courts have found acceptably race neutral).

⁸⁴ See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 278 (2005) (Thomas, J., dissenting).

⁸⁵ *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 578 U.S. 488 (2016); *Flowers v. Mississippi*, 588 U.S. 284, (2019); *but see Clark v. Mississippi*, 143 S. Ct. 2406, 2408–09 (2023) (Sotomayor, J., dissenting from denial of cert.) (denying review where "the State was over five times more likely to strike a Black prospective juror than a white one." and the State conducted special investigations into some of the most qualified Black prospective jurors in an attempt to disqualify them and then struck a two separate jurors because they found people in the community with the same surname with felony convictions and charges); *Compton v. Texas*, 144 S. Ct. 916, 917 (2024) (Sotomayor, J. dissenting from denial of cert.) (denying review where prosecutors used 13 of their 15 peremptory strikes on women, and justified the strikes in the aggregate referencing the potential jurors' views on the death penalty as a group and failing to note "that at least one woman struck by the State had more favorable views on the death penalty than at least one man the State did not strike.").

⁸⁶ See generally Catherine M. Grosso & Barbara O'Brien, *Race and Jury Selection*, in *RESEARCH HANDBOOK IN LAW AND PSYCHOLOGY* (Rebecca Hollander-Blumoff, ed., forthcoming 2024) (reviewing the research).

⁸⁷ *Flowers v. Mississippi*, 588 U.S. 284, 356 (2019) (Thomas, J., concurring) (arguing that peremptory challenges must continue to exist exactly because racial biases persist); see generally Paul Butler, *Mississippi Goddam: Flowers v. Mississippi's Cheap Racial Justice*, 2019 SUP. CT. REV. 73.

Several states have undertaken reforms to address the persistent influence of race in this part of the jury selection. The Washington Supreme Court concluded that the *Batson* procedures were not “robust enough to effectively combat race discrimination in the selection of juries.”⁸⁸ General Rule 37 [GR 37] lowered the burden on parties seeking to challenge a peremptory strike and removed any requirement that the court find intentional discrimination.⁸⁹ GR 37 specifies as presumptively invalid reasons for a strike that have historically “been associated with improper discrimination in jury selection. These include a potential juror’s residence in a high-crime neighborhood or previous contact with the criminal legal system. California passed similar legislative reforms to the jury selection process,⁹⁰ followed by Connecticut and New Jersey.⁹¹ The Arizona Supreme Court chose to eliminate peremptory challenges altogether rather than adopt a rule based on GR 37.⁹²

The jurors who remain after the exercise of peremptory challenges form the petit jury, the jurors who sit to decide the case. The rules of jury selection replicate themselves almost without challenge across the United States. Jurors must be fair and impartial; they must set aside prior opinions on the charges or the guilt of the defendant. They must be prepared to perform their duties and to follow the law as provided. To the extent they disagree with the law or question its efficacy, they are perceived as biased. In contrast, jurors who express no disagreement or dissatisfaction with how the state exercises its authority over its citizens are seen as neutral and, therefore, unbiased. From this pattern emerges an Ideology of Jury Selection.

In practice, the Ideology of Jury Selection operates as a powerful, hegemonic ideal, taking on an “aura of the natural and inevitable[.]”⁹³ leaving the impression that productive discourse, opposition, or change remains “unlikely because . . . they are unthinkable, outside the cognitively available categories.”⁹⁴

⁸⁸ State v. Saintcalle, 178 Wash.2d 34, 35 (2013).

⁸⁹ See WASH. SUP. CT. GEN. R. 37.

⁹⁰ See CAL. CIV. PROC. CODE § 231.7 (WEST 2024).

⁹¹ CONN. SUP. CT. R. § 5-12(b); N.J. CT. R. 1:8-3A.

⁹² See ARIZ. SUP. CT. ORD. No. R-21-0020 (Aug. 30, 2021) (removing peremptory challenges from the Rules of Civil and Criminal Procedure, effective Jan. 1, 2022); ARIZ. SUP. CT. ORD. No. R-21-0020 (Sept. 28, 2021) (removing peremptory challenges from the Justice Court Rules of Civil Procedure and the Rules of Procedure for Eviction Actions). For an excellent critical review of these state reforms, see generally Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 CHI.-KENT L. REV. 67 (2024).

⁹³ Silbey, *supra* note 3, at 292.

⁹⁴ *Id.* at 290-91. For example, Torkington, Stanford, and Guiver posit that “the metaphor of economic growth has become a discursive resource of a hegemonic ideology, in the sense that an ideology is a ‘shared framework of social beliefs that organise and coordinate the social interpretations and practices of groups.’” The assumption that growth is an unequivocal good is so firmly entrenched that pursuing it requires no justification. Any cost-benefit analysis about the trade-offs is heavily

Under this ideology, abiding by these values may result in racial disparities, but because of the commitment to colorblindness, efforts to point out these disparities seem self-serving and gauche—“playing the race card.”⁹⁵

Conceptions of what constitutes acceptable and unacceptable jurors stems from an ideology so firmly entrenched in our legal system that its premises typically go unchallenged. This is to make sure that the jury remains fair; that is, that it is not biased against the state’s interest in winning a death sentence.⁹⁶ The *Witherspoon* line of cases provides constitutional imprimatur to wide-ranging questions and expansive removals for cause. The dismissals continue with extensive peremptory challenges. This is the inevitable result of an ideology that values preserving and protecting established practices over broad citizen participation.⁹⁷

As noted above, the laws governing jury selection do not wholly ignore the possibility of race discrimination tainting the process. At the same time, they operate from a foundation of aspirational colorblindness.⁹⁸ By operating as though a person’s race is as irrelevant as their astrological sign in assessing their fitness as a juror, the jury selection rules presume that so long as everyone is operating in good faith, the law can transcend pervasive race discrimination.⁹⁹ Discrimination,

weighted in favor of growth, which is treated as non-negotiable. Kate Torkington, Davina Stanford & Jo Guiver, *Discourse(s) of Growth and Sustainability in National Tourism Policy Documents*, 28 J. SUSTAINABLE TOURISM 1041, 1045 (2020) (citing TEUN. A. VAN DIIJK, *IDEOLOGY: A MULTIDISCIPLINARY APPROACH* 8 (London: Sage 1998)).

⁹⁵ See Kimberlé W. Crenshaw, *Playing Race Cards: Constructing a Proactive Defense of Affirmative Action*, 16 NAT’L BLACK L. J. 196, 198 (1998) (noting her contempt for the trope that “raising concerns about racism in the criminal justice system is merely an opportunistic ploy”).

⁹⁶ Simonson, *supra* note 5, at 282 (arguing that current criminal procedure practices define neutrality “as a subset of the public that buys into the legitimacy of the current system and the general priorities of current policing and prosecutorial practices.”).

⁹⁷ Consider, for example, the way the ideology that leads one to perceive a juror’s mistrust of law enforcement, for example, as a bias, while perceiving a juror who has never had a negative interaction with police as neutral is one that prioritizes preserving the legitimacy of existing power structures. See Silbey, *supra* note 3, at 291 (arguing that “[w]hen law functions hegemonically, its categories and symbols so suffuse consciousness that opposition and resistance are unlikely because most of the time they are unthinkable, outside the cognitively available categories.”).

⁹⁸ See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 149 (1994) (O’Connor, J., concurring) (acknowledging the gap between an aspiration that race and gender be irrelevant to the decision to strike or pass a juror and reality). For critiques of colorblind conception of antidiscrimination laws and the Equal Protection Clause, see Reva B. Siegel, *Discrimination in the Eyes of the Law: How Color Blindness Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000); Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007).

⁹⁹ This commitment to colorblindness by some members of the Court can be seen in contexts outside of criminal procedure. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court struck down a school district’s plan to achieve diversity because it explicitly considered race in placing high school students. Chief Justice Roberts justified the ruling by asserting that “The way to stop discrimination on the basis of race is to stop discriminating on the basis

in this view, is the product of an individual failing to achieve colorblindness and seeing race as relevant, thereby violating the law. As a result, mechanisms for addressing discrimination reflect a narrow conception of discrimination as a product of bad intent¹⁰⁰ or at the very least, of specific identifiable decisions by government actors at one stage of the process that disparately impact a protected group.¹⁰¹

The high burden to win even these narrow claims undermines a true commitment to juries that are actually racially diverse and representative. Moreover, prevailing on either a fair cross-section or a *Batson* claim is extraordinarily difficult because even substantial evidence of racial disparities yields to the state and litigants' theories about what constitutes a reasonable effort to summon a fair cross section of jurors and who makes a good juror, however unsupported those theories may be. Put simply, aspirations about broad democratic participation in juries always seem to take a back seat to the desire to exercise firm control over the selection of a jury.

Indeed, the dominance of the Ideology of Jury Selection is evidenced by courts' and lawyers' ability to exercise almost complete control over who may and may not serve as jurors. The unquestioning adherence to current capital jury selection procedures, including *Witherspoon* exclusions,¹⁰² and the availability of expansive peremptory strikes, despite their well-documented and well-articulated costs to jury participation by people of color, reflect a hegemonic ideology that runs up against values arising from the role of juries in the U.S. democratic system. The following section takes stock of these costs.

III. JURY SELECTION UNFAILINGLY RELEGATES FULL DEMOCRATIC PARTICIPATION

Race has long been used—explicitly and implicitly—to exclude citizens from jury participation.¹⁰³ Early state laws strictly limited jury participation to white male property owners.¹⁰⁴ The exclusion of Black citizens from juries through the middle

of race.” 551 U.S. 701, 749 (2007). The logic of such a position is simple, but reminiscent of self-help advice to make one’s goals a reality by “manifesting” them. See, e.g., MARIANNE WILLIAMSON, *MANIFESTING ABUNDANCE: TALKS ON SPIRITUALITY AND MODERN LIFE* (Hay House Audio 2004).

¹⁰⁰ See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986); see generally Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of The Roberts Court’s Criminal Jurisprudence*, 110 CALIF. L. REV. 681 (reviewing this narrow conception of discrimination and proposing new frame for the discourse).

¹⁰¹ See *Duren v. Missouri*, 439 U.S. 357 (1979) (requiring a defendant making a fair cross-section argument to show that underrepresentation).

¹⁰² See *supra* text accompanying notes 40-49 (explaining *Witherspoon* exclusions).

¹⁰³ See generally James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895 (2004).

¹⁰⁴ Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 57-58 (2020) (reviewing state laws in the 1700s and 1800s).

of the last century was “near absolute.”¹⁰⁵ Decades later, racism—explicit, implicit, and structural—continues to produce disparities in how jurisdictions summon potential jurors, whom the court excuses for cause or hardship, and how lawyers exercise their peremptory strikes.¹⁰⁶ In many places, juries remain predominantly white even though the communities in which they sit are not.¹⁰⁷ These disparities persist even though the law no longer tolerates explicit discrimination because efforts to rectify them conflict with much of the hegemonic ideology that dominates the law of jury selection. Each step in the process reflects choices and tradeoffs that ultimately undermine the goal of broad citizen participation and the seating of diverse juries.

To begin the process of jury selection, each jurisdiction creates a jury summons list to call potential jurors to the courthouse. As noted above, the Sixth Amendment fair cross-section right requires that jury summons practices include groups in the community and provide them fair and reasonable representation on venires.¹⁰⁸ Historically, exclusion has been the norm. As noted, juries originally included only white men with property. Over time a fair cross section of the community came to include women and people of color, at least in the abstract.

The way a jurisdiction compiles its summons list, however, often causes it to underrepresent some segments of the population. Voter registration lists underrepresent people of color, yet voter registration records alone or in combination with other databases remain predominant in jury selection across the country, followed only by driver’s license lists, a list also likely to exclude people of color disproportionately.¹⁰⁹ At the end of the day, “this country’s history with respect to [] Tocqueville’s free school is not one of wide availability—especially for racial and language minorities.”¹¹⁰

Limits on juror qualifications may also contribute to the exclusion of people of color from juries. For example, many jurisdictions systematically disqualify people with previous misdemeanors or felonies; given the over-policing of people of color

¹⁰⁵ *Id.* at 56.

¹⁰⁶ See generally Diamond & Rose, *supra* note 37 (collecting and reviewing research on discrimination and jury selection).

¹⁰⁷ See, e.g., *Flowers v. Mississippi*, 588 U.S. 284, 2236-38 (2019) (noting that the population of the community in which Mr. Flowers faced six trials was 53% Black but that the jury population in his trials was overwhelmingly white); see also ELISABETH SEMEL, DAGEN DOWNARD, EMMA TOLMAN, ANNE WEIS, DANIELLE CRAIG & CHELSEA HANLOCK, *WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS*, BERKELEY LAW DEATH PENALTY CLINIC (JUNE 2020), at 13, <https://doi.org/10.15779/J26054>, (summarizing empirical findings of exclusionary behavior in California) & note 52 (collecting cases comparing California’s population demographics to jury demographics in various state jurisdictions).

¹⁰⁸ See *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (providing the standard for adjudicating Sixth Amendment fair cross-section claims); *Berghuis*, 559 U.S. 314 (2010) (same).

¹⁰⁹ See Chernoff, *supra* note 37, at 187–90 (noting challenges faced by state courts in updating procedures).

¹¹⁰ Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 168 (2014).

and their overrepresentation in criminal courts, this disqualification disproportionately limits participation by people of color.¹¹¹

Excusing potential jurors for cause also undermines diversity. Thomas Frampton analyzed decision making in challenges for cause in 400 criminal jury trials in Louisiana and Mississippi, documenting that “black jurors’ ‘qualifications’ for jury service, or lack thereof, operate as an important instrument of racial exclusion.”¹¹² He found that Louisiana prosecutors moved to exclude Black prospective jurors for cause at 3.24 times the rate of white prospective jurors,¹¹³ and Mississippi prosecutors in the study were 6.8 times more likely to seek a cause challenge against a Black prospective juror than a white prospective juror.¹¹⁴

Anna Offit documented ways that cause dismissals for financial hardship disparately exclude jurors of color.¹¹⁵ She noted that the concerns about the racialized experience of poverty featured prominently in federal hearings on jury selection in the late 1960s, and that 2019 poverty rates continued to reflect significant racial disparities.¹¹⁶ Offit observed that “even in the absence of explicit racial animus or bias, financial hardship stands as a persistent obstacle to representative jury participation,”¹¹⁷ noting previous research showing that jurors were “most likely to face dismissal during voir dire as a result of economic hardship, including the risk of lost income, and the need to care for a child or another dependent.”¹¹⁸

Offit analyzed 120 semi-structured interviews with state and federal prosecutors and public defenders across 30 civil and criminal proceedings¹¹⁹ to show how judges, prosecutors, and defense attorneys worked collaboratively to document and justify these dismissals, often concluding that dismissals “were best serving everyone’s interests.”¹²⁰ They did so without regard to how the dismissals impacted jury diversity with respect to both class and race.¹²¹

¹¹¹ See generally JAMES M. BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM (2021); See also Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013); See also Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL’Y REV. 387 (2016).

¹¹² Frampton, *supra* note 44, at 789.

¹¹³ *Id.* at 795.

¹¹⁴ *Id.* at 797.

¹¹⁵ Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613, 615 (2021).

¹¹⁶ *Id.* at 630.

¹¹⁷ *Id.* at 632.

¹¹⁸ *Id.* at 647, n.214 (collecting research).

¹¹⁹ *Id.* at 635.

¹²⁰ *Id.* at 647.

¹²¹ *Id.* at 648.

The overwhelming majority of studies on cause challenges focus on the impact of “death qualifying” capital jurors under *Witherspoon v. Illinois*¹²² and *Wainwright v. Witt*.¹²³ As discussed in the previous section, the Supreme Court held that courts may dismiss potential capital jurors whose opposition to capital punishment would “prevent or substantially impair the performance of” their duties.¹²⁴ Scholars and lawyers have frequently raised concerns that the process of “death qualifying” juries would limit diversity, undermine jury community representativeness, and lead to more punitive juries.¹²⁵ Death qualified jurors tend “to hold more favorable attitudes toward crime victims, have more negative attitudes toward defendants, see themselves as similar to crime victims, and perceive the defendant’s chances of rehabilitation in prison to be less likely.”¹²⁶ These jurors also tend to focus more on factors that make the defendant’s crime worse and to be less able to empathize with some defendants.

Death qualified jurors are also whiter. In a large-scale survey of 3,284 jury-eligible Americans conducted in November of 2020, Black mock jurors were significantly less likely to satisfy death qualification requirements.¹²⁷ In addition, “mock jurors who were more racially biased (as assessed by the voir dire questions), more politically conservative, and wealthier, were more likely to pass death qualification.”¹²⁸ Mona Lynch and Craig Haney found that the death qualification process in their mock jury study resulted in “the significant underrepresentation of African American” mock jurors and ultimately “systematically whitewash[ed] the capital eligible pool.”¹²⁹

¹²² *Witherspoon*, 391 U.S. 510.

¹²³ *Wainwright v. Witt*, 469 U.S. 412.

¹²⁴ *Id.* at 424.

¹²⁵ Justice Stevens expressed this concern in *Baze v. Rees*, noting that “[i]tigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a ‘death qualified- jury is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction.’” 553 U.S. 35, 84 (2008) (Stevens, J., concurring in judgment); see also Amelia Courtney Hritz, Caisa Elizabeth Royer & Valerie Hans, *Diminishing Support for the Death Penalty: Implications for Fair Capital Case Outcomes*, in *CRIMINAL JURIES IN THE 21ST CENTURY: CONTEMPORARY ISSUES, PSYCHOLOGICAL SCIENCE, AND THE LAW* 43–44 (Cynthia J. Najdowski & Margaret C. Stevenson eds. 2019) (reviewing the literature documenting ways in which the death-qualification process changes the composition of the capital jury); Valerie Hans & Amelia Hritz, *Juries in Capital Cases*, in *THE ELGAR COMPANION TO CAPITAL PUNISHMENT AND SOCIETY* 117–118.

¹²⁶ Hritz, Royer & Hans, *supra* note 125, at 45 (reviewing the literature).

¹²⁷ Matthew A. Gasperetti, *Crime and Punishment: An Empirical Study of the Effects of Racial Bias on Capital Sentencing Decisions*, 76 U. MIAMI L. REV. 525, 531–32, n.30 (2022).

¹²⁸ *Id.* at 532.

¹²⁹ Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decisionmaking and Death-Qualified Juries*, 40 LAW & POLICY 148, 165 (2018).

Lynch and Haney demonstrated that the process of death qualification resulted in a capital eligible pool that “does not represent the views of its community.”¹³⁰ Aliza Cover’s study of death qualification in eleven capital trials in Louisiana raised a similar concern.¹³¹ She found that Black jurors were removed on the basis of their death penalty opinions at “markedly higher rates,”¹³² producing qualified capital jury pools that differed significantly from the summoned venire.¹³³ Cover noted that jurors removed under *Witherspoon* and *Witt* “are excluded not only from capital jury service in each individual case but also from the constitutional conversation about whether the death penalty violates the Eighth Amendment.”¹³⁴ Jury decisions in capital cases contribute to the Supreme Court’s analysis of evolving standards of decency under the Eighth Amendment.¹³⁵ Verdicts reached by death-eligible jurors may not represent wider community norms.¹³⁶

Extensive research has also documented the influence of racial discrimination on the exercise of peremptory strikes and on the ineffectiveness of the framework designed to counter racial discrimination.¹³⁷ In death penalty cases, a portion of

¹³⁰ *Id.*; see also Hritz, Royer & Hans, *supra* note 125, at 47–52 (noting that declining national support for the death penalty is pervasive but not prevalent among in all geographic areas or among all political or demographic lines).

¹³¹ Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 INDIANA L. J 113, 115–16 (2016).

¹³² *Id.* at 137.

¹³³ *Id.* at 115-16.

¹³⁴ *Id.*

¹³⁵ See, e.g., *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); see also Hans & Hritz, *supra* note 125, at 121 (noting that “trends in jury trial outcomes influence the U.S. Supreme Court’s analysis of whether applications of the death penalty are constitutional”).

¹³⁶ See, e.g., Hritz, Royer & Hans, *supra* note 125, at 50 (noting, after discussing jury selection in the Boston Marathon death penalty case against Dzhokhar Tsarnaev when 62% of Boston citizens favored a life sentence, “[I]f the jury is meant to introduce the conscience of the community into the criminal justice system, the relevant question is not whether there were enough unbiased people in the city of Boston [given the media attention to the crime] who were willing to sentence Tsarnaev to death but whether that group would be representative of the community.”).

¹³⁷ See, e.g., David C. Baldus, George Woodworth, David Zuckerman, Neil A. Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 53 (2001) (finding that prosecutors in 317 Philadelphia County capital murder trials struck on average 51% of the Black strike-eligible jurors compared to 26% of comparable non-black jurors); Will Craft, *Peremptory Strikes in Mississippi’s Fifth Circuit Court District*, APM REPORTS (2018) (finding that prosecutors in 225 trials in Mississippi’s Fifth Circuit Court District between 1992 and 2017 exercised a peremptory strikes against Black venire members four and one-half times as often as against white venire members); Shari Seidman Diamond & Joshua Kaiser, *Race and Jury Selection: The Pernicious Effects of Backstrikes*, 59 How. L.J. 705, 717–18 (2016) (finding that prosecutors in Caddo Parrish, Louisiana, between January 2003 and December 2012 struck 46% of Black prospective jurors compared to 15.3% of all other prospective jurors and that defense counsel struck 14.0% of Black prospective jurors compared to 38.9% of all other prospective jurors); Grosso & O’Brien, *supra* note 67; Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender*

peremptory strikes against Black venire members may relate to greater reluctance to impose the death penalty within this community, but controlling for death penalty attitudes did not substantially mitigate the race disparities in one statewide study.¹³⁸ This North Carolina study found that while the expression of death penalty reservations greatly increased the odds that a prosecutor would strike potential jurors of any race, Black jurors with death penalty reservations were still significantly more likely to be struck than their non-Black counterparts expressing similar views. As noted, several states passed laws or court rules reforming the *Batson* test to eliminate the disproportionate exclusion of potential jurors based on race or ethnicity.¹³⁹ These changes typically lower the threshold for a successful objection and may lead to the seating of more diverse juries.

The study presented in Part IV demonstrates the high costs of the combined jury selection rules to full democratic participation by willing citizens in one North Carolina county. Different jury selection rules serve different purposes, and some—as currently practiced or potentially after refinement—may be essential to holding a fair trial. However, practices can become so deeply entrenched that they seem like the only reasonable way of doing things, rather than reflecting a choice with real tradeoffs. Our goal here is not to deny the concerns these rules are designed to address, but to make explicit the real costs of these practices to diversity and democratic engagement. Viewing these rules as the products of choices to advance certain objectives over others reveals the values and priorities of the legal system.

IV. CAPITAL JURY SELECTION IN WAKE COUNTY, NORTH CAROLINA, 2008–2019

The case study presented in this section provides new evidence of the cumulative costs of the jury selection rules. The study examined jury selection in eleven capital proceedings in Wake County from 2008–2019 and documented race and gender disparities in decisions relating to juror’s death penalty opinions and the state’s exercise of peremptory strikes. In so doing, the study adds to the body of

Discrimination? Some Data from One County, 23 *LAW & HUM. BEHAV.* 695, 698–99 (1999) (reporting that prosecutors in one North Carolina county used 60% of their strikes against Black jurors who constituted only 32% of the venire).

¹³⁸ Grosso & O’Brien, *supra* note 67, at 1553 (finding that after controlling for several other race-neutral factors, Black venire members face odds of being struck by the state that were 2.48 times those faced by all other venire members).

¹³⁹ Wash. Gen. R. 37 (Adopted effective April 24, 2018); *see also* SUP. CT. WASH., JURY SELECTION WORKGROUP Proposed New GR 37—Jury Selection Workgroup, Final Report (2018) (providing background on the rule and the reasons for its adoption). Connecticut and California adopted very similar reforms beginning in 2022. CONN. JUD. BRANCH COMM’N ON OFF. LEGAL PUBL’N, OFFICIAL 2024 CONNECTICUT PRACTICE BOOK (2024) (Objection to the Use of a Peremptory Challenge); Cal. Assem. Bill No. 3070 (2022), Stats. 2020, Ch. 318, Sec. 2 (AB 3070), codified at (2 Cal. Civ. Proc. Code § 231). Arizona eliminated peremptory challenges altogether. ARIZ. SUP. CT., Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure (2021).

literature presented in the previous section demonstrating the persistent relegation of democratic participation to tight control over jury selection.

In our Wake County study we sought to include every venire member who faced excusal for cause (including hardship) or a peremptory challenge as part of jury selection in eleven capital proceedings.¹⁴⁰ As reported in Table 1, Columns B and C, the venire members' racial composition was as follows: white (1,059, 76%); Black (237, 17%); Asian (55, 4%); Latine/Hispanic (23, 2%); mixed race (4, 0.3%); other (4, 0.3%); Native American (4, 0.3%); and unknown (16, 1%). According to the U.S. Census Quick Facts, the county population at the time was approximately 67% white, 21% Black, 8% Asian, 10% Latine/Hispanic, 3% mixed race, and 0.8% Native American.¹⁴¹ The white population in the coded venire members is nine points larger (76% vs. 67%) than would be expected in the population, following the national pattern of underrepresentation of jurors of color.

The findings presented here limit the database to Black and white venire members because of the small number of venire members in the remaining race or ethnic populations.¹⁴² We ran parallel analyses for every finding using the full dataset, and these are available upon request. Limiting the data to Black and white venire members did not change magnitude, direction, or significance of findings in any instance. Limiting the data reduces the study population to 1,296 potential jurors. Of these, 640 (49%) were women and 656 (51%) were men. As reported in Table 1, Columns D and E, the venire members' racial composition was as follows: white (1,059, 82%); Black (237, 18%).

Table 1: Venire Members in the Study by Race or Ethnicity

	A	B	C	D	E
	VM Race/Ethnicity	Number Venire Members	Percent of Venire Members	Number of Black & White Venire Members Only	Percent of Black & White Venire Members Only
1.	White	1,059	76%	1,059	82%
2.	Black	237	17%	237	18%
3.	Asian	55	4%	---	---
4.	Latine/Hispanic	23	2%	---	---
5.	Native American	4	0.3%	---	---
6.	Other	4	0.3%	---	---
7.	Mixed (Self-Reported)	4	0.3%	---	---
8.	Unknown	16	1%	---	---
	Total	1,402		1,296	

¹⁴⁰ For the purposes of this study, a "venire member" includes anyone who was subjected to voir dire questioning, including alternates. It does not include potential jurors who were summoned and appeared at court, but who did not participate in voir dire.

¹⁴¹ U.S. Census Bureau, *QuickFacts, Wake County, North Carolina* (<https://www.census.gov/quickfacts/wakecountynorthcarolina>) [<https://perma.cc/8VPL-8P5V>].

¹⁴² When the database is limited to Black and white venire members, the number of venire members involved varied with the same low and high numbers as in the full dataset: 71 (Donavan Richardson) and 187 (Jason Williford).

A. Overview of Database Development

We created an electronic case file for each proceeding in the study. The case file contains the primary data for every coding decision. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys' or clerks' notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race coding decision.¹⁴³

Staff attorneys completed all coding and data entry under the direct supervision of the primary investigators. Staff attorneys received detailed training on each step of the coding and data entry process.¹⁴⁴

We used two data collection instruments for coding data in this study: (1) the Venire Member Level Data Collection Instrument (Venire Member DCI) and (2) the Missing Venire Member Race Data Collection Instrument (Supplemental Race Coding DCI).¹⁴⁵

The Venire Member DCI documented basic identification and procedural information specific to each venire member, including whether they were struck, excused for cause, or seated. Coded information includes who initiated a motion for cause and whether either party objected, and which party, if either, exercised a peremptory strike. The Venire Member DCI also required the staff attorney to determine strike eligibility for each potential juror. ("Strike eligibility" refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member¹⁴⁶). This DCI also captures information about the bases for cause excusals and hardship as defined under North Carolina law.¹⁴⁷ We also coded excusals based on disqualifying death penalty views under *Witherspoon*, *Witt*, and *Morgan*.¹⁴⁸

Staff attorneys coded using the complete case file, including juror questionnaires (when available) and the transcripts of *voir dire* proceedings. Staff attorneys used the search function in Adobe Acrobat to search for venire members by name or number. This allowed them to reliably and efficiently find each instance when a particular venire member answered questions during the jury selection

¹⁴³ We are missing the transcript for one day of jury selection in Wilson's case. This limited our ability to code detailed jury selection information for four venire members.

¹⁴⁴ Details of training procedures are available on request from the authors.

¹⁴⁵ The data collection instruments are available upon request from the authors.

¹⁴⁶ For instance, if the prosecution struck someone before the defense had a chance to question that person, that juror would be strike eligible to the prosecution only. Likewise, if the court excused a venire member for cause, then neither party had the chance to exercise a peremptory strike. This determination refines the analysis of strike decisions to examine only those instances in which that party actually had a choice to pass or strike a juror, and it excludes those when the decision was out of the party's hands.

¹⁴⁷ N.C. GEN. STAT. § 15A-1212; N.C. GEN. STAT. § 9-6.

¹⁴⁸ *Witherspoon*, 391 U.S. 510 (1968); *Wainwright*, 469 U.S. 412 (1985); *Morgan*, 504 U.S. 719, 729 (1992). See also, *supra* Section III (discussing the law of death qualification).

process. Every question in the DCI provided a response option for the staff attorney to indicate that the case file did not contain sufficient information for a particular characteristic.

We also instituted double coding procedures. Under these procedures, two staff attorneys separately coded information for each venire member to ensure accuracy and intercoder reliability. A senior staff attorney with extensive experience working on the study compared and reviewed their codes for consistency and suggested corrections, subject to approval of the primary investigators. After a primary investigator resolved the issue, the senior staff attorney documented the proper coding for the issue in the coding log.¹⁴⁹ We also developed systematic procedures to catch and correct errors in data entry.¹⁵⁰

The Venire Member DCI further documents venire members' personal characteristics, such as race, gender, and religious affiliation. Staff attorneys completed race and ethnicity information from venire members' responses on juror questionnaires or from public records. We were unable to code race for 1.1% (16/1,402) of the venire members.

We obtained information about potential jurors' race from two sources. First, we collected juror questionnaires for many of the venire members in our study. These questionnaires asked the venire member's race, and the vast majority of respondents provided that information. Potential venire members' self-reports of race were available from juror questionnaires for 82.4% (1,155/1,402) of the venire members overall.

For 17.6% (246/1,402) of venire members, we used electronic databases to research race information and record the race in the Supplemental Race Coding DCI. The Supplemental Race Coding DCI also records the quality of the match for race coding from public records and the source of the race information.¹⁵¹

¹⁴⁹ All staff attorneys had access to the coding log and were responsible for reviewing this document regularly to inform themselves about ongoing coding decisions. The coding team met weekly with the primary investigators to review discrepancies and discuss questions. This system allowed the study team to develop a shared expertise and enhanced intercoder reliability. The number of differences in judgment diminished over time due to staff attorney experience with the data collection instruments, the improved availability of data, and the coding log.

¹⁵⁰ Staff attorneys entered data into an Excel spreadsheet. The data entry fields accepted only valid responses in order to minimize errors.

¹⁵¹ The primary investigators prepared a strict protocol for use of these websites for race coding and trained coders on that protocol. Coders completing the Supplemental Race Coding DCI started with the information available in the file. For example, many case files included juror summons lists with addresses and dates of birth. This information allowed coders to match online records to each juror with a high level of certainty. Coders entered this information in the North Carolina Board of Elections Voter Search website (<https://vt.ncsbe.gov/reglkup/>) [<https://perma.cc/Q28H-GW9N>] and the Lexis-Nexis Public Records Locate a Person (Nationwide) database according to the protocol to identify juror race. Coders coded a venire member's race as "unknown" unless they were able to meet strict criteria ensuring that the person identified in the public record was in fact the venire member.

Coders were not to rely on a record containing information that was not wholly consistent with known information about a particular venire member. For instance, they would not rely on a public

B. Findings

This section reports our findings starting with race and gender disparities that result from requiring excusal of venire members based on death penalty opinions (“*Witherspoon* exclusions”), then turns to the race and gender disparities in the state’s exercise of peremptory strikes. The final section reports the combined impact of *Witherspoon* exclusions and state peremptory strikes on the population of Black and white venire members.¹⁵²

1. Racial and Gender Disparities Resulting from *Witherspoon* Exclusions

This section reports the race and gender disparities that result from the operation of rules requiring the dismissal of venire members because of their opinions on the death penalty. Table 2 presents the rates at which jurors are removed from the venire because of their opposition to the death penalty under *Witherspoon v. Illinois* and related cases.¹⁵³ Fifteen percent of the venire members were excluded because of their opposition to the death penalty. This decision impacted 192 venire members. Fifty-three venire members (4%) were excluded because they would automatically impose the death penalty.

Black venire members were excluded for their opposition to the death penalty at a significantly higher rate than white venire members. As reported in Table 2, Column B, 27% of Black venire members were removed under the *Witherspoon* rules (65/237) compared to 12% of white venire members (127/1,059).¹⁵⁴ This is a relative ratio of 2.25 (27%/12%). The disparity is statistically significant ($p < .0001$).

record in which the person’s middle initial was inconsistent with that of the venire member, unless they were able to document a name change to account for the discrepancy. If coders found someone with the same name as the venire member but with a different address, they were to use that record only if they could trace the person’s address back to that of the venire member. Coders saved a copy of the electronic record for each step in the process, linking current information about each venire member to information recorded at the time of the trial.

The authors developed this protocol for use in a statewide jury selection study. See Grosso & O’Brien, *supra* note 67. The full protocol is available on request from the authors.

¹⁵² We report the disparities observed as well as a measure of the likelihood that the finding would occur as a result of chance. The p-values for the racial disparities observed in this study are consistently well below the standard scientific benchmarks for reliability. See David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211, 249–52 (Federal Judicial Center 3d ed. 2011).

¹⁵³ *Witherspoon*, 391 U.S. 510 (1968).

¹⁵⁴ This calculation, and those below, focuses the information presented in Column B. We include the remaining jurors in Column C and provide the totals in Column D for transparency. The “other jurors” include those removed for hardship, other causes bases, and by peremptory strikes, as well as seated jurors. Some venire members are removed—typically because service would impose a hardship—before their views on the death penalty could be explored. When those venire members are removed from the analysis, the disparity remains.

Table 2: *Witherspoon* Exclusion of Venire Members by Race (Removal of venire members aggregated across cases.)¹⁵⁵

	A		C	B	D
	Venire Member		<i>Witherspoon</i>	Other	Totals
	Race		Exclusions		
1.	Black	<i>number</i>	65	172	237
		<i>percent</i>	27%	72%	100%
2.	White	<i>number</i>	127	932	1,059
		<i>percent</i>	12%	88%	100%
	Total		192	1,104	1,296
			15%	85%	

This disparity persists if we focus on venire members for whom the transcript presents no basis for cause removal other than failure to be death qualified. This reduces the number of *Witherspoon* exclusions from 192 to 182, removing 14% of venire members overall. Black venire members were removed for their death penalty opinions with no other basis for cause removal 25% of the time (60/237), whereas white venire members were removed on this basis with no other basis for cause removal 11% of the time (122/1,059). The relative rate of dismissal remains over two, at 2.27 (25%/11%). The disparity remains statistically significant ($p < .0001$).

We also calculated the rate at which men and women were excused based on their death penalty opinions. Women were excluded at a higher rate than men. In particular, 19% of women (120/640) compared to 11% of men (72/656) were death disqualified. This relative disparity is statistically significant, but smaller than that observed for race: 1.73 (19%/11%) ($p < .001$).

The gender disparity is concentrated among the Black women who appeared for jury duty in these cases. Table 3, Column B, reports that 36% of Black women were excluded under *Witherspoon* for their opinions about the death penalty (47/131). This rate is 2.4 times the 15% overall rate of *Witherspoon* exclusions in this study (36%/15%) and 3.0 times the 12% rate of all other venire members (145/1,165). The disparity is statistically significant ($p < .001$). It is higher than we identified for any other race-gender combination in separate analysis.

¹⁵⁵ We replicated this analysis by calculating the rate of removal by death qualification in each of the eleven cases and averaging these rates across the ten cases. In this analysis, Black venire members faced an average death qualification removal rate of 25% (SD = 2.49) compared to white venire members' average death qualification removal rate of 12.0% (SD = 1.81). A paired t-test indicates that this difference in strike rates is significant at $p < .001$.

Table 3: Witherspoon Exclusion of Black Female Venire Members (Removal of venire members aggregated across cases.)¹⁵⁶

A		B	C	D
Venire Member Race-Gender		Witherspoon Exclusions	Other	Totals
1.	Black Female	<i>number</i> 47	84	131
		<i>percent</i> 36%	64%	100%
2.	All Other Venire Members	<i>number</i> 145	1,020	1,165
		<i>percent</i> 12%	87%	100%
	Total	192	1,104	1,296
		15%	85%	

The cost of removals required under *Witherspoon v. Illinois* and related cases had a large and disparate impact on the ability of Black citizens in general and Black women in particular to participate in these capital juries.

2. Racial and Gender Disparities in the Impact of State Peremptory Strikes

As noted above, research has demonstrated the ongoing significance of race in the exercise of peremptory challenges.¹⁵⁷ This section presents the rate at which prosecutors exercised peremptory challenges against Black versus white venire members when they had the opportunity to strike. As noted, North Carolina rules provide fourteen peremptory strikes to each side in a capital jury selection.¹⁵⁸ This analysis is limited to those venire members who were “strike eligible” to the prosecutors.¹⁵⁹

Table 4: State Strikes against Strike Eligible Venire Persons by Race (Peremptory strikes aggregated across cases.)¹⁶⁰

A		B	C	D
Venire Member Race		State Peremptory Strike	No Strike	Totals
1.	Black	<i>number</i> 38	37	75
		<i>percent</i> 51%	49%	100%
2.	White	<i>number</i> 93	273	366
		<i>percent</i> 25%	75%	100%
	Total	131	310	441
		30%	70%	100%

¹⁵⁶ We replicated this analysis by calculating the rate of removal by death qualification in each of the eleven cases and averaging these rates across the ten cases. In this analysis, Black female venire members faced an average death qualification removal rate of 35.2% (SD = 4.79) compared to all other venire members’ average death qualification removal rate of 12.4% (SD = 1.80). A paired t-test indicates that this difference in strike rates is significant at $p < .001$.

¹⁵⁷ See Grosso & O’Brien, *supra* note 67.

¹⁵⁸ N.C. Gen. Stat. § 15A-1217(a).

¹⁵⁹ See discussion of strike eligibility, *supra* note 125, and accompanying text.

¹⁶⁰ We replicated this analysis by calculating the rate of removal by death qualification in each of the eleven cases and averaging these rates across the ten cases. In this analysis, prosecutors struck Black venire members at an average rate of 52.4% (SD = 4.46) compared to white venire members’ average strike rate of 25.3% (SD = 1.22). A paired t-test indicates that this difference in strike rates is significant at $p < .001$.

As earlier North Carolina research found, prosecutors in Wake County struck Black venire members at a significantly higher rate than white venire members.¹⁶¹ Table 4, Column B, reports that state strikes removed 51% of eligible Black venire members (38/75) compared to 25% (93/366) of eligible white venire members. The relative strike ratio is 2.04 (51%/25%). This disparity is statistically significant ($p < .0001$).

We replicated the gender analysis presented in Subsection i but did not observe disparities in prosecutorial exercises of peremptory strikes against all women. We did, however, observe significant disparities in strikes against Black women.¹⁶² Table 5 shows that the state removed 55% of eligible Black women with peremptory strikes (17/31) compared to 28% of all other venire members (114/410). This is a relative strike ratio of 1.96. This disparity is statistically significant ($p < .01$).

Table 5: State Strikes against Strike Eligible Black Female Venire Persons (*Peremptory strikes aggregated across cases.*)¹⁶³

	A	B	C	D	
	Venire Member Race-Gender	State Peremptory Strike	No Strike	Totals	
1.	Black Female	<i>number</i>	17	14	31
		<i>percent</i>	55%	45%	100%
2.	All Other	<i>number</i>	114	296	410
		<i>percent</i>	28%	72%	100%
	Total		131	310	441
			30%	70%	100%

3. Combined Impact of Witherspoon Exclusions and State Peremptory Strikes by Race

Section 3 presents the combined effect of death qualification and state peremptory strikes on the participation in these capital juries by Black citizens. Table 6 collects information presented in previous tables to illustrate the combined impact of the Ideology of Jury Selection in these cases. Column B reports the number of Black and white venire members in the study overall. Remember that this starting point underrepresented Black venire members relative to their presence in the community. Column C presents the actual number of Black and white venire members removed under *Witherspoon*. Column D presents the actual number of

¹⁶¹ See Grosso & O'Brien, *supra* note 67.

¹⁶² Note that very few Black women remained in the venire and eligible for prosecutorial peremptory strikes. State strikes removed all of the strike eligible Black women in three of the ten cases: Cooper (1 of 1), Devega (2 of 2), and Stepp (1 of 1). In a fourth, Richardson, no Black women were eligible for state strikes.

¹⁶³ We replicated this analysis by calculating the rate of removal by death qualification in each of the eleven cases and averaging these rates across the ten cases. In this analysis, prosecutors struck Black female venire members at an average rate of 57.2% (SD = 10.49) compared to white venire members' average strike rate of 24.8% (SD = 2.69). A paired t-test indicates that this difference in strike rates is significant at $p < .01$.

Black and white venire members removed by state peremptory strikes. Column E combines the number of venire members removed under *Witherspoon* with those removed by state strikes and presents the total number of Black and white venire members excluded from jury service. Finally, Column F presents the number of Black and white venire members in the reduced population.

Table 6 also presents basic calculations concerning the cumulative impact of these decisions on jury diversity. Column G shows that Black venire members were removed at more than twice the rate of white venire members (43%/21%). This may be in part because Black venire members make up only 18% of the initial venire (Column B), but removals of Black venire members constitute 32% of the total removals (Column E), almost twice the rate of their presence in the overall population. Moving to the second row in the same columns, removals of white venire members, by contrast, constitute 68% of total removals, a rate more than 14 percentage points lower than their representation in the initial venire (82%).

Table 6: Combined Impact of *Witherspoon* Exclusions and State Strikes

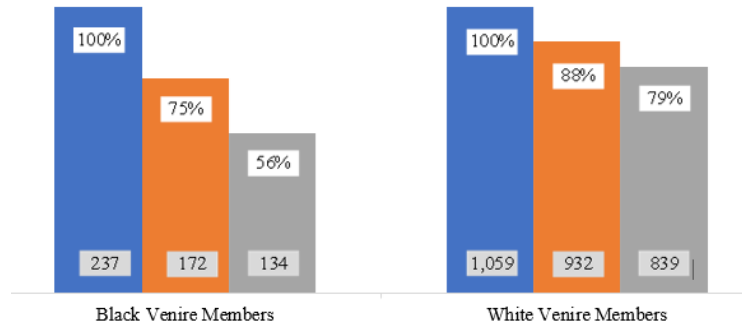
	A	B	C	D	E	F	G
	Venire Member Race	Initial Number of Venire Members	<i>Witherspoon</i> Exclusions	State Strikes	Population Removed (C+D) Percent	Population Remaining (B-E) Percent	Rate Removed (E/B)
1.	Black	237 18%	65	38	103 32%	134 14%	43% (103/237)
2.	White	1,059 82%	127	93	220 68%	839 86%	21% (220/1,059)
	Totals	1,296 100%	192	131	323 100%	973 100%	

The cumulative effect of the death qualification process and the state’s exercise of peremptory strikes meant that Black potential jurors were removed at almost twice the rate of their representation in the population of potential jurors (1.8 times, 32%/18%), whereas white potential jurors were removed at 0.8 times their rate (68%/82%). Figure 1 illustrates this change.

The findings of this study echo earlier findings and illustrate the magnitude of the cumulative costs to diversity of jury selection rules. Transcripts from jury selection in these cases illustrate the extent to which the rules authorizing removal of potential jurors based on their death penalty opinions and the availability of a large number of peremptory strikes operate as accepted but consequential parts of the process. Prosecutors and defense counsel raise arguments about whether a potential juror’s opinions qualify for removal under *Witherspoon* without challenging the overall cost of this inquiry to the democratic jury ideal. Peremptory challenges quietly backstop and expand *Witherspoon*’s reach—allowing prosecutors to remove even those whose opinions satisfy the constitutional standards for

allowable concerns about capital punishment.¹⁶⁴ This practice puts the rules for selecting capital juries in direct tension with our democracy ideals.

Figure 1: Percent in Population Remaining by Decision Point—Full Venire (blue), Post Witherspoon Exclusions (orange), and Post Witherspoon and Peremptory Exclusions (grey) (percent of population remaining at top of column, number of venire members remaining at bottom with grey background)



V. A COLLISION OF IDEOLOGIES THAT HARMS JURY DEMOCRACY

Section II reviews research documenting the costs of current jury selection procedures generally, and jury selection in capital cases in particular, to the diversity of seated juries. Section IV presents the results of a new study documenting similar results and showing the cumulative costs of the Ideology of Jury Selection in one county. This Section collects evidence documenting the costs of the predictable lack of diversity that undermines the vibrancy valued under Ideology of Jury Democracy.

Diversity enhances the quality of deliberation.¹⁶⁵ These benefits include the opportunity to present and discuss differing interpretations of the evidence or even varying memories about the details of the case.¹⁶⁶ For example, Sommers used a mock jury experiment to examine “the processes through which racial diversity

¹⁶⁴ Cover, *supra* note 131, at 121 (citing Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 28–29 (1982)).

¹⁶⁵ See Diamond & Hans, *supra* note 29, at 884 (noting that “diverse juries engage in more robust and vigorous deliberation”); see also Margaret Bull Kovera & Lora M. Levett, *Chapter 10. Jury Decision Making*, in APA HANDBOOK OF FORENSIC PSYCHOLOGY: VOL. 2. CRIMINAL INVESTIGATION, ADJUDICATION, AND SENTENCING OUTCOMES 271, 296–97 (B.L. Cutler & P.A. Zapf eds., 2015) (reviewing the literature).

¹⁶⁶ See Hans & Hritz, *supra* note 125, at 1189–19 (discussing the phenomenon of confirmation bias and the importance of presenting and testing differing narrative accounts or understandings of the evidence).

influences group decision making.”¹⁶⁷ Study subjects, recruited from an actual jury pool of people responding to jury summons, deliberated in heterogeneous groups (four white and two Black mock jurors) or homogeneous groups (six white jurors). In this study, “heterogeneous groups deliberated longer and considered a wider range of information than did homogeneous groups.”¹⁶⁸ Sommers also observed that white participants in heterogeneous groups raised more case facts, made fewer factual errors, and engaged more comfortably in race-related issues.¹⁶⁹

Subsequent research has documented ways in which “diversity provides diverse perspectives, and also promotes perspective taking.” It “increases people’s tendency to process information more deeply” and “can raise their tolerance of ambiguity and open-endedness.”¹⁷⁰ Alternately stated, diversity of perspective reduces the risk of biased outcomes because the range of views expressed prevents one dominant view from determining the outcome. Diversity means accountability: people process facts more deeply because there are voices that challenge the prevailing status quo and assumptions about defendants and victims. These qualities enhance the truth-seeking function of the jury inherent to the Ideology of Jury Democracy. The persistent harms to jury diversity that arise from the hegemonic Ideology of Jury Selection—from decisions about assembling jury summons lists, to the failure to accommodate situations that require hardship removals, to race disparities in the exercise of cause excusals and peremptory strikes¹⁷¹—never stand out in higher relief than they do in this respect.

A second important cost of a lack of diversity arises from the juries’ role as a check on government power. Juries lacking in diversity have been found to be more punitive.¹⁷² A jury that is more punitive than the community in which it sits is simply less well prepared to carry out this role. Shamena Anwar and colleagues collected information on 300,000 individuals who responded to jury summons for felony trials in Harris County, Texas. They observed that Black defendants were much more likely to be convicted and to receive more severe punishments when juries had a higher share of residents from predominantly white and high-income

¹⁶⁷ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606 (2006).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Justin Sulik, Bahador Bahrami & Ophelia Deroy, *The Diversity Gap: When Diversity Matters for Knowledge*, 17 PERSP. PSYCHOL. SCI. 752, 757 (2022) (collecting research on the epistemic benefits inherent to diversity) (internal citations omitted).

¹⁷¹ See *infra* Section III & V; see generally Catherine M. Grosso & Barbara O’Brien, *Race and Jury Selection*, in RESEARCH HANDBOOK IN LAW AND PSYCHOLOGY (forthcoming 2024); Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1407 (2018); Frampton, *supra* note 44, at 785.

¹⁷² Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEG. & CRIM. PSYCH. 171, 179–81 (2007) (reviewing literature). See generally Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269 (2015) (reviewing the literature).

neighborhoods. They also documented that residents from these neighborhoods tended to be substantially overrepresented on juries.¹⁷³

A second study from the same research team looked at the impact of the racial composition of jury pools on trial outcomes in felony trials in Florida between 2000 and 2010.¹⁷⁴ This comparison was possible because 36% of the jury pools had no Black members. The scholars found that juries formed from all-white jury pools convicted Black defendants sixteen percent more frequently than white defendants. They also found that this disparity in outcome disappeared entirely when the jury pool included at least one Black member. This research builds on earlier research concluding that lack of diversity can exacerbate a racial gap in conviction rates.¹⁷⁵

This harm to diversity of perspectives can arise from the removal of candidate jurors based on widely accepted grounds. Emily Shaw and colleagues studied the importance of racial diversity when judging the strength and quality of evidence presented in criminal cases.¹⁷⁶ Their 2021 study examined whether attitudes and beliefs about law enforcement help explain the racial gap among jurors in support for conviction.¹⁷⁷ Participants were presented with a hypothetical federal drug conspiracy case in which the race of the FBI informant—whose testimony was a major part of the government’s case—varied. The authors found Black participants significantly less likely to convict than white participants, especially when exposed to the white informant condition. Black participants also rated the law enforcement witness as less credible and viewed police more negatively.¹⁷⁸

Shaw and colleagues caution, however, against using this finding to justify excluding skeptical jurors from service because “removing jurors due to their skepticism about the police runs a high risk of seating a biased jury.”¹⁷⁹ They continue that “our findings suggest that the legal processes that are used to excuse jurors from service, either peremptorily or for cause, need to be reconsidered to ensure that views of police, including those rooted in actual experience or knowledge

¹⁷³ See generally Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *Unequal Jury Selection and Its Consequences*, 4 AER INSIGHTS 159 (2022).

¹⁷⁴ See generally Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017 (2012).

¹⁷⁵ See *id.*; Fran Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J.L. & ECON. 189 (2018); Johnson, *supra* note 111, at 394.

¹⁷⁶ See Emily V. Shaw, Mona Lynch, Sofia Laguna & Steven J. Frenda, *Race, Witness Credibility, and Jury Deliberation in a Simulated Drug Trafficking Trial*, 45 LAW & HUM. BEHAV. 215, 225 (2021) (finding a racial conviction gap possibly based on difference in credibility assessments of the law enforcement witnesses); Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1036 (2003) (reporting a study finding that laypersons bring “expectations, beliefs, and experiences” that enhance the likelihood that they will find certain evidence more persuasive).

¹⁷⁷ Mona Lynch & Emily V. Shaw, *Downstream Effects of Frayed Relations: Juror Race, Judgment, and Perceptions of Police*, RACE & JUST., 2023, at 2.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 17.

about problems with fair and just policing, are not used to disproportionately exclude persons of color, or to seat juries overrepresented by people who blindly trust and support police.”¹⁸⁰ Removing jurors based on their views of police—that is, by favoring jurors who have never had a negative interaction with police—prioritizes the existing power structures wherein the hegemonic Ideology of Jury Selection dominates.¹⁸¹

Similarly, the practice of peremptory strikes against potential jurors—who have not been excused for cause and have therefore been deemed acceptable by the judge—privilege litigants’ rights over those of citizens to participate in the democratic function of the jury.¹⁸² That parties can exercise peremptory strikes for any reason—bar race, gender, or ethnicity—“no matter how ‘implausible or fantastic,’” suggests that idealistic notions about the jury’s role in participatory democracy are subordinate to litigants’ rights to exercise control over who can and cannot take part.¹⁸³ This is not necessarily a problem; the interests of a defendant facing the prospect of a criminal conviction outweigh those of a prospective juror whose biases or personal connection to the case would render them partial. But the choice to allow parties to strike for even reasons that have no basis in fact or logic demonstrates just how readily ideals of democratic participation yield to other values.

The higher rates of opposition among Black citizens to capital punishment have historically led to their disproportionate removal from juries, contributing to the production of homogeneous juries.¹⁸⁴ Given this, the process of removing potential jurors based on their death-penalty attitudes leads to a “demographic dilemma” where the “lack of support for the death penalty among African Americans compromises the composition of capital juries in such a way that the capital sentencing process threatens to become a system in which minority jurors are excluded from this critical aspect of the criminal justice process altogether.”¹⁸⁵

¹⁸⁰ Id. at 18 (quoting Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don’t Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIR. PSYCHOL. SCI. 183, 183 (2018)).

¹⁸¹ See Silbey, *supra* note 3, at 291 (arguing that “[w]hen law functions hegemonically, its categories and symbols so suffuse consciousness that opposition and resistance are unlikely because most of the time they are unthinkable, outside the cognitively available categories.”).

¹⁸² Abrahamson, *supra* note 25, at 869.

¹⁸³ Purkett v. Elem, 514 U.S. 765, 775 (1995) (Stevens, J., dissenting) (quoting per curium opinion).

¹⁸⁴ See, e.g., John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. CRIM. JUST. 85 (2006); Mark Peffley & John Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 997 (2007).

¹⁸⁵ Sullivan, *supra* note 67, at 1110.

Witherspoon exclusions have the potential to impact diversity of perspectives in other respects as well.¹⁸⁶ On top of *Witherspoon*, the exalted view of juries as fundamental to democratic participation conflicts with a deep mistrust of jurors themselves. As Laura Gaston Dooley argues, trial lawyers are trained to look upon jurors as fickle and easily swayed by superficial factors such as an attorney's mannerisms and clothing.¹⁸⁷

Capital jurors have direct influence on both guilt and sentencing decisions in the cases in which they serve. Juries' decisions also contribute to how reviewing courts interpret the Eighth Amendment. The Supreme Court established more than a century ago that the Eighth Amendment's prohibition on cruel and usual punishment derives its meaning in part from public opinion that may evolve or change "as public opinion becomes enlightened by humane justice."¹⁸⁸ The Court emphasized its commitment to measuring "evolving standards of decency" in determining the constitutionality of the death penalty in *Gregg v. Georgia*.¹⁸⁹ The *Gregg* Court sought to identify "objective indicia that reflect the public attitude,"¹⁹⁰ noting that the "jury . . . is a significant and reliable objective index of contemporary values, because it is so directly involved" in the administration of capital punishment.¹⁹¹

The Court has looked to patterns in capital jury decisions as part of its evolving standards of decency analysis in decisions limiting the execution of intellectually disabled defendants,¹⁹² prohibiting the execution of juveniles,¹⁹³ and repeatedly limiting the death penalty to homicide cases.¹⁹⁴ But that process necessarily excludes essential information about public attitudes and values when jury selection procedures lead to juries that are more likely to convict or issue death sentences, or

¹⁸⁶ Craig Haney, Eileen L. Zurbriggen & Joanna M. Weill, *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection*, 28 PSYCHOL., PUB. POL'Y & L. 1, 3 (2022) (collecting research suggesting the death-qualified jurors in Florida were more likely to endorse racist, sexist, and homophobic attitudes, be more susceptible to pretrial publicity, and be more responsive to victim impact statements) (internal citations omitted).

¹⁸⁷ Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 338 (1994-1995) (observing that attorney training manuals paint the jury "in feminine terms; it is an object to be wooed by the charms of the attorney.").

¹⁸⁸ *Weems v. United States*, 217 U.S. 349, 378 (1910); *see also Trop v. Dulles*, 356 U.S. 86, 101 (1958) (affirming that the meaning of the cruel and unusual punishment prohibition derives from "the evolving standards that mark the progress of a maturing society").

¹⁸⁹ *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion) (finding the death penalty constitutional).

¹⁹⁰ *Id.* at 173.

¹⁹¹ *Id.* at 181.

¹⁹² *Atkins v. Virginia*, 536 U.S. 304, 307-13 (2002).

¹⁹³ *Roper*, 543 U.S. 551, 564-75 (2005).

¹⁹⁴ *Coker v. Georgia*, 433 U.S. 584, 593-600 (1977) (disallowing a death penalty for rape of an adult woman); *Kennedy v. Louisiana*, 554 U.S. 407, 419, 421 (same for rape of a child).

that are less representative of society's opinions.¹⁹⁵ As such, the selection procedures create a skewed picture that imposes an independent cost to constitutional interpretation itself.

This process also undermines the expected authority of juries under the Ideology of Jury Democracy. For example, Cohen and Smith note that at the time of the founding, a potential juror's "view on the constitutionality of a particular law . . . marked an important component of society's deliberative process."¹⁹⁶ They suggest that cause strikes undermine the deliberative process needed to give the jury its full and expected role.¹⁹⁷ "Far from being a prohibited 'bias,'" they argue, "the jury's beliefs on the appropriateness of the law or its punishment served an important function both in the English system and in ours at common law."¹⁹⁸ Similarly, Frampton notes that the "version of the 'impartial jury' that now reigns in American criminal procedure—distant, dispassionate, ignorant of the parties and allegations—contrasts with the 'local jury' that predominated . . . at the country's founding."¹⁹⁹ This concern parallels Carroll's image of jury democracy where the jurors play an essential role in "grounding the law in the living world of the citizens whose obedience it commands."²⁰⁰

Current jury selection methods not only distort information communicated to the Court regarding evolving standards of decency, but they also send a troubling message to the public about the value of their participation. Justice and Meares conceptualize the costs in terms of procedural justice of the "disproportionate exclusion and inclusion of various groups in society," noting that "this cherished (if impotent) form of civic education sends a clear message that some people are worthy citizens whose opinions and judgments are valued, while other citizens' views do not count."²⁰¹ These exclusions undermine public confidence in jury decision making and, in turn, in public confidence in the justice system as a whole.²⁰² The

¹⁹⁵ See generally Cover, *supra* note 131 (arguing that the rate of juror disqualification on the basis of death penalty opinions should be incorporated into the Court's use of jury verdicts in assessing the constitutionality of the death penalty); Craig Haney, *supra* note 186.

¹⁹⁶ G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87, 89–90 (2008).

¹⁹⁷ *Id.* at 99.

¹⁹⁸ *Id.* at 99–100.

¹⁹⁹ Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 829 (2020); see also Cohen & Smith, *supra* note 44, at 99–100.

²⁰⁰ Carroll, *supra* note 10, at 830; see also Ortman, *supra* note 10, at 1327 (arguing that "jury decisions have both majoritarian and deliberative democratic provenance").

²⁰¹ Justice & Meares, *supra* note 110, at 169.

²⁰² See Diamond & Ellis, *supra* note 29, at 1037–1039 (discussing the importance of jury diversity to perceptions of jury fairness and reporting the results of a study demonstrating that racial composition of the jury influenced ratings of trial fairness when the verdict was guilty); Kate Abramowitz & Amy Bradfield Douglass, *Racial Bias in Jury Selection Hurts Mock Jurors, Not Just Defendants: Testing One Potential Intervention*, 47 LAW & HUM. BEHAV. 153, 154–55 (2023) (testing the impact of the exclusion of jurors by race on juror perceptions of fairness).

pervasive Ideology of Jury Selection harms the system as a whole. The following section notes initiatives that introduce “productive discourse” that challenges the hegemonic ideology and protects democratic engagement.²⁰³

VI. AVENUES TO RECENTER THE IDEOLOGY OF JURY DEMOCRACY

Harms like those identified in the previous section have led some jurisdictions to introduce reforms with potential to re-center the Ideology of Jury Democracy in their systems. This section reviews some of these reforms and discusses their potential for enhancing jury diversity, noting the ways in which they rebalance the values of each ideology.

States continue to improve the inclusiveness of jury source lists and technology improves their capacity to update addresses regularly. Diamond and Hans reviewed the state of reform nationally and noted that “[c]ourts, legislatures, and jury commissioners could take a number of steps to fully realize, or at least more closely approach, the fair cross-section goal.”²⁰⁴ The Juror Project in New Orleans “presents at high schools, colleges, churches and other community gatherings discussing the importance of jury service and the factors at play removing diversity from the jury putting the fairness of our criminal legal system in jeopardy.”²⁰⁵ Changes in juror pay can have expected diversity benefits.²⁰⁶ As discussed above, lifting exclusions can also make a difference. For example, a number of communities have begun to eliminate the wholesale exclusion of felons from jury service.²⁰⁷ These reforms and others like them can improve the diversity of jury venires counteracting the costs described above and deficits like those observed in the Wake County cases.

²⁰³ Silbey, *supra* note 3, at 290–91.

²⁰⁴ See Diamond & Hans, *supra* note 29, at 905–13 (reviewing possible reforms including improving juror source list practices, expanding jury eligibility, addressing non-responsiveness, and addressing hardships).

²⁰⁵ The Juror Project, *About Us*, [thejurorproject.org/new-page](https://perma.cc/46QK-8QHF) [https://perma.cc/46QK-8QHF] (last visited 19 March 2024) (explaining the project); see also Sonali Chakravarti, RADICAL ENFRANCHISEMENT IN THE JURY ROOM AND PUBLIC LIFE (2019) (discussing The Juror Project).

²⁰⁶ Michelle Lau & Anne Stuhldreher, *Ensuring San Francisco Juries Reflect the Economic Diversity of Our City, The Financial Justice Project: San Francisco* (Nov. 2022), available at https://sfgov.org/financialjustice/files/2022-11/Be%20the%20Jury%20Report_Final.pdf [https://perma.cc/2W5G-FSXJ] (last visited Feb. 9, 2024) (reporting on a pilot project that increased the daily juror stipend from \$15 to \$100 for low- to moderate-income jury qualified citizens that made it possible for more citizens to serve as jurors and increased the diversity of jury pools); See also Diamond & Hans, *supra* note 29, at 912 (citing Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 350 (2005)). Anna Offit characterizes cause excusals for economic hardship as a form of “benevolent exclusion,” which ultimately reduces the diversity of experiences and attitudes of the seated jury. See also Offit, *supra* note 115, at 615.

²⁰⁷ Diamond & Hans, *supra* note 29, at 909–10 (noting that “[t]he 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 history of mass incarceration, strongly affects the representation of persons of color.”); Moreover, excluding felons on the assumption that they will share attitudes about criminal activity and law enforcement overlooks significant variability in the views of people with felony records. See also BINNALL, *supra* note 111, at 50–61 (2021).

Moreover, these reforms do not interfere with a court's ability to empanel an impartial jury, which means that they do not present significant tradeoffs between the values of the competing ideologies. In other words, these reforms are low-hanging fruit in the effort to facilitate broad juror participation.

The *Batson* reforms undertaken in Washington, California, Connecticut, and Arizona have a similar goal of protecting jury diversity.²⁰⁸ Reforms in the first three states specify presumptively invalid reasons to exercise peremptory strikes, providing lists of inherently suspect reasons historically associated with improper discrimination in jury selection including: prior contact with or expressing a distrust in police, having close relationships with people who have been convicted of crimes, living in a high-crime neighborhood, having a child outside of marriage, receiving state benefits, and not being a native English speaker.²⁰⁹ The lists signals the importance of diversity and the state's commitment to inclusion. They disrupt the presumption that litigants' rights always rise above those of citizens to participate in the democratic function of the jury and of society to have diverse juries. In so doing, these reforms interrupt the hegemonic authority of the Ideology of Jury Selection and center the values of inclusion and representation central to the Ideology of Jury Democracy.

Any reform, no matter how well intended, must be evaluated to assess its efficacy and to consider unintended consequences. The challenge in evaluating these reforms is the paucity of data available for review as they are implemented. California is a case in point where the trial courts do not systematically collect demographic information from prospective jurors. As one report notes, this lack of information makes it impossible to know whether the state's reform is increasing representativeness on seated juries.²¹⁰ Lack of information also prevents courts from knowing if their summons practices comply with the fair cross-section requirements.

²⁰⁸ See *infra* notes 68-70 and accompanying text; see also Nancy S. Marder, *supra* note 92 (reviewing the reforms). These reforms are not always well-received. In 2009, North Carolina enacted its own reform in the Racial Justice Act. N.C. Gen. Stat. §15A-2010. The Racial Justice Act originally allowed capital defendants to challenge their death sentences using statistical evidence that race was a factor in decisions to charge capital, impose a death sentence, or in the exercise of peremptory strikes. Four death-sentenced defendants successfully challenged their sentence under the Act, triggering significant backlash and ultimately leading to its repeal in 2013. See North Carolina Racial Justice Act ("RJA"), N.C. GEN. STAT. ANN. §§ 15A-2010, 15A-2011 (West, effective Aug. 11, 2009) (repealed 2013), § 15A-2012 (West, effective Aug. 11, 2009) (repealed 2012). In 2020, the North Carolina Supreme Court ruled that anyone who had filed their petition before the RJA was repealed was entitled to have their claims heard. *North Carolina v. Ramseur*, 374 N.C. 658 (2020). There were more than 100 active cases at the time this Article went to press. *North Carolina v. Hasson Bacote*, ACLU, <https://www.aclu.org/cases/north-carolina-v-hasson-bacote#:~:text=In%202013%2C%20as%20a%20backlash,move%20forward%2C%20despite%20the%20repeal> [<https://perma.cc/63CW-TWCS>] (last visited February 10, 2024).

²⁰⁹ Wash. Gen. R. 37(h).

²¹⁰ Elisabeth Semel, Willy Ramirez, Yara Slaton, Casey Jang & Lauren Havey, *Guess Who's Coming to Jury Duty? How the Failure to Collect Juror Demographic Data Contributes to Whitewashing the Jury Box*, Berkely Law Death Penalty Clinic, Feb. 2024, at 3-4

The first three states' reforms also educate attorneys, judges, and other participants about the extent to which prior contact with the police remains correlated with race and invite them to think differently about what it means to live in a high-crime neighborhood or to receive state benefits.²¹¹ Prohibiting reliance on these reasons again interrupts the operation of the Ideology of Jury Selection and invites adoption of a new norm.

As we have written earlier, a similar educational initiative took place during jury selection for the 2021 Minneapolis trial of Derek Chauvin.²¹² The court created space to engage with potential jurors as full citizens with complex opinions. This court implicitly and explicitly recognized the importance of race and racism to the trial and the pervasive history of discrimination in jury selection. This approach similarly interrupted the hegemonic Ideology of Jury Selection. Everything about the jury selection process in this case sought to include eligible jurors and to protect diversity where possible.²¹³ The tone and tenor of the process centered key tenets of the Ideology of Jury Democracy—fairness, inclusion, and respect for the citizen participants.

Arizona, the fourth state to undertake jury reforms, abolished peremptory challenges altogether.²¹⁴ As part of the reform, Arizona courts worked to expand voir dire and to increase the use of written jury questionnaires.²¹⁵ These reforms also have the potential to center the Ideology of Jury Democracy, limiting the excusal of eligible citizens. They also change the entire tenor of the conversation with jurors. England, Wales, and Canada eliminated peremptory challenges before Arizona.²¹⁶ Observing a British court after the abolition of peremptory challenges, Nancy Marder noted that the court operated from the assumption that “all jurors would play their proper role and put aside any prejudices they might hold” without extensive

https://www.law.berkeley.edu/wp-content/uploads/2024/02/Guess-Whos-Coming-to-Jury-Duty_2-14-24.pdf [<https://perma.cc/A2Y7-YVGS>] (last visited March 18, 2024).

²¹¹ See Barbara O'Brien & Catherine M. Grosso, *Judges, Lawyers, and Willing Jurors: A Tale of Two Jury Selections*, 98 CHI-KENT L. REV. 111, 116-17 (2024).

²¹² See *id.* at 117 (generally describing the Chauvin jury selection process).

²¹³ *Id.* at 117-29 (reviewing the Chauvin jury selection).

²¹⁴ See ARIZ. SUP. CT. ORD. No. R-21-0020 (Aug. 30, 2021) (removing peremptory challenges from the Rules of Civil and Criminal Procedure, effective Jan. 1, 2022); ARIZ. SUP. CT. ORD. No. R-21-0020 (Sept. 28, 2021) (removing peremptory challenges from the Justice Court Rules of Civil Procedure and the Rules of Procedure for Eviction Actions).

²¹⁵ See Nancy S. Marder, *supra* note 92, at 100 (reviewing aids for proceeding without peremptory challenges post abolition).

²¹⁶ See Criminal Justice Act, 1988, c. 33, § 118 (Eng.); Criminal Code, R.S.C. 1985, c. C-46, s. 633 & 634 (repealed) (Can.) (noting that amendments to ss. 633 and 634 of Criminal Code eliminated peremptory challenges); see also Hassan Kanu, *Arizona Breaks New Ground Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2021), <https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-202109-01/> [<https://perma.cc/NXR7-AZ2H>] (“England abolished peremptory strikes in 1988, and Canada did so in 2019, for example, without any chaos in the courts[.]”).

questioning or exhaustive inquiries into their opinions and experiences.²¹⁷ She observed, “The process was very dignified, and of course, extremely efficient.”²¹⁸ Again, this process centers the juror as citizen participants in the court, moving values of the Ideology of Jury Democracy back from the periphery.²¹⁹

Several provinces in Argentina introduced juries beginning in the 1990s. The initiative arose “during a time of intense debate over crime and personal security” and sought to “generate a bridge between the people and their leaders.”²²⁰ One province in particular, Neuquén, developed its law governing juries based on many of the characteristics of well-known common law juries, like those in the United States. The drafters, however, sought to avoid the history of discriminatory jury selection and unrepresentative juries in the United States. To avoid this, the jury law states:

The jury must be integrated, including alternates, by men and women equally. It will be that at least half the jury belongs to the same social and cultural environment of the accused. It will also try, whenever possible, to have seniors, adults and youth in the panel of juries.²²¹

This rule mandates an intercultural, intergenerational jury. In one instance where the court sat an intercultural jury, the defendants introduced evidence of relevant human-rights violations and of a failure to protect where they had not been able to do so before.²²² Hans notes that this intercultural jury resembles an early form of English mixed jury (“*de medietate linguae*”), which included “half of the jurors from the local community and half from an alternative community.”²²³

Reforms that deliberately create diversity and engage important members of the community have great potential to reinforce the Ideology of Jury Democracy. The Court has rejected the claim that the right to a fair cross section applies to petit juries—in part due to the impracticality of achieving representativeness in a group

²¹⁷ Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 86 CHI.-KENT L. REV. 537, 553 (2011) (reporting on jury selection without peremptory challenges).

²¹⁸ *Id.*

²¹⁹ To expand jury participation even further, the Criminal Justice Act 2003 reduced the number of groups whose members had been either ineligible to serve or entitled to excusal from jury service, such as those in the medical profession or those who work in the justice system. Criminal Justice Act 2003, c. 44, §321, sch. 33 (UK).

²²⁰ Valerie Hans, *Trial by Jury: A Story of a Legal Transplant, Presidential Address*, 51 LAW & SOC’Y REV. 471, 474–75 (2017) (citing and quoting María Inéz Bergoglio) (internal citations omitted).

²²¹ *Id.* at 476–77 (quoting an interpretation of the law from Andrés Harfuch, Mariana Bilinski & Andrea Ortiz, “*Argentina’s Indigenous Jury*.” Presented at the Annual Meeting of the Law and Society Association, New Orleans, LA (3 June 2016)). Actual quotation does not include an oxford comma [R5.2]

²²² *Id.* at 477–78.

²²³ *Id.* at 478–79.

of twelve.²²⁴ But, as Richard Re argued, the Court could extend the fair cross section requirement to petit juries “in a loosened, practically obtainable form,” such as by showing a disparity in petit juries over time.²²⁵ Imposing some mechanism to assess how well trial courts are doing at seating petit juries that reflect their community over time would signal the legal system’s commitment to ensuring that criminal defendants generally—even if not in every individual case—are tried by a fair cross section of their community.

Turning to the practice of removing potential jurors based on their death penalty opinions, the presumption that people opposed to the death penalty are impaired in capital cases because they are unable to apply the law authorizing the death penalty sweeps more broadly than necessary at a great cost to full democratic participation. In *Uttecht v. Brown*, the Court noted the prosecution’s “strong interest in having jurors who are able to apply capital punishment with the framework state law prescribes.”²²⁶ However, the state’s interest could be served with a broader view of what makes a juror death qualified. The Court should limit exclusions to those authorized under the holding in *Witherspoon*, whereby only potential jurors who unambiguously express their refusal to vote for the death penalty under any circumstance may be excused. This limited reform narrowly tailors the death qualification process sufficiently to serve the state’s interest in preventing death penalty nullifiers from serving. But it avoids the broad sweep of later cases that interpreted the standard to allow more room for interpretation, authorizing the exclusion of those where the trial judge is left with the impression that his attitude will “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”²²⁷

We are also concerned that the expansive rule that operates as a default in capital cases not only removes qualified and willing jurors in a manner that harms Black potential jurors but also unfairly places the state’s interest above those of both the defendant and the potential juror. Our system places the full burden of proof on the state, and no law requires the imposition of the death penalty.²²⁸ Our system does

²²⁴ *Taylor*, 419 U.S. 522, 538 (1975); *Lockhart*, 476 U.S. 162, 173-74 (noting the “practical impossibility” of achieving representativeness on a petit jury).

²²⁵ Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1576 (2007).

²²⁶ *Uttecht*, 551 U.S. 1, 9 (2007).

²²⁷ *Adams v. Texas*, 448 U.S. 38, 45 (1980) (relied upon by *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). *But see Haney*, *supra* note 186, at 14 (concluding “substantial empirical evidence we have amassed showing the breadth and depth of these persistent biasing effects raises serious questions about whether the time has come to simply end this unfair practice”).

²²⁸ *See In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding a statute imposing an automatic death penalty upon all persons convicted of first-degree murder was unconstitutional); *see also* Brandon L. Garrett & Gregory Mitchell, *Error Aversions*

not envision parity between the state and the defense.²²⁹ Research presented above documents ways in which removing people with concerns about capital punishment yields a more punitive jury.²³⁰ A more punitive jury tips the scale in favor of the state in a manner antithetical to the due process requirements and does so to the detriment of the Ideology of Jury Selection. A narrower cause exclusion would mitigate this harm.

Similarly, decades of capital trials demonstrate that death qualifying a jury takes a great deal of time and resources.²³¹ This reality, considered in conjunction with the costs of full democratic participation that the current process imposes, suggests a clear benefit to seating the guilt trial jury separately from the penalty trial. Empaneling a jury tasked only with deciding guilt would obviate any justification for excusing jurors based on their opinions about the death penalty.²³² It is a reform worthy of additional consideration.

Each of these reforms addresses pieces of the process that arise from adherence to the Ideology of Jury Selection. In our judgment, the critique presented here calls for a much broader shift in paradigm. Carroll urges the United States to reimagine jury composition “as a forum to embrace a citizen’s fluid identity and promote diverse perspectives within democracy.”²³³ Simonson calls to embrace an “agonistic stance toward public participation in criminal legal institutions” that “would allow groups to participate in the processes of those institutions while still remaining opposed to the dominant priorities of the state actors in charge of them.”²³⁴ She imagines a jury that would engage differently and encourage people to “take an adversarial stance toward practices and ideologies of institutions in power through engagement with those institutions, by acknowledging intractable differences but respecting the adversary who disagrees.”²³⁵ Both of these approaches reject the

and Due Process, 121 MICH. L. REV. 707, 710–11 (2023) (“The fundamental due process protections for criminal defendants at trial—the presumption of innocence and the requirement of proof of guilt beyond a reasonable doubt—arise from the principle that the state should impose punishment only on the clearest of proof that the accused committed the crime charged, even if this high bar means some wrongdoers will escape punishment.”).

²²⁹ *Cf. Witherspoon*, 391 U.S. 510, 535 (1968) (Black, J., dissenting) (reasoning that permitting jurors with “conscientious or religious scruples against capital punishment” would lead to bias against the prosecution).

²³⁰ *See infra* text accompanying note 126 (documenting this effect).

²³¹ *See infra* text accompanying notes 63–68 (explaining the exhaustive questioning of potential jurors in capital trials).

²³² *Cf. Lockhart*, 476 U.S. 162 (1986) (holding that the Constitution did not require separate juries for bifurcated capital trials).

²³³ Carroll, *supra* note 10, at 870.

²³⁴ *See* Simonson, *supra* note 5, at 265.

²³⁵ *Id.* at 288.

image of “fickle and easily swayed” jurors. They imagine strong citizens who have learned to engage in democracy.²³⁶ The Constitution imagines nothing less.

CONCLUSION

Examining how juries are selected through the lens of ideology demonstrates that the values of broad democratic participation in civic life through jury service take a back seat to notions about which attitudes and life experiences render a prospective juror fit or unfit for service. This gatekeeping is generally not thought of as the product of an ideology but instead as necessary to ensure the fairness of the trial.

The literature on jury selection follows conflicting themes. First, juries and jury participation play a deliberate role in the U.S. democratic system of governance. Second, citizens who present themselves for jury participation consistently and persistently face exclusion on bases that disproportionately impact Black and brown citizens. In the interest of assembling an unbiased jury, courts implicitly privilege some views over others—treating expressions of skepticism about law enforcement practices, for example, as a disqualifying bias, while treating a potential juror who reports never having had an upsetting encounter with police due to their race and socioeconomic status as unbiased.²³⁷ By categorizing some views and experiences as neutral and others as biased, courts undermine the democratic functions of the jury.²³⁸ The ideological underpinnings of these themes work against each other. The value of broad democratic participation with the goal of including a diverse range of views in the jury’s decision-making process often gives way to competing values regarding whose views are considered properly part of that process. In this conflict, the ambitions and ideals of the Ideology of Jury Democracy make clear the imperative for change.

²³⁶ For a thoughtful and nuanced argument in favor of strengthening juries as essential democratic institutions, see CHAKRAVARTI, *supra* note 205.

²³⁷ Anna Offit, *Antidiscrimination Law through a Sociolegal Lens*, 73 ALA. L. REV. 753, 756 (2022) (“When judges and juries impute bias or insurmountable hardship to people who are poor or people who do not trust the police, they are increasing the likelihood that the jury will not reflect the diversity of the community from which it is drawn.”).

²³⁸ See Simonson, *supra* note 5, at 277–78 (arguing that “doctrines defining the composition of ‘unbiased’ juries exemplify a conception of criminal procedure that defines ‘bias’ as the tendency to side with defendants”).