PEREMPTORY CHALLENGES AT THE TURN OF THE NINETEENTH CENTURY: DEVELOPMENT OF MODERN JURY SELECTION STRATEGIES AS SEEN IN PRACTITIONERS' TRIAL MANUALS

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Peremptory challenges based on race, national origin, religion, and class are well-known problems in modern jury selection, and have led to calls to abolish them altogether. Defenders of peremptory challenges argue that they are a fixture of the common law system that should not be discarded because of a few abuses.

This Article explores how and why strategic jury selection developed in the United States by looking at previously unstudied primary source materials: nineteenth-century trial attorneys' practice guides. Peremptory challenges and voir dire are difficult to study because court records often leave them out. Even when strikes are recorded, an attorney's strategy may not be evident to the outsider. But practice guide materials reveal these strategies, demonstrating that nineteenth-century attorneys used peremptory challenges to eliminate jurors based on stereotypes. They also show how a number of features of the modern American jury selection system—most notably, extended pretrial questioning of jurors—were expanded from their more limited common law forms to make it easier for lawyers either to respond to particular social prejudices in American society or to make discriminatory peremptory challenges.

These findings have important implications for the modern-day debate over peremptory challenges. While proponents point to their ancient origins as justification for keeping them, a historical perspective shows that modern jury selection looks nothing like its English common law progenitor. Analysis of turn-of-the-century practices exposes modern abuses as part of a trend that began in the 1800s, suggesting that discrimination as a trial strategy is inevitable where courts allow extended voir dire and unfettered challenges.

* Attorney, Congressional Research Service. The views set forth herein are the personal views of the author and do not reflect those of the Congressional Research Service. I am grateful to John Langbein, Morris Cohen, Jordan Barry, Matthew McCarthy, Tanya Spackman, and participants in the Yale Law School's Jury Trial Seminar for helpful comments.

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INTRODUCTION

In his 1885 advice manual for trial lawyers, *Conduct of Lawsuits out of and in Court*, John C. Reed insisted that "you are to learn at the outset of your practice, that, if you neglect the study of your panel and the selection of your jurors according to the principles set forth above, a mistrial or an adverse verdict will often befall you when you ought to win."[1] To anticipate jurors' "friendly and hostile prejudices," he warned lawyers to consider "the attitude of different races, political parties, religious denominations, [and] secret societies . . . ."[2] Writing four years earlier, Joseph Donovan likewise told his readers that proper use of the peremptory challenge was "a work of more importance than any one act of the trial—not even excepting the argument."[3] Such sentiments might not seem unusual for anyone familiar with the modern American jury trial; lawyers have significant influence over jury composition and jury selection can take days. But for anyone familiar with common law practices in early America—or with jury trials at any time in England—this emphasis on jury selection would seem bizarre.

At common law, lawyers had little control over jury selection. In theory, criminal defendants, then as now, could challenge an individual venireman, removing him from consideration.[4] The rules gave a criminal defendant a set number of peremptory challenges, made without requiring any justification. The defendant could also challenge as many jurors as he or she pleased "for cause," giving a reason such as a conflict of interest or demonstrated bias.[5]

In modern American practice parties challenge jurors, too, but they interrogate them first. In voir dire, the pretrial questioning of jurors by the court or attorneys, jurors are asked about their connections, characteristics, or prejudices.[6] But as historian J.B. Post argued, there was likely no such practice

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1. JOHN C. REED, CONDUCT OF LAWSUITS OUT OF AND IN COURT 232 (1885).

2. *Id.* at 118.

3. J. W. DONOVAN, MODERN JURY TRIALS AND ADVOCATES 227 (1881).

4. J.B. POST, *Jury Lists and Juries in the Late Fourteenth Century*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800, at 71 (J.S. Cockburn & Thomas A. Green eds., 1988).

5. At common law, there were two types of challenges for cause. First, "principal challenges," governed by specific rules, were decided by the court. *See* Edward J. Finley II, Comment, *Ignorance as Bliss? The Historical Development of an American Rule on Juror Knowledge*, 1990 U. CHI. LEGAL F. 457, 465 (1990). Second, those "for favor," meaning prejudice, were tried by other jurors known as "triors." Most nineteenth-century American jurisdictions abolished or ignored the distinction between the two. *See* 1 SEYMOUR D. THOMPSON, A TREATISE ON THE LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL 35-36 (1889); JOHN PROFFATT, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT 220-21 (1877); C. LARUE MUNSON, A MANUAL OF ELEMENTARY PRACTICE 280 (1897).

6. "Voir Dire," a phrase meaning "to speak the truth," initially described preliminary witness examination. *Voir Dire*, BLACK'S LAW DICTIONARY 1227 (1st ed. 1891). By the dictionary's third edition, the definition included the examination of jurors. *Voir Dire,* BLACK'S LAW DICTIONARY 1822 (3d ed. 1933). American courts used the term at least by 1805 to describe a juror's pretrial examination. Berry v. Wallen, 1 Tenn. 186, 187 (1805).

at common law.[7] As Post explained in his study of late fourteenth-century jury lists, trial records generally show "no marking that could represent the process of trying the jurors between selection and swearing" to inform peremptory challenges.[8] Later English courts roundly rejected lawyers' attempts to question jurors in order to decide their peremptory challenges.[9] In practice, Post found, parties at common law very rarely made any challenges. For almost all trials, the first twelve veniremen called from the list and marked as present served as the jury.[10]

This Article will show how American pretrial voir dire questioning and peremptory challenges evolved in the late nineteenth century, giving rise to current practices allowing counsel in all U.S. jurisdictions to question prospective jurors about their identity, opinions, and habits, and to remove those they find objectionable. And, as this Article will argue, trial lawyers discovered ways to manipulate social divisions and biases from the start. The tactics many decry as modern abuses are, in reality, more than a hundred years old.

It is all the more important to understand the origins of these procedures as they have grown increasingly controversial. In 1989, Justice Marshall called racial bias in jury selection "perhaps the greatest embarrassment in the administration of our criminal justice system . . . ."[11] The Supreme Court has declared strikes based on race or gender unconstitutional, and lawyers may now be asked to give race- or gender-neutral explanations for removing a juror.[12] But, as many commentators note, unconstitutional challenges are hard to detect and root out, and abuses abound.[13] Lawyers must sometimes justify a peremptory strike, but, as one court put it, "[s]urely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"[14] Justice Breyer opined in 2005 that "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before."[15]

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7. POST, *supra* note 4, at 71-72.

8. *Id*. at 71.

9. *See infra* notes 83-88 and accompanying text.

10. POST, *supra* note 4, at 71. Post found "not a trace" of challenge procedures in routine jury trials. *Id*.

11. Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari).

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

13. *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis,* 3 U. PA. J. CONST. L. 3, 10 (2001) (concluding, in a study of Philadelphia death penalty cases, that "the use of peremptory challenges on the basis of race and gender by both prosecutors and defense counsel is widespread.").

14. People v. Randall, 671 N.E. 2d 60, 65 (Ill. App. 1996). One former prosecutor reflected that perhaps when veteran prosecutors passed on "little truisms" about jury selection, "they were instructing us in code to do what the Constitution forbids." Jeffrey Toobin, *Juries on Trial*, NEW YORKER, Oct. 31, 1994, at 43.

15. Miller-El v. Dretke, 545 U.S. 231, 270 (2005) (Breyer, J., concurring). *See also*

While courts struggle to enforce rules against racial and gender discrimination,[16] they can do nothing to restrain other types of demographic manipulation. Lawyers may strike venirepeople from the panel because of arbitrary characteristics, like age,[17] education, cultural habits, socioeconomic status, political opinion, or other features—no matter how capricious or seemingly unfair.[18]

Accordingly, opponents of peremptory challenges see attorneys as "stacking" juries and contend that selection procedures undermine confidence in the justice system, waste time, burden courts, and increase costs. Jury selection threatens the representative nature of the jury, as a few strikes can completely eliminate minority groups from the venire.[19] The problem may be worse now than in the past, as some jurisdictions have reduced the size of the jury pool without decreasing the number of peremptory challenges.[20] An unrepresentative jury, in turn, diminishes public faith in trial outcomes as observers attribute results to the jurors' uniform race, gender, class, or politics, speculating that excluded jurors would have voted differently.[21]

Challenge procedures also greatly add to the time and expense of litigation. In a high-profile murder case, picking a jury can last weeks.[22] Voir dire can consume more time than the trial,[23] and a party with means can hire jury selection

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Baldus et al., *supra* note 13, at 10, 128 n.285 (concluding abuses are widespread).

16. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 156 (1989) (finding that *Batson* "provided only a weak corrective" for discrimination); *see also* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 159 (2010) (observing that "[b]oth the voir dire process and the exercise of peremptory strikes pose particular problems for eradication of implicit bias from the jury selection process.").

17. *See* Baldus et al., *supra* note 13, at 128 n.285 (finding "[a]ge discrimination against young and older venire members is also widespread.").

18. *See* Joshua Revesz, Comment, *Ideological Imbalance and the Peremptory Challenge*, 125 YALE L.J. 2535, 2536-37 (2016) (noting how challenges skew the demographic characteristics and political opinions represented on juries).

19. Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 868 (1997).

20. Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1148 (1993).

21. *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986) (observing that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

22. Lonnie Mack, *Retrial Under Way in City Murder Trial*, HOME NEWS TRIBUNE, Nov. 22, 2003, at B4 (noting that it took six weeks to pick a jury for murder defendant's first trial).

23. Alschuler, *supra* note 16, at 157-58; Sherry Wilson Youngquist, *Allen Trial Ends with Plea Deal—He Pleads Guilty in Deaths of Two Men in Exchange for Life Sentence*, WINSTON-SALEM JOURNAL, Feb. 21, 2004, at A1 (reporting that jury selection for murder trial took seven weeks). One judge declared that "90 percent of the cost of a capital [trial] is on voir dire." Jo Ann Zuniga, *Election '94: 2 Former Prosecutors Matched in Close Race for Criminal Court*, HOUS. CHRON., Mar. 9, 1994, at A24 (quoting Texas judge Woody Densen). The

experts to research community opinion, design pretrial questions, draw up selection strategies, or run computerized analyses.[24] Hiring experts not only increases litigation costs, but gives wealthy parties an advantage. These troubles, among others, have prompted calls to eliminate peremptory challenges.[25]

Supporters, in contrast, praise peremptory challenges as essential to rooting out bias. Some go so far as to assert that race-based challenges are *proper* in certain situations.[26] Jury selection is still hailed as "the most crucial part of the trial."[27] Proponents assert that the peremptory challenge is "part of our common law heritage."[28]

Supreme Court's efforts to thwart race and other discrimination in the selection of jurors have made the process even more cumbersome. *See Batson*, 476 U.S. at 102 (White, J., concurring) (predicting that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding"); J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 162 (1994) (Scalia, J., dissenting) (predicting a "lengthening of the *voir dire* process that already burdens trial courts" and expressing concern that "damage has been done . . . to the entire justice system"); Miller-El v. Dretke, 545 U.S. at 267, 267 (2005) (Breyer, J., concurring); Alschuler, *supra* note 16, at 156 (arguing that *Batson* "produced cumbersome procedures that will generate burdensome litigation for years to come").

24. Each party may pay tens or hundreds of thousands of dollars for experts who design questionnaires, perform extensive community attitude surveys, and test the client's case before mock juries. *See* JOEL D. LIEBERMAN & BRUCE SALES, SCIENTIFIC JURY SELECTION 10-11, 119-121 (2007) (describing process of jury research and analysis); NEIL J. KRESSEL & DORIT F. KRESSEL, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING 61-65 (2002) (describing the "first known instance" of modern "scientific" jury selection); Stephen J. Adler, *Consultants Dope Out the Mysteries of Jurors for Clients Being Sued,* WALL ST. J., Oct. 24, 1989 at A1 (describing payment of "several hundred thousand dollars" to legal consulting firm for jury analysis).There are computer software programs to assist. Tera Bias, *The Impact of Technology on Equal Protection As Applied in Voir Dire: Examining Inventions' Influence on Peremptory Strikes and the Standard of Review*, 17 SMU SCI. & TECH. L. REV. 163, 165 (2014). For a description of some modern stereotypes used to pick jurors, *see* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY, 73-75 (1986).

25. *Batson*, 476 U.S. at 103 (Marshall, J., concurring) (arguing that effectively combating racial discrimination in jury selection "can be accomplished only by eliminating peremptory challenges entirely"); Hoffman, *supra* note 19, at 809 n.2 (noting the challenge's opponents); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182-83 (1996) (suggesting challenges be eliminated).

26. Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L REV. 9, 63 (1997) (discussing argument that "strikes based on race or sex are at least understandable—and sometimes even morally warranted—as a means to secure justice"); Abbe Smith, *Nice Work if You Can Get It: Ethical Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 531 (1998) (arguing that "it is unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with" *Batson*).

27. Judith H. Germano, Note, *Preserving Peremptories: A Practitioner's Prerogative,* 10 ST. JOHN'S J. LEGAL COMM. 431, 432 (1995) (quoting MARILYN BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS AND STRATEGY 164 (1989)). Jury selection errors provide common grounds for appeal in criminal cases. William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1391 (2001).

28. *J.E.B*., 511 U.S. at 147 (O'Connor, J., concurring) (quotation omitted); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *346-47. *But see* Hoffman, *supra* note 19, at 812 (claiming that challenges were "invented two hundred years before the notion of jury

But as a historical matter, this is a distorted view. Jury selection in its current form is a uniquely American practice—and not a venerable one. Peremptory challenges certainly *existed* at common law,[29] but as a practical matter attorneys rarely *used* them.[30] They played almost no part in routine trial practice. Parties (especially unrepresented ones) did not want to risk offending jurors.[31] Many litigants, including misdemeanor defendants and anyone in a civil trial, had no right to peremptory challenges at common law.[32] And, perhaps most importantly, voir dire questioning was very limited, making it hard for anyone to choose which jurors to remove.[33]

In the United States, this gradually changed in the nineteenth century. Jurisdictions began allowing peremptory challenges in misdemeanor trials and civil trials, and courts gradually expanded voir dire.[34] First, courts adopted freer questioning about potential challenges for cause.[35] As attorneys learned more about individual jurors, they used this information to make peremptory challenges.[36] Soon courts allowed voir dire questions designed to inform peremptory challenges.[37] Often, when voir dire revealed grounds for challenge for cause—ethnic prejudice, religious bias, or knowledge of the case—attorneys had to make a peremptory challenge after a judge denied a challenge for cause.[38] Judicial reluctance in challenges for cause, then, helped drive peremptory challenges.

At other times, trial lawyers used common, stereotypical beliefs about class, ethnicity, or religion to make tactical peremptory challenges.[39] They tried to put together a jury sympathetic towards a client, or to foster disagreement among jurors. Consider Francis Wellman's advice to defense counsel on engineering a hung jury: He needed "all kinds of men . . . old and young, rich and poor, intelligent and stupid, a German, an Irishman, a Jew, a Southerner, and a Yankee. He should mix them up all he can and let them fight it out among themselves and *agree if they can*."[40]

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impartiality"). One observer has speculated that "the judges who created the challenge might be surprised to learn of the tactical games that it now enables professional advocates to play." Alschuler, *supra* note 16, at 165 n.51 (citing telephone interview with Thomas A. Green).

29. *See* BLACKSTONE, *supra* note 28, at *346-47.

30. *See infra* notes 70-76 and accompanying text.

31. *See infra* note 73 and accompanying text.

32. *See infra* notes 89-93 and accompanying text; PROFFATT, *supra* note 5, at 215.

33. *See infra* notes 82-85 and accompanying text.

34. *See infra* notes 119-124, 138-155 and accompanying text; PROFFATT, *supra* note 5, at 215-16.

35. *See infra* notes 129-40 and accompanying text.

36. *See infra* notes 141-43 and accompanying text.

37. *See infra* notes 140-47 and accompanying text.

38. *See infra* note 140 and accompanying text.

39. *See infra* Part IV.A-B.

40. FRANCIS L. WELLMAN, DAY IN COURT, OR, SUBTLE ARTS OF GREAT ADVOCATES 126 (1910). Hirschl agreed that the "defense gains by a single undesirable man on the jury . . . [to]

Such tactics worked in nineteenth-century America because its venire panels were more diverse than any jury William Blackstone would have imagined. Even though many were excluded (women, African Americans, Native Americans, and noncitizens), American juries were much less uniform than English ones.[41] Trial attorneys could strategize around religious loyalties, political opinions, ethnic divisions, occupations, and perceptions of class in hopes of winning. It was American diversity, then, that fueled American exceptionalism in jury selection. Whether attorneys sought to root out bias or to build it up, they manipulated potential divisions and loyalties inherent in a heterogeneous venire.

Simply put, the problems reformers now point to—using race, ethnicity, class, religion, or other characteristics to engineer a jury—are not modern abuses that have crept into a traditional system. They have existed for as long as the jury selection procedures we know have been practiced. Modern jury selection and abusive tactics grew up simultaneously as a reaction to the country's social divisions. Understanding how the United States drifted away from common law practices, we can no longer assume that that unfettered peremptory challenges and extended voir dire accord with historic notions of due process.[42]

Knowing more about jury selection history puts modern problems into perspective. Seeing how modern practices grew out of sometimes underhanded exploitation of demographic prejudices further undercuts arguments that peremptory challenges protect against bias. Taken together, these observations suggest that restoring traditional limits to challenges, such as by limiting voir dire or restricting the numbers of challenges, might produce more representative juries and more efficient trials.[43]

Morris Hoffman observed that the history of peremptory challenges is "weird and misunderstood."[44] In general, the history of jury trials in the 1800s has not been much studied. But this was an important time. Early nineteenth-

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tire out the plaintiff with a succession of mis-trials or hung juries." ANDREW J. HIRSCHL, TRIAL TACTICS 75 (1906).

41. As the Supreme Court noted in *Swain v. Alabama*, "juries here are drawn from a greater cross-section of a heterogeneous society," as compared to England. 380 U.S. 202, 218 (1965). The same was true at the turn of the century. Venire panels were more diverse in the United States because American society was more diverse in terms of ethnicity and religion, see *infra* notes 195-209, 465-74, and accompanying text; Moore, *supra* note 30, at 453, and because property requirements for jury service in America admitted a greater proportion of citizens, *see infra* notes 177-89 and accompanying text.

42. The Court has acknowledged that "[p]eremptory challenges are not of constitutional origin," Gray v. Mississippi, 481 U.S. 648, 663 (1987), but has also endorsed them as having "very old credentials," *Swain*, 380 U.S. at 212, *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). Justice Scalia noted that "[t]he tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone." Holland v. Illinois, 493 U.S. 474, 481 (1990).

43. *See infra* Part II.B. Challenges for cause, which are not limited, could always be used to remove jurors with obvious conflicts of interest.

44. Morris B. Hoffman, *Peremptory Challenges: Lawyers Are From Mars, Judges Are From Venus*, 3 GREEN BAG 2d 135, 135 (2000).

century case law opened up voir dire; at midcentury, peremptory challenges made their way into civil cases. And though venire panels in the United States had always been more representative of social divisions than were English ones, throughout the second half of the nineteenth century divisions expanded as immigration brought greater ethnic and religious diversity.[45] Urbanization increased markedly, bringing economic specialization and stratification in professions.[46] Personal connections or reputation gave way to stereotypes as reasons for challenges, because trial participants drawn from the larger population of a city likely did not know one another.[47] Social movements around labor rights and temperance also divided Americans, and lawyers drew on these factions, too.[48]

This Article uses a unique category of source material, trial practice guides, to analyze the tactics attorneys developed and used in response to these societal changes. Considered alongside judicial commentary on voir dire and challenges, the practice guides show how the social divisions of the time shaped American trial procedures, lawyers' practices, and jury composition in the late 1800s and early 1900s.

Historians looking at cases, statutes, or other sources of legal rules have missed important parts of the story of American jury selection.[49] This Article fills in those gaps by examining the techniques that attorneys used and recommended to others. In doing so, it shows that by the late 1800s jury selection tactics had become an important part of legal culture in America. Some of these trial strategies would seem familiar to modern practitioners, and modern critics would certainly spot familiar problems. Gradually, lawyers expanded an old safeguard against prejudice to take advantage of local religious, economic, and ethnic divisions.

Part I describes turn-of-the-century trial practice guides. Part II outlines challenge practice in the United States and England, and briefly examines the procedural history of challenges and voir dire through the late 1800s. This Part highlights changing rules and the growth of extended voir dire in the United States. Part III reviews the reasons for American exceptionalism in jury selection, including the influence of trial attorneys, judicial acquiescence to their methods,

45. *See infra* note 206 and accompanying text.

46. Between 1850 and 1910, rates of urban dwellers more than doubled from roughly 15% to about 45% of Americans. U.S. Census Bureau, *United States Summary: 2010 Population and Housing Unit Counts Census of Population and Housing* (Sept. 2012), CPH-2-1 at 20, https://perma.cc/UBQ5-7A9A.

47. *See* Robert J. Kaczorowski, *From Petitions for Gratuities to Claims for Damages: Personal Injuries and Railroads During the Industrialization of the United States*, 57 AM. J. LEGAL HIST. 261, 313 (2017).

48. *See infra* notes 309-21 and accompanying text.

49. Laura E. Gomez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 L. & SOC'Y REV. 1129, 1178 n.113 (2000) (stating that the author knew "of no other study that has attempted to map jury selection patterns historically.").

and (most importantly, I argue) the heterogeneity of American venires. Part IV identifies specific strategies that turn-of-the-century lawyers used to take advantage of extended voir dire and peremptory challenges, expanding their use and effectiveness. It shows how lawyers used America's religious, ethnic, and socioeconomic conditions to manipulate cultural loyalties and divisions as they sought to pick a winning jury.

I. TRIAL PRACTICE GUIDES' ROLE IN UNDERSTANDING TURN-OF-THE-CENTURY JURY SELECTION

Peremptory challenges and voir dire practices are difficult to study because court records often leave out examinations and challenges. Even when they can be found, an attorney's strategy may not be evident to the outsider. Fortunately, important descriptions of these tactics, as attorneys perceived them, remain in the form of trial practice guides.

Practice guides were designed to be easily accessible to practitioners. As bibliographer Robert Mead put it, practice guides "were written to be read for enjoyment and instruction, rather than as reference works for legal analysis."[50] They were more practical, didactic, and informal than treatises and they adopted the casual, pithy style of legal periodical literature.

Practice guide writers included law teachers, solo practitioners, prosecutors, and city attorneys. Reed studied law privately and became a city councilman in Atlanta.[51] Francis Wellman, author of *Art of Cross Examination* and *Day in Court*, worked in a partnership in Boston, lectured at Boston Law School, and became an Assistant District Attorney.[52] Andrew Hirschl, who wrote *Trial Tactics*, taught for a time at the Chicago Law School and worked with two partners in a broad practice.[53]

Most guides were small books that sold for a few dollars.[54] The genre cannot be precisely defined, as it includes books, articles, and published lectures as well as some volumes that contain both formal treatise material and advice.[55]

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50. Robert A. Mead, *'Suggestions of Substantial Value': A Selected, Annotated Bibliography of American Trial Practice Guides*, 51 U. KAN. L. REV. 543, 543 (2003).

51. T.W. HERRINGSHAW, 4 HERRINGSHAW'S NATIONAL LIBRARY OF AMERICAN BIOGRAPHY 566 (1914).

52. FRANCIS L. WELLMAN, LUCK AND OPPORTUNITY 10-12, 15, 21-22 (1938); 37 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 103 (1951).

53. *See* HIRSCHL, *supra* note 40; *Chicago Attorney Meets Sudden End*, CHI. DAILY TRIB. Feb. 8, 1908, at 4; *Work of the Hamilton Club*, INTER OCEAN (Chicago), Feb. 1, 1896, at 2; *see also* E.R.S., Book Review, *Trial Tactics*, 5 MICH. L. REV. 160, 160 (1906).

54. 18 L. STUDENT'S HELPER 128 (1910) (advertising J.W. DONOVAN, TACT IN COURT (6th enlarged ed.) for $1.00); 16 YALE L.J., Dec. 1906, back matter at vii (advertising Hirschl's *Trial Tactics*, cited *supra* note 40, for $2.50).

55. *See* Mead, *supra* note 50, at 543-55. Based on extensive research, there appear to be no more than a few dozen trial practice guides. But as Alfred Simpson remarked, "the boundary between a good treatise, a bad treatise, and something that is not worth regarding as

It is hard to know if practice guides had a wide readership, but there is some indication that they were quite popular. According to his entry in the *National Cyclopaedia*, Francis Wellman's *Art of Cross-Examination* still sold 24,000 copies annually twenty-five years after publication.[56] Some went through multiple editions.[57] A few guides crossed the Atlantic: the English author Richard Harris wrote one of the most widely-printed guides to appear in either country.[58]

The books provide insight into trial strategies and courtroom realities that a review of statutes and case law alone cannot offer. "It has been our purpose to treat of matters not usually discussed in works on pleading and practice," wrote Byron and William Elliot in their practice guide.[59] "We have, as we believe, treated more of the things that abide in the unwritten practice than of those which are found in books."[60] Many had no footnotes or formal citations, relying instead on anecdotal discussion of case law.[61] They purported to be based on experience, not rules.[62] "The art of trying causes is not gained from the statutes or the decisions . . . but chiefly if not altogether from experience," according to Hirschl.[63]

Practice guide writers brazenly acknowledged that legal work requires strategy, not just procedural knowledge. As Hirschl explained in *Trial Tactics*,

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a treatise at all is indefinite." Alfred W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 634 (1981). The same is true in defining what is, and is not, a practice guide.

56. WELLMAN, *supra* note 52, at 104 (stating that in 1942 a *New York Times* writer noted that Wellman's decades-old books "have been widely read."); Murray T. Quigg, *Great Men of the Law Discuss the Lawyer's Skills*, N.Y. TIMES, Feb. 15, 1942 (stating that his *Art of Cross-Examination* went through four editions and was in print for some fifty years).

57. Wellman's *Art of Cross-Examination* went through four editions and was in print for decades. *See* FRANCIS WELLMAN, THE ART OF CROSS-EXAMINATION: WITH THE CROSS-EXAMINATIONS OF IMPORTANT WITNESSES IN SOME CELEBRATED CASES (4th ed., rev. and enl. New York: Collier Books; 1936). Harris's *Hints on Advocacy* went through more than a dozen editions. *See infra* note 58.

58. RICHARD HARRIS, HINTS ON ADVOCACY (Waterlow Bros. & Layton, 1879). Harris wrote three practice guides, each printed in both England and America. *See* RICHARD HARRIS, ILLUSTRATIONS IN ADVOCACY: EXAMPLES OF CONDUCTING THE PROSECUTION AND DEFENSE OF CIVIL AND CRIMINAL CASES, (1st American ed. St. Louis, Mo.: W.H. Stevenson, 1885); *infra* notes 86, 214-19 and accompanying text. *Hints* was "a widely-used trial manual which went into more than a dozen editions over three decades." Philip Gaines, *Writing the Discursive Proto-Culture of Modern Anglo-American Trial Advocacy: Edward William Cox's* The Advocate, 51 AM. J. LEGAL HIST. 333, 356 (2011).

59. BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, WORK OF THE ADVOCATE: A PRACTICAL TREATISE iii (Bowen-Merrill Co. 1888). Byron Elliot served as city attorney in Indianapolis, fought in the Civil War, took the bench as a judge on the Marion County Criminal Circuit, and eventually became a justice of the Indiana Supreme Court. *See* 22 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 217 (1932).

60. ELLIOTT & ELLIOTT, *supra* note 59, at iii.

61. *See, e.g.*, HIRSCHL, *supra* note 40 and WELLMAN, *supra* note 40 (containing fewer than a dozen footnotes between them and no formal citations).

62. *See* HIRSCHL, *supra* note 40, at iv.

63. *Id.*

"[l]aw books contain decisions upon certain instructions, holding them technically right or wrong, but nowhere do these books indicate how to get those lawful and honorable advantages in the litigation which are a legitimate part of the lawyer's duty to his client."[64] Hirschl wrote that "[t]he skillful conduct of a trial may be compared somewhat to the jiu jitsu system of wrestling, which enables the inferior man, with less weight, less strength, and less endurance to win because he knows better how to apply the weight and the strength that he does possess . . . ."[65]

Trial practice guides still exist today.[66] Indeed, the Supreme Court has cited modern guides as evidence of current abuses in jury selection.[67] Then as now, trial practice guides are unique evidence—perhaps the best we have—for what trial lawyers were actually thinking and doing with jury selection decisions. They show how jury selection functioned in practice.

II. THE HISTORY OF VOIR DIRE AND RULES GOVERNING PEREMPTORY CHALLENGES IN ENGLAND AND THE UNITED STATES

To evaluate the tactics practice guide writers recommended at the turn of the century, we must first place them in context, understanding the procedural changes that made them viable. Strategic jury selection came about only after American legal rules expanded the jury pool, broadened peremptory challenges, and permitted extended voir dire questioning. Before I turn to the practice guides I will outline those earlier changes.

A. Practical Restrictions Constrain Common Law Challenges

Peremptory challenges have long been available, at least in theory, for criminal defendants. English common law, as William Blackstone explained in the 1760s, allotted 20 to 35 challenges to each felony defendant, on the theory that when the prisoner's life was at stake, he should not "be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike."[68] Although Blackstone hailed the right as "full of . . .

64. *Id.* at v.

65. *Id.*

66. Mead, *supra* note 50, at 544-56 (describing historical and modern guides).

67. Miller-El v. Dretke, 545 U.S. 231, 266 (2005). In overturning the defendant's case for *Batson* errors, the Supreme Court pointed out that "prosecutors took their cues from a . . . manual of tips on jury selection" based on race. *Id.*

68. Blackstone, *supra* note 28, at *347. Alschuler and Deiss have observed that "[m]ore than any other law book, [Blackstone's] Commentaries shaped American legal consciousness." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 922 n.286 (1994). Defendants had 35 challenges until the number was reduced to 20 in 1540. *See* R. Blake Brown, *Challenges for Cause, Stand Asides, and Peremptory Challenges in the Nineteenth Century*, 38 OSGOODE HALL L.J. 453, 458-59 (2000).

tenderness and humanity to prisoners,"[69] it was rarely invoked by defendants.[70] One reason for this disuse was probably ignorance: Defendants, often without counsel, may not have known of their right to challenge.[71] Indeed, courts could require even counseled defendants to make challenges personally.[72] Those who did understand the right might hesitate to use the procedure in person, unwilling to risk offending potential jurors—usually social superiors, and not necessarily strangers—with challenges.[73]

The prosecution had more leeway in jury selection.[74] It could direct any number of jurors to "stand aside" as their names were called, with the understanding that the state would explain and defend its objections later, if the venire panel was exhausted.[75] Especially as jury pools for state trials increased in size during the eighteenth and nineteenth centuries, the stand-aside procedures gave the crown great power over jury composition in England.[76] With this procedure, state prosecutors could sift through a large venire and eliminate any jurymen they suspected would be hostile.[77]

Peremptory challenges did not provide the only means of controlling jury

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69. BLACKSTONE, *supra* note 28, at *346.

70. Post, *supra* note 4, at 71 (finding no evidence of challenges in late fourteenth-century trial records); P.J.R. King, *"Illiterate Plebeians, Easily Misled": Jury Composition, Experience, and Behavior in Essex 1735-1815*, *in* TWELVE GOOD MEN AND TRUE, *supra* note 4, at 277 (noting challenges' rarity in eighteenth-century Essex); Hoffman, *supra* note 19, at 821 ("[T]he actual use of the peremptory challenge in English criminal trials appears almost nonexistent over its entire seven-hundred-year history, and rare even at its zenith."); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 275 (1978) (finding challenges "quite rare" in trials at the Old Bailey in the late seventeenth and early eighteenth centuries).

71. Brown, *supra* note 68, at 460. Lawyers were rarely present in the early eighteenth century, and adversarial procedure was not fully developed. *See* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth-Century England*, 75 CORNELL L. REV. 497, 533 (1990).

72. Brown, *supra* note 68, at 460 (citing W. Hawkins, 2 A TREATISE OF THE PLEAS OF THE CROWN 68-69 (1724, reprint London, 1973)).

73. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1058 n.51 (1994).

74. The difference was most likely an artifact of history. Historians have suggested that unwritten procedures permitted challenges for both sides and unlimited peremptory challenges for the prosecution until 1305, when a statute abolished the crown's challenges. Judicial practices circumvented the statute, however, as judges invented the "stand aside" procedures. Pizzi & Hoffman, *supra* note 27, at 1412; John F. McEldowney, *"Stand By for the Crown": An Historical Analysis*, 1979 CRIM. L. REV. 272, 274, 276 (1979).

75. Brown, *supra* note 68, at 459; Pizzi & Hoffman, *supra* note 27, at 1412-13; McEldowney, *supra* note 74, at 274, 276.

76. Brown, *supra* note 68, at 463-65. Brown notes that several late eighteenth-century cases confirmed the right to stand aside despite a defendant's plea that the large jury pools rendered the procedure unfair. In the treason trial of John Horne Tooke, the court refused to accept his objection in part because the crown had challenged only seven jurors. Later courts refused to reconsider the rule, even when the crown could sort through a panel of over three hundred. *Id.*

77. *Id.* at 463.

composition. The common law provided "special juries" in some circumstances.[78] A litigant could, for example, demand a jury of merchants in a contract dispute.[79] Property requirements were higher for special jurors, leading to complaints that litigants requested them just to obtain more wealthy jurors, and "rely upon a certain class of prejudice."[80] Only one form of the special jury, a struck jury, allowed litigants a hand in selecting individuals. The court gave litigants a list of 48 jurors and each side crossed off 12.[81]

B. Limits on Voir Dire Questioning in England

Whether challenging jurors, striking them from a struck jury, or asking them to stand aside, parties had to guess about their impartiality. Neither the defendant nor the prosecutor had much leeway to question potential jurors at common law. Counsel could not ask about issues of prejudice.[82] Compelling a juror to admit that he had prejudged a case would embarrass and degrade him—something jurists of the time, in stark contrast to modern American judges, would not allow.[83] As one court explained in 1696, "I think it is a very shameful discovery of a man's weakness and rashness, if not malice, to judge before he hears the cause, and before the party that is accused could be tried."[84] By shielding veniremen from potentially embarrassing questions, the common law protected potential jurors' dignity and avoided tempting them to into untruthful answers.[85]

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78. James Oldham, *Special Juries in England: Nineteenth Century Usage and Reform*, 8 J. LEGAL HIST. 148, 148-49, 160 (1987). As part of a request for a special jury, the litigant had to pay a fee. Id. at 151, 153. Many American states also permitted special juries. *Id.* at 160; James Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 Wm. & MARY BILL RTS. J. 623, 627-628 (1998). PROFFATT, *supra* note 5, § 71-76, 105-11.

79. Oldham, *supra* note 78, at 149-50. A merchant jury was regarded as a jury of "experts," drawn from a special list. *Id.*

80. *Id.* at 151 (quoting testimony before the House of Commons in 1868).

81. *Id.* at 162 n.13. Many states used struck juries, too. At least 20 have some history of the practice. *Id.* at 161; PROFFATT, *supra* note 5, § 72-76.

82. T.B. HOWELL, 13 A COMPLETE COLLECTION OF STATE TRIALS 335-36, 355 (T.C. Hansard, London 1696); PROFFATT, *supra* note 5, § 195-97.

83. At common law, a potential juror could not be asked questions that might "dishonor" or "disparage[]" him, including questions about prejudice or hostility. HENRY H. JOY, ON THE ADMISSIBILITY OF CONFESSIONS AND CHALLENGE OF JURORS IN CRIMINAL CASES IN ENGLAND AND IRELAND 110 (Philadelphia, John S. Littell, American ed. 1843). Modern trial attorneys often ask deeply intrusive questions in search of a reason for a challenge. *See* Jerry Markon, *Judges Pushing for More Privacy of Jurors' Names*, WALL ST. J., June 27, 2001, at B1 (describing a voir dire during which a distraught prospective juror disclosed that she had been raped by her stepfather, a secret she had never before revealed); Roberto Santiago, *Jury Panel Queried in Masturbation Trial*, MIAMI HERALD, July 25, 2007 (reporting defense attorney asked jurors if they had ever masturbated).

84. HOWELL, *supra* note 82, at 335.

85. Voir dire restrictions that protected veniremen from shameful confessions are in the same spirit as the witness privilege, which in the eighteenth century prevented witnesses from

As a practical matter, restrictions on voir dire made peremptory challenges nearly useless. They were often limited, perfunctory, or nonexistent because counsel could not ask questions to expose bias, opinions, or other provocation for a strike. According to the description given in a nineteenth-century English practice guide, counsel simply called out "Challenge!" as a juror was called to the box.[86] English judges rebuffed most efforts to expand questioning, even in challenges for cause. To make a challenge for cause, of course, counsel needed a justification. But there was no license to fish for one. So although, during the late eighteenth and early nineteenth centuries, criminal defendants more often had counsel who tried to assist in jury selection, lawyers still faced strict rules governing challenges and questioning those attorneys could pursue.[87] In 1845 a defendant accused of check fraud could not ask whether a juror was a member of an association for prosecuting fraud, and in 1848 the defendant could not ask whether a juror was a special constable.[88]

With such restrictions on formal procedures, a limited, informal jury selection emerged in England. Samuel Warren gave an example in his English practice guide. In a case against a tavern-keeper, counsel requested the list of panel members, identified two fellow publicans, and "the two obnoxious gentlemen were quietly invited to retire."[89] Henry Joy's 1843 treatise on jury selection explains how this might happen. As he described the procedure, "even in misdemeanors it is usual in England for the officer, upon application to him, to abstain from calling any reasonable number of names objected to either by the prosecutor or the defendant, taking care that enough be left to form a jury . . . ."[90] Similarly, one court in 1854 denied a civil litigant's challenge, but, nevertheless, one reporter noted, "the juror was by consent withdrawn from the box."[91]

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being asked to give statements that could lead to prosecution, civil liability, or degrading disclosure. *See* Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, in THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 157-59 (R.H. Helmholz et al. 1997).

[89] RICHARD HARRIS, ILLUSTRATIONS IN ADVOCACY 63-65 (3d ed., London, Waterlow Bros. & Layton 1888); *see also* JOHN JERVIS, ARCHBOLD'S PLEADING AND EVIDENCE IN CRIMINAL CASES 139-40 (London, Henry Sweet, 1862).

87. *See* J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries* 9 L. & HIST. REV. 221, 221 (1991) (describing the increased role for English lawyers trying felonies beginning in the eighteenth-century); Langbein, *supra* note 71, at 263; Brown, *supra* note 68, at 463, 466.

88. Queen v. Stewart, 1 Cox CC 174 at 175 (Home Cir. 1845); Reg. v. Dowling, 3 Cox C.C. 509 at 510 (Cent. Crim. Ct. 1848).

89. SAMUEL WARREN, THE MORAL, SOCIAL, AND PROFESSIONAL DUTIES OF ATTORNIES AND SOLICITORS 280 (London, William Blackford and Sons, 2d ed. 1851). Warren's jury selection advice was repeated in American guides. *See* 2 BYRON K. ELLIOTT AND WILLIAM F. ELLIOT, A TREATISE ON GENERAL PRACTICE CONTAINING RULES AND SUGGESTIONS FOR THE WORK OF THE ADVOCATE 651-52 n.1 (1894) (this work is essentially a treatise—complete with extensive case citations and procedural detail—liberally sprinkled with passages of advice on strategy); MUNSON, *supra* note 5, at 268-69.

90. JOY, *supra* note 83, at 87.

91. Creed v. Fisher (1854), 156 Eng. Rep. 202; 18 Jur. 228, 228.

Patrick Devlin gave a comparable account a century later, in 1956. If the defense objected to a particular juror, counsel usually spoke to the clerk, who (after notifying the judge and obtaining the approval of the prosecution) simply did not call the challenged juror.[92] This informal method, however, was an impractical way of eliminating veniremen in any significant numbers. And without pretrial questioning, counsel rarely had the knowledge to make such strikes.[93]

Given these limits, challenges were rare in England. In 1956 Devlin wrote that challenges were "uncommon," and that even challenges for cause were "obsolescent."[94] The last reported case on challenge for cause, he claimed, was then about ninety years old.[95] In 1948, legislation reduced the number of challenges allowed to seven and, in 1977, to three.[96] In 1979, researchers studying juries in Birmingham saw them in no more than one in seven trials—and usually there was only one juror challenged.[97] In the 1980s, a new statute abolished peremptory challenges altogether, although it did not abrogate the prosecution's right to stand jurors aside.[98] Unlike the United States, England never extended peremptory challenges to civil trials.[99]

Thus, while jury selection has become more prominent in American trials—with jury selection experts,[100] complex Constitutional anti-discrimination

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92. *See* PATRICK DEVLIN, TRIAL BY JURY 29 (1956).

93. By the mid-1900s, at least, some judges permitted a modest voir dire in particular cases, but even this practice was abolished in 1973. Graham Hughes, *English Criminal Justice: Is It Better Than Ours?*, 26 ARIZ. L. REV. 507, 592 (1984).

94. DEVLIN, *supra* note 92, at 29.

95. *Id.*

96. Carol A. Chase & Collen P. Graffy, *A Challenge for Cause Against Peremptory Challenges in Criminal Proceedings*, 19 LOY. L.A. INT'L & COMP. L. REV. 507, 523 (1997).

97. JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIALS 92 (1979). Baldwin and McConville reported that an unpublished 1976 survey of London juries showed that more defendants, one-third, used challenges (although only a handful exhausted all seven). *Id.* at 93 n.15.

98. Criminal Justice Act 1988, ch. 33 § 118(1) (Eng.); Amy Wilson, Note, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363, 364-65 (2009); Chase & Graffy, *supra* note 96, at 533 (noting stand-asides remained, although subsequent guidelines from the Attorney General restricted their use to exceptional circumstances).

99. DEVLIN, *supra* note 92, at 28. When two nineteenth-century civil litigants attempted a peremptory challenge, the courts refused them. *See* Creed v. Fisher 18 Jur. 228 (Excheq. Div. 1854); Marsh v. Coppock, 9 Car. & P. 480 (Shrewsbury Assizes 1840).

100. For descriptions of selection experts, see LIEBERMAN & SALES, *supra* note 24, at 8-10; KRESSEL & KRESSEL, *supra* note 24, at 65-70; HANS & VIDMAR, *supra* note 24, at 79-94. In the murder trial of O.J. Simpson, jury selection expert Jo-Ellan Dimitrius and her company, Forensic Technologies International, helped the defense pick a favorable jury after surveying 1,600 people about attitudes toward the defendant and the trial evidence. Marc Davis & Kevin Davis, *Star Rising For Simpson Jury Consultant: Social Science and Luck Helped Jo-Ellan Dimitrius Choose Sympathetic Panel,* 81 A.B.A. J. 14 (Dec. 1995).

rules,[101] and weeks-long jury selection sessions[102]—it has disappeared in England.

C. Rules Governing Peremptory Challenges Change in America

In the United States, peremptory challenge procedures gradually expanded. States made the challenges available to prosecutors, misdemeanor defendants, and civil litigants. And, perhaps more importantly, voir dire expanded, making challenges for cause easier and peremptory challenges more useful in manipulating jury composition.

1. Early statutes codify common law and reduce stand-aside privileges

From their inception, American colonies largely adopted common law jury trials.[103] In New England, for example, they began as early as 1623.[104] Many jurisdictions allowed peremptory challenges, and even in colonies with no legislation authorizing formal peremptory challenges, judges might still consider defendants' objections to biased jurors.[105] What evidence exists suggests they were rarely used.[106]

In the wake of the Revolution, despite colonial hostility to alleged jury packing, laws governing peremptory challenge changed little.[107] The right to

101. *See* Batson v. Kentucky, 476 U.S. 79, 101-02 (1986) (White, J., concurring); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 505 (1999).

102. Mack, *supra* note 22, at B4 (six weeks); Youngquist, *supra* note 23, at A1 (seven weeks).

103. Twelve states enacted constitutions before the federal Constitutional Convention, and all guaranteed jury trial in criminal cases. Alschuler & Deiss, *supra* note 68, at 870. "Most American colonial courts accepted the English common law practice of giving criminal defendants some peremptory challenges." Pizzi & Hoffman, *supra* note 27, at 1413; JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 148 (1977) (noting "substantial popular protest" against prosecution peremptory challenges).

104. New England used juries "from the beginning." EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND 99 (1993) (citing a 1623 New Plymouth court order).

105. *See id.* at 101.

106. A study of early Maryland juries found they were "rather unusual" before 1784 "and voir dire proceedings took up little or no time." James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681-1837*, 40 AM. J. LEGAL HIST. 455, 464 (1996).

107. Constitutional delegates probably had in mind crown jury-packing cases when they decreed an "impartial tribunal" to be every defendant's right. U.S. CONST. amend. VI; S. Mac Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 294-96 (1972); *see also* James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 159 (1983) (noting widespread "accusations of jury-packing" in early modern England); JOHN PHILIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 28-29, 57 (1977) (noting jury packing in pre-Revolution Massachusetts). Fear of

challenge was not mentioned in the federal Constitution or Bill of Rights, although some delegates wished to include it.[108] Federal law, under the Crimes Act of 1790, followed the common law and allowed a defendant thirty-five peremptory challenges in treason cases and twenty in other capital trials.[109] State law (which governed most trials) usually allowed challenges, too.[110]

Both state and federal laws veered from common law in one important way: they cut back on the prosecution's controversial "stand-aside" privileges.[111] In federal cases, the Crimes Act of 1790 allotted challenges for the defense but mentioned no such privileges for the prosecution.[112] The Supreme Court later declared that "the right of challenge by the prisoner recognized by the act of 1790, does not necessarily draw along with it this qualified right, existing at common law, by the government."[113] So "unless the laws or usages of the State . . . allow it on behalf of the prosecution, it should be rejected."[114]

Over the nineteenth century, most states denied prosecutors their traditional, unlimited stand-aside privileges and instead allotted them a set number of peremptory challenges.[115] In a few states, the prosecution retained stand-aside privileges even *after* it gained peremptory challenges.[116] But, for the most part, states gave the prosecution *fewer* peremptory challenges than they allotted to defendants: John Proffatt wrote in his 1877 treatise that the prosecutor typically

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a state-packed jury led to uniquely American precautions in empanelment. In some places, sheriffs did not select jurors; they were drawn by lot. This was done, Proffatt claimed, because "the power and discretion given to the sheriff in England could not be safely [e]ntrusted to an officer here." PROFFATT, *supra* note 5, § 127 at 173.

108. During the ratification debates George Mason and Patrick Henry complained about the omission of challenges. Gutman, *supra* note 107, at 296-97. In its first session, Congress considered protecting the right to challenge jurors in a draft of proposed amendments. *Id.* at 297-98.

109. 1 Stats. 112 § 30 (1790).

110. Although federal law regulated challenges in federal courts, the Supreme Court declined to give strict guidelines for jury selection and suggested federal courts consider adopting the practice of the states in which they sat. Lewis v. United States, 146 U.S. 370, 379 (1892); *see also* United States v. Shackleford, 59 U.S. 588, 590 (1855).

111. Brown, *supra* note 68, at 470-71.

112. 1 Stats. 112 § 30 (1790).

113. *See Shackleford*, 59 U.S. at 590.

114. *Id.* In 1827 the Supreme Court noted that the crown, at common law, had the right to stand-aside jurors, but declined to say whether "the same right belongs to any of the States in the Union" owing to the diversity of local practice. United States v. Marchant, 25 U.S. 480, 483 (1827).

115. Some states adopted the common law rule; others abolished it by statute. HUGO HIRSH, A PRACTICAL TREATISE ON JURIES, THEIR POWERS, DUTIES, AND USES, IN ALL ACTIONS AND PROCEEDINGS, BOTH CIVIL AND CRIMINAL, UNDER THE COMMON LAW, AND UNDER THE STATUTES OF THE UNITED STATES AND OF THE STATE OF NEW YORK 141 (New York, George S. Diossy ed. 1879); WILLIAM L. CLARK JR., HAND-BOOK OF CRIMINAL PROCEDURE 451 (St. Paul, West Publishing Co. 1895); State v. Arthur, 13 N.C. 217, 219 (1829).

116. SEYMOUR D. THOMPSON & EDWIN G. MERRIAM, A TREATISE ON THE ORGANIZATION, CUSTODY AND CONDUCT OF JURIES 148 (St. Louis, William H. Stevenson 1882).

had half of the number that the defendant enjoyed.[117] Virginia went further—in 1853, a prosecutor there had neither peremptory challenges nor stand-aside privileges, and could challenge only for "a good and legal cause."[118] Although state procedures were hardly uniform, in general they reduced prosecutorial power in picking the jury, as compared either with common law procedures or with the challenges most states afforded defendants.[119]

2. Challenge privileges expand in the nineteenth century

Across the second half of the nineteenth century, as statutes gradually codified challenges, they came to allow challenges in almost every trial. During the 1800s most states extended peremptory challenges to misdemeanor defendants.[120] More remarkably, and in stark contrast to common law rules, American law introduced them in civil trials.[121] Federal legislation extended challenges to civil trials in 1872,[122] and states, too, began to allow them.[123] By 1889, Seymour Thompson's *Treatise on the Law of Trials* reported that ten states allowed two challenges in civil cases, eleven states allowed three challenges, nine permitted four challenges, and one allowed five challenges.[124] And unlike their common law progenitors, nineteenth-century parties and their attorneys

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117. PROFFATT, *supra* note 5, § 161 at 213. *See also* THOMPSON, *supra* note 5, at 41. Giving the state peremptory challenges could help stop private citizens from packing the jury through influence or bribery. In Kentucky, at least, that was the rationale for giving the state peremptory challenges in 1849. Robert M. Ireland, *Law and Disorder in Nineteenth-Century Kentucky*, 32 VAND. L. REV. 281, 291-92 (1979). And in Missouri, the state allowed the prosecution more peremptory challenges in cities of over 100,000 residents to combat perceived problems with lawless urbanites. In upholding the statute against an equal protection challenge, the Supreme Court remarked on the "mixed population" of large cities. Hayes v. Missouri, 120 U.S. 68, 71 (1887).

118. Montague v. Commonwealth, 51 Va. (10 Gratt.) 767, 773-74 (1853). *See also* VAN DYKE, *supra* note 103, at 148-49 n.46 (noting New York did not grant the state peremptory challenges until 1881 and Virginia did not until 1919).

119. State statutes have at times changed the numbers of peremptory challenges permitted. C.J. Williams, *On the Origins of Numbers: Where Did the Number of Peremptory Strikes Come from and Why Is Origin Important?*, 39 AM. J. TRIAL ADVOC. 481, 503 (2016).

120. Brown, *supra* note 68, at 472; *see also* Burk v. State, 2 H. & J. 426, 430 (Md. 1809) (stating that Maryland law allowed four peremptory strikes in a misdemeanor case).

121. PROFFATT, *supra* note 5, § 163 at 216; *see also* Stone v. Segur, 93 Mass. 568, 569 (noting recent statute establishing civil peremptories); THOMPSON, *supra* note 6, at 39-40 ("In civil cases the number is variously fixed at *two, three, four* and *five*, and in one jurisdiction at *one-fourth* of the jurors summoned."). Proffatt reported that Vermont, Massachusetts, New Hampshire, Connecticut, New York, Pennsylvania, Iowa, Alabama, and California allowed them. PROFFATT, *supra* note 5, § 163 at 215-16.

122. Law of June 8, 1872, ch. 333, § 2, 17 Stat. 282 (1872) (currently codified at 28 U.S.C. § 1870 (2003)).

123. Proffatt noted in 1877 that the right was "becoming more extended and recognized here." PROFFATT, *supra* note 5, § 163 at 215.

124. THOMPSON, *supra* note 5, at 39 n.2, 3, & 4, 40 n.1; *see also* MUNSON, *supra* note 5, at 279.

were *using* challenges.[125]

D. Extended Voir Dire Develops in the United States

1. English restrictions recede

The most important change in peremptory challenges was not their availability or numbers, but the expansion of the pretrial voir dire examination. This change helped attorneys use their challenges. In the early 1800s, American case law gradually redefined voir dire limits.

The issue rose to national prominence in the 1807 case *United States v. Burr*, when defense attorneys wished to ask jurors if they had already formed an opinion about whether former Vice President Aaron Burr, charged with treason for an alleged conspiracy, was guilty. Chief Justice John Marshall, overseeing the case, allowed the questions. Notably, in a break with common law practice, Marshall did not require any "ill will" to support a challenge for cause; a potential juror could be removed just because of his opinion.[126] Marshall rejected any venireman with "strong and deep impressions which will close the mind against the testimony that may be offered."[127] But he would overlook "light impressions which may fairly be supposed to yield to the testimony," given that it was probably "impossible" to find a juror "without any prepossessions whatever."[128] This rule invited—indeed required—another novelty, careful inquiry into the juror's opinions. As Marshall put it, the court must "hear the statement" of the juror and decide.[129]

Subsequently, American treatises and state courts often cited the *Burr* case in support of a shift towards more permissive voir dire questioning.[130] In 1813 Judge Nott of South Carolina (albeit in a dissent) opined that *Burr*'s rule was "correct upon principle" even if some considered it "new fangled," because in "the progress of public opinion, the practice of courts of justice and of legislatures, has been to relax the rigour of the law in favour of persons accused of great crimes."[131] By the mid-1800s, courts in most states had cited *Burr* favorably, although expansion of voir dire varied from jurisdiction to jurisdiction

125. Rice concluded that in Maryland "jury challenges were the norm" by 1819. Rice, *supra* note 106, at 464.

126. United States v. Burr, 25 F. Cas. 55, 58-59 (C.C.D. Va. 1807) (No. 14,693). For an assessment of the significance of *Burr* for voir dire, see James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 IND. L.J. 163, 165 (1984); Gutman, *supra* note 107, at 305-07.

127. United States v. Burr, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g).

128. *Id.* at 50-51.

129. *Id.* at 51.

130. MUNSON, *supra* note 5, at 285-86; HIRSH, *supra* note 115, at 127 (quoting a question approved in *Burr*).

131. State v. Baldwin, 1 Tread. 289, 299-300 (S.C. Const. App. 1813) (Nott, J., dissenting).

and from court to court.[132] A prejudicial opinion based on rumor, newspaper reports, or stereotypes might be a reason for challenge and thus the subject of interrogation.

One court in Virginia, writing in 1822, was still struggling with the new rule because of the break with common law. The court explained that "it has been said in some of the English books, that [a potential juror] is not obliged to disclose whether he has, or has not, formed and delivered an opinion on the prisoner's case." But the English rule "certainly was disregarded in *Burr's* Case."[133]

Court practices were not uniform. An Iowa attorney defending a horse thief in 1859 found it impossible to discover whether veniremen were members of a local society for prosecuting horse thieves, yet an Illinois defendant in 1873 secured a reversal because the court refused to ask whether jurors belonged to a temperance league.[134] On the whole, however, courts in the late 1800s allowed considerable inquiry into juror opinions. Illinois counsel in 1887 could ask whether a venireman belonged to a labor organization and whether he was a socialist, communist, or anarchist.[135] Writing in 1887, the California Supreme Court instructed that judges need not "take the simple statement of the juror upon" the matter of prejudice.[136] "[C]ounsel have a right to make such inquiries as will bring out the character and force of the conviction he has. How else can the court determine whether he is able, notwithstanding his prejudice, to act fairly and impartially?"[137]

2. Voir dire privileges enable peremptory challenges

Burr changed the rules in a challenge *for cause* alleging prejudice. But in practice the new, expanded voir dire questioning also enabled peremptory challenges. One reason for this was that even with probing questions, nineteenth-

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132. Brown, *supra* note 68 at 474-75; State v. Johnson, 1 Miss. 392, 397 (1831) (stating that *Burr* "has been looked to by the state courts as the pole star by which they were to be guided"); *see also* Irvine v. Kean, 14 Serg. & Rawle 292, 293 (Pa. 1826); State v. George, 8 Rob. (LA) 535, 539 (La. 1844), overruled on other grounds by State v. Bill, 15 La. Ann. 114 (1860); PROFFATT, *supra* note 5, § 183 at 237. There were trial judges who, well into the nineteenth century, hewed to the English rule. *See* Sprouce v. Commonwealth, 4 Va. 375, 378 (1823). Adoption of a new, American rule may have been slow among those who used English law books. In the early years of the republic, most law books were imported. M. H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 25, 172 (2010).

133. *Sprouce*, 4 Va. at 378.

134. State v. Wilson, 8 Iowa 407, 410 (1859); Lavin v. People, 69 Ill. 303, 304-05 (1873). Regarding the English origins of prosecuting societies, see David Philips, *Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons, 1760-1860*, *in* POLICING AND PROSECUTION IN BRITAIN 1750-1850, at 113 (Douglas Hay and Francis Snyder eds. 1989).

135. Spies v. Illinois, 123 U.S. 131, 174 (1887).

136. People v. Brown, 14 P. 90, 91 (Cal. 1887).

137. *Id.*

century challenges for cause were often unsuccessful. Indeed, a present-day observer would be surprised at some of these failures. Even a juror who admitted prejudice might escape if the court decided that new evidence would likely change the juror's opinion, and the judge sometimes prodded a reluctant juror into newfound impartiality.[138] As the Oregon Supreme Court put it in 1892, quoting *Burr*, it had "become substantially the settled law of this country, and it is now generally considered" that a juror's "light impressions" were no cause for challenge.[139] Often, after a failed challenge for cause, an attorney would strike the juror peremptorily.[140]

Gradually, American courts permitted questioning that went beyond exploring a challenge for cause, accepting that voir dire should inform peremptory challenges. The Vermont Supreme Court seemingly endorsed this view early, explaining in 1817 that a litigant "is permitted to ask a Juror if he has formed his opinion, in order to enable him to decide upon his peremptory challenges."[141] As the California Supreme Court said in 1863, "[e]ach party has a right to put questions to a juror, to show, not only that there exists proper grounds for a challenge for cause, but to elicit facts to enable the party to decide whether or not he will make a peremptory challenge."[142]

Later courts gradually endorsed this view. In 1872 the Illinois Supreme Court reversed a conviction for liquor law violations, holding that defense counsel had a right to question jurors about their membership in a temperance society.[143] "The questions were asked with a view to call out facts upon which to base a peremptory challenge," the court explained, "and for this purpose they were proper, and should have been answered."[144]

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138. *See* HIRSCHL, *supra* note 40, at 101. As one Mississippi judge explained it, "[i]t is frequently the case, that a juror, who has barely heard the case from report, and has but a slight impression on his mind, will answer affirmatively, that he has formed and expressed opinions." State v. Johnson, 1 Miss. 392, 398 (1831). Asking more questions, the judge suggested, might show the juror's predisposition was "not a decided opinion." *Id.* (emphasis omitted).

139. Kumli v. S. Pac. Co., 28 P. 637, 637-38 (Or. 1892).

140. 1 DAVID PAUL BROWN, THE FORUM: OR FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR lxxxiv (Philadelphia, Robert H. Small 1856).

141. State v. Godfrey, Brayt. 170, 1817 WL 443 (Vt. 1817) (granting a new trial). The case was published only in digest form, but the summary was prepared by William Brayton, a member of the court. WILLIAM BRAYTON, REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF THE STATE OF VERMONT 170 (2d ed. 1868).

142. Watson v. Whitney, 23 Cal. 376, 378-79 (1863) (holding court erred in denying questions). *See also* Pearcy v. Mich. Mut. Life Ins. Co., 12 N.E. 98, 99 (Ind. 1887) (noting juror examination was "to ascertain whether a cause for challenge exists" and whether "to exercise the right of peremptory challenge"); State v. Mann, 83 Mo. 589, 596 (1884) ("The examination of such persons on their *voir dire*, is necessary . . . to enable the accused to exercise judiciously his right of peremptory challenge."). There was, admittedly, some variation among courts. *See* State v. Lautenschlager, 22 Minn. 514, 520 (1876) (holding that courts had discretion whether to allow juror questioning without prior challenge).

143. Lavin v. People, 69 Ill. 303, 305-06 (1873).

144. *Id. But see* State v. Bresland, 61 N.W. 450, 451 (Minn. 1894) (acknowledging

In many courts, counsel also had more opportunity to *compare* potential jurors. Advocates did not have to challenge jurors as each was called, as was the practice in England. Indeed, when a trial court in Wisconsin required that jurors be "called singly, singly questioned," and "singly submitted to the parties for peremptory challenge," the state supreme court found error.[145] "[T]his mode of impaneling the jury largely impaired the right of peremptory challenge," the Court explained, because it "gave no opportunity for comparison and choice between jurors, and little opportunity for observance of each juror" before challenge.[146] The Texas Supreme Court similarly recognized a right to compare jurors before choosing peremptories, holding that a defendant should not have to make his challenges all at once, "without having the panel refilled."[147]

With expanded questioning and comparison of jurors, voir dire grew lengthy. Sometimes interrogations became so burdensome that judges overruled questions simply in the interest of time. In a Missouri homicide case, after the judge stopped the defense counsel from further probing jurors' knowledge about the killing, the state supreme court upheld the decision, as "the line of interrogation indicated . . . would tend to make such examinations interminable."[148] Expanded voir dire sometimes provoked other objections. "[W]e find the process lengthened to a tedious and exasperating extent in trials of great importance," Proffatt lamented in his 1877 treatise on jury trial.[149] As an example, he described a voir dire where twenty-four jurors were examined on challenge for cause, extending jury selection to four days.[150]

Criticisms continued decades later: One commentator in 1922 complained of the "disgraceful proceedings" and "the unseemly spectacle, occasionally witnessed, of a court permitting counsel to waste days and weeks in irrelevant and useless inquiries addressed to prospective jurors."[151]

In another break with tradition, counsel chose which veniremen to challenge. A panel of the Louisiana Supreme Court emphasized counsel's importance, reversing a conviction in 1850 after the trial court refused to allow the defendant

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questioning to inform peremptory challenges as "a mere incidental right" during challenge for cause).

145. Lamb v. State, 36 Wis. 424, 427 (1874).

146. *Id. But see* Pointer v. United States, 151 U.S. 396, 411 (1894) ("[T]he practice in England, as in some of the states was to have the question of peremptory challenge as to each juror . . . determined as to him before another juror is examined.").

147. Cooley v. State, 38 Tex. 636, 638-39 (1873).

148. State v. Brooks, 5 S.W. 257, 264 (Mo. 1887). One scholar has observed, in a study of New Mexico trials, that "[s]ome juries were assembled rapidly and without controversy; in other cases, the process of selecting and questioning jurors was drawn out and contentious." Gomez, *supra* note 49, at 1176.

149. PROFFATT, *supra* note 5, § 167 at 220.

150. *Id.*

151. E.M.M., Comment, *Examination of Jurors Prior to Challenge*, 31 YALE L.J. 514, 518 (1922).

leave to confer with counsel about challenges.[152] "The moment at which perhaps it is most seasonable and necessary that a person accused of a crime should have aid and counsel," the court said, "is that when he is about to be put upon his trial for the offence, and to select the jury for his trial."[153] In the court's estimation, "[a] good counsellor in criminal cases studies the book of man as thoroughly as the statute book, and by that study qualifies himself to aid his client in the selection of the jury to try him as much as by the discharge of his other duties."[154] Trial counsel—rather than the court—increasingly led the voir dire. Practices varied, but by the late 1800s courts generally allowed counsel to question directly.[155]

III. WHY THE BREAK WITH COMMON LAW?

The differences between English and American courtrooms help explain why jury selection procedures diverged. Jury selection procedures evolved as lawyers became more involved, and attorneys in the United States often had less judicial oversight than their English counterparts.[156] The most important reason for the transatlantic divergence, however, and the one most clearly captured in trial practice guides, is a nature of American venires. As we shall see, American society was heterogeneous, and a greater cross-section of citizens qualified for jury service in American jurisdictions. Because of this, venire panels were more mixed, and perceived differences among jurors drove challenge strategies.

On the one hand, the diverse venires presented lawyers with more potential for biased jurors. They might be called upon to defend an African American among white jurors, an Italian Catholic among Protestant ones, or a saloon-keeper among a jury of temperance enthusiasts. On the other hand, attorneys had a new opportunity. They could exploit affinity, and sometimes outright bias or prejudice, in *favor* of their clients. The practice guide writers had strategies for all of these situations, using voir dire, peremptory challenges, and challenges for cause.

A. Limited Judicial Oversight

Under the common law, the trial judge closely controlled voir dire and the

152. State v. Cummings, 5 La. Ann. 330, 331-33 (1850).

153. *Id.* at 332.

154. *Id.*

155. Burgess v. Singer Mfg. Co., 30 S.W. 1110, 1111 (Tex. Civ. App. 1895) (finding error in "not permitting appellant's counsel to examine jurors" about fraternity memberships). *But see* Bales v. State, 63 Ala. 30, 38 (1879) (holding, where court had already requested veniremen, that "neither party has a right to interrogate a juror before he is challenged" and rejecting the "speculative, inquisitorial practice, consuming needlessly the time of the court, and offensive to the persons subjected to it.").

156. A study of Maryland trials found that challenges became more frequent as more defendants hired lawyers. Rice, *supra* note 106, at 464-65.

use of challenges.[157] Even when lawyers participated (in the United States, parties before the 1800s rarely employed them[158]) the court could restrict questions asked to inform peremptory challenges and could deny or grant any challenges for cause.[159] Given this background, why did American trial judges so often allow the extended voir dire decried by observers as "lengthened to a tedious and exasperating extent?"[160]

From the beginning of the nation's history, American judges did not exercise as much control over jury trial as did their English counterparts.[161] After the 1840s, as states increasingly chose to elect rather than appoint the judiciary, judges faced diminished independence and authority.[162] The change left the typical judge, who now had to consider his prospects of re-election, more vulnerable to public opinion—and more reluctant, perhaps, to rein in trial lawyers who might influence local politics.[163] Trial lawyers' growing influence over procedures likely played a role in the United States' departure from the common law. And lawyers' influence over jury composition should be seen as part of a trend of increased power in the courtroom relative to the judge.

One commentator writing in the *Yale Law Journal* in 1922 contrasted American and English judges in voir dire.[164] In both countries, questioning had become increasingly useful for counsel who wanted to use challenges. With

157. Nealon v. People, 39 Ill. App. 481, 487 (1890) (affirming court's rejection of "captious and dilatory" questioning).

158. Rice, *supra* note 106, at 457.

159. Appellate courts had less influence here, as difficulties with record-keeping at voir dire made it hard to appeal a trial judge's error. Appellate courts sometimes declined to rule on a voir dire issue, citing an inadequate record. *E.g.*, Indianapolis, Peru & Chicago Ry. Co. v. Pitzer, 10 N.E. 70, 70 (Ind. 1887) ("[T]he record must contain . . . his whole examination."); S. Pac. Co. v. Rauh, 49 F. 696, 703 (9th Cir. 1892) ("The whole of the examination [of the juror] is not reported in the record."). Sometimes the court had difficulty learning the challenges made, much less their reasons or preceding questioning. *See* Richards v. United States, 175 F. 911, 914 (8th Cir. 1909). Perhaps with such issues in mind, Hirschl's guide recommended that "before doing anything at all" counsel should secure a good reporter. HIRSCHL, *supra* note 40, at 59.

160. PROFFATT, *supra* note 5, § 167 at 220.

161. Nelson explains that early American judges generally had "power only to guide, not to command." William E. Nelson, *The Eighteenth-Century Background of John Marshall's Jurisprudence*, 76 MICH. L. REV. 893, 904 (1978).

162. Every state that entered the union before 1845 chose to appoint judges, while all those entering between 1846 and 1912 chose election. Caleb Nelson, Note, *A Re-Evaluation of the Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190 (1993). In the later 1800s, many states with an appointed judiciary altered their selection procedures in favor of elected judges. *Id.* at 192-93.

163. In 1856 Brown observed that some lawyers sought favor in various ways—from giving judges loans to sponsoring petitions to increase judicial salaries. *See* BROWN, *supra* note 133, at 309-14. Scholars have suggested that elected judges are more susceptible to the influence of special interest groups, particularly the plaintiff's bar. *See* Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999).

164. E.M.M., *supra* note 151, at 515-16.

urbanization, jurors at the turn of the century were more often strangers to attorneys and parties alike. Less able to rely on local reputation, counsel needed to ask questions.[165] But in response to counsels' efforts to expand voir dire, "English judges emphatically discountenanced this attempted innovation upon settled practice."[166] In the United States, the writer said, extended questioning "crept in unawares."[167]

Consider an English prosecution for check fraud in 1845. The defense attorney tried to ask, as each panel member came into the box, whether the potential juror "was a member of a certain association for the prosecution of parties committing frauds upon tradesmen."[168] The court protested: "It is quite a new course to catechise a jury in this way."[169] The defense attorney asked the judge to "intimate to the jury, that such of them as are members of this association had better retire from the box."[170] The court refused this request, too: "I cannot allow you to cross-examine the jury, nor will I intimate to them any thing on the subject you mention."[171] In another case three years later, the court denied a similar entreaty, insisting it was a "very unreasonable thing that a juryman should be cross-examined without your having received any information respecting him."[172]

American attorneys generally did not face such rigid constraints.[173] Trial practice guides back up the view, long endorsed by historians, that a relatively passive judiciary helps explain changes in American courtroom procedures. By 1929, practice guide writer Norbert Savay surmised that voir dire had become unwieldy because trial judges refused to constrain it.[174] "Judges are the ones who should be censured, if any one should," he wrote, "a rich man with high-priced lawyers is extended every courtesy to take all the time he cares to, not alone in

165. *See id.* at 515.

166. *Id.*

167. *Id.* at 516.

168. Queen v. Stewart, 1 Cox CC 174, 175 (Home Cir. 1845).

169. *Id.*

170. *Id.*

171. *Id.*

172. Reg. v. Dowling, 3 Cox CC 509, 510 (Cent. Crim. Ct. 1848).

173. *See* E.M.M., *supra* note 151, at 515. Granted, there were sporadic protests from the bench. In 1824, a New Jersey judge refused to allow an attorney to ask a juror if he had a settled opinion. *See* State v. Zellers, 7 N.J.L. 220, 222-23 (1824). Counsel was surprised at the rebuke. "Do we understand it to be the opinion of the court, that we cannot interrogate the juror as to his having formed an opinion;—it has been repeatedly done." *Id.* at 222. The court held its ground, but admitted the admonishment was unusual. "It is true that we have slipped into the practice, but on looking into it I am satisfied it is not the true way." *Id.* at 223. Nevertheless, the occasional remonstrance did not prevent voir dire from expanding over time.

174. NORBERT SAVAY, THE ART OF THE TRIAL 102 (1929). There were judges who did constrain time-consuming voir dire sessions. *See* Nealon v. People, 39 Ill. App. 481, 487 (1890) ("[Q]uestions to be asked of jurors on their voir dire, and the time permitted . . . is largely within the discretion of the court.") (punctuation altered).

the selection of the jury . . . ."[175] Another commentator, writing in 1922, called for judges "with the character and energy to exercise their discretion sanely and courageously" in limiting voir dire.[176]

B. Abolition of Juror Property Requirements and Heterogeneous Venires

If American judges were unlike their English counterparts, so too were American juries. Extended voir dire would have been useless without demographic, social, religious, and other divisions an attorney could explore and exploit. Fortunately for American lawyers of the late nineteenth century, venires were becoming more economically diverse as states relaxed traditional, property-based eligibility requirements for jury service. In contrast, England restricted jurors to those considered more respectable, such as people who held property.[177] In England, throughout the eighteenth century, only men owning property producing an income of at least ten pounds per year could serve as jurors, which excluded some two-thirds of Englishmen from jury service.[178] Douglas Hay concluded that English juries "were certainly not composed of the poor or even men of average wealth after 1730," when legislation bolstered the property qualifications.[179] Property requirements persisted until 1972.[180]

In the early United States, property requirements were often more inclusive and, even where landownership was required, land was cheaper and more available.[181] Daniel Blinka has described pre-Revolutionary Virginia's jurors as being drawn from the "lower and middling orders" and "largely illiterate."[182]

From the mid-nineteenth century on, many states abolished or cut back their property requirements.[183] As of 1877, Proffatt explained, requirements varied greatly: in Indiana, "reputable male householders" were eligible; in Kansas and

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175. SAVAY, *supra* note 174, at 102-03.

176. E.M.M., *supra* note 151, at 518.

177. John Langbein, *The English Criminal Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, at 13, 25 (Antonio Padoa Schioppa ed., 1987).

178. *Id.*

179. Douglas Hay, *The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century*, *in* TWELVE GOOD MEN AND TRUE, *supra* note 4, at 310-11, 354. Hay estimates that "75 percent of the population was rigorously excluded." *Id.* at 354.

180. Oldham, *supra* note 107, at 146. A litigant could request a special jury and empanel jurors of a "higher class than usual." But if he felt his client would fare better among poorer jurors, he was out of luck. Oldham, *supra* note 107, at 139.

181. Alschuler & Deiss, *supra* note 68, at 877.

182. Daniel D. Blinka, *Trial by Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. REV. 529, 540 (2003). Blinka observed that Virginia courts often relied on bystanders—anyone standing around the courthouse—to make up a jury, and property requirements were irregularly enforced. *Id.* at 563.

183. *See* CHRISTOPHER WALDREP, JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI 235-47 (2010) (collecting state statutes and constitutional provisions).

Michigan, men listed on the tax rolls as electors could serve; and in New Jersey, freeholders were qualified.[184] New York City considered real as well as personal property in determining eligibility.[185] In multiple states, the head of a family could serve, even if not a landowner.[186] Proffatt observed that "lately the tendency is to dispense with a property qualification, and to make the selection from citizens who are qualified voters . . . ."[187] This trend could exclude some demographic groups who were disenfranchised, including Indians, Chinese, and (in Idaho, at least) Mormons.[188] The trend of greater inclusion spread slowly; New York and Texas, two of the last states to rescind property requirements, did not do so until 1967 and 1969, respectively.[189]

It is important to note that changing statutes do not give the whole picture. Consider a case in territorial New Mexico, where a court broadly construed property requirements to expand the available jury pool.[190] When a defendant argued that a potential juror merely farmed federal land he did not own, and was "only a squatter on the public domain," the Court rejected the challenge.[191] In a territory with so many federal land grants, the court reasoned, "it would be practically impossible to obtain juries in many instances, if it was an essential qualification that each juror should be the owner in fee simple . . . ."[192] The court considered the juror's uncontradicted claim that he owned the lot upon which his house was built to be sufficient.[193]

Relaxed property requirements changed jury compositions, as many more

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184. PROFFATT, *supra* note 5, § 115 at 161. Some states required city or court officials to write up jury lists of those they considered competent. *Id.* § 121 at 168-69.

185. *Id.* § 115 at 161.

186. MUNSON, *supra* note 5, at 277; W. W. THORNTON, THE LAW APPERTAINING TO JURIES AND INSTRUCTIONS THERETO 60-62 (1888); WALDREP, *supra* note 183, at 235-39. In general, a "freeholder" must hold property, while a head of household may qualify as a "householder." THORNTON, supra, at 61.

187. PROFFATT, *supra* note 5, § 115 at 161.

188. Shepherd v. Grimmett, 31 P. 793, 794 (Idaho 1892) (per curiam) (noting exclusion of "Indians, not taxed, who have not severed their tribal relations"); State v. Ah Chew, 16 Nev. 50, 58 (1881) (holding Chinese defendant could not challenge exclusion of Chinese from juries when based on citizenship rather than race). Mormons were barred from serving on polygamy trials by the Supreme Court and federal statute. Edwin B. Firmage, *Free Exercise of Religion in Nineteenth Century America: The Mormon Cases*, 7 J.L. & RELIGION 281, 300-01 (1989). In Idaho, all Mormons were excluded from voting and, therefore, from jury service. *Id.* at 301.

189. Diane Gujarati, Kicking an Old Habit: The Abandonment of Property Qualifications for Juror Service in the United States 1 (Apr. 1995) (unpublished manuscript) (on file with the author).

190. Territory of New Mexico v. Young, 2 N.M. 93, 94, 102 (1881) (cited in Gomez, *supra* note 49, at 1177 n.111). In Gomez's estimation, the challenge represented a racialized attempt by a white defendant to remove a Mexican juror. When the challenge for cause did not succeed, the defendant challenged the juror peremptorily. *See* Gomez, *supra* note 49, at 1177.

191. *Id.* at 94, 102.

192. *Id.* at 102.

193. *Id.*

farm hands, laborers, and tradesmen entered American venires.[194] Drawn as they were from all walks of life, the new panels presented lawyers with many ethnic, religious, socioeconomic, and occupational groups from which to shape the jury.

American venires were more diverse in other ways as well, reflecting the nation's immigrant history and relative religious tolerance, which some historians dub a "free market, religious economy."[195] In the United States church membership grew from about one-tenth of all adults in 1800 to one-third of all adults by 1850.[196] Three groups dominated: evangelical Protestants; traditionalists tied to European traditions (including Catholics, Lutherans, Episcopalians, and Dutch Reformed congregations); and non-Trinitarian monotheists (such as Jews, Unitarians, and Quakers).[197] But this schema does not capture other groups, such as Mormons and Native Americans.[198] There were further partitions; although evangelical Protestants were the dominant group, "powerful internal divisions" made for fervent turmoil.[199] The largest Protestant denomination, Methodists, made up 34.2% of churchgoers in the mid-1800s.[200] Catholics numbered 13.9%, but they would become the largest denomination in the later 1800s.[201]

By contrast, the vast majority of people in England and Wales, over 75%, were Anglican in 1840.[202] Only one other group, Methodists, could claim a significant share—nearly 10% of the population.[203] Fewer than 3% were Catholic.[204] To underscore cultural homogeneity in the area of religion, non-Anglican Protestants were typically known as "nonconformists" or "dissenters."[205]

Immigration also enhanced American heterogeneity. 10% of American residents were immigrants in 1850 and nearly 15% were foreign-born in 1910.[206] Immigrants came to England in fewer numbers. In 1851, fewer than 1% of residents in England and Wales were foreigners; by 1901 immigrants still

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194. *See infra* Part IV.

195. ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA, 1776-2005, at 60 (2005).

196. Curtis D. Johnson, *"Sectarian Nation": Religious Diversity in Antebellum America*, OAH MAGAZINE OF HISTORY, Jan. 2008, at 14.

197. *Id.* at 14-16.

198. *Id.* at 16.

199. *Id.* at 14.

200. FINKE & STARK, *supra* note 195, at 56.

201. *Id.* at 56; Johnson, *supra* note 196, at 17.

202. Clive Field, *Counting Religion in England and Wales: The Long Eighteenth Century, c. 1680–c. 1840*, 63 J. ECCLESIASTICAL HIST. 693, 711 (2012).

203. *Id.*

204. *Id.*

205. *Id.* at 695-96, 711.

206. *U.S. Immigrant Population and Share over Time, 1850-Present*, MIGRATION POLICY INST., https://perma.cc/FX3Z-56Y8. *See also infra* note 368 and accompanying text.

amounted to less than 2%.[207] Irish-born residents—not technically foreign born—made up almost 3% of residents in 1851 and less than 2% in 1901.[208] Because the Irish were usually unskilled laborers, they seldom appeared as veniremen.[209]

Modern commenters have observed that, as a general matter, peremptory challenges are of little use in eliminating a majority viewpoint or group; they have a more significant effect where counsel seeks to remove a minority.[210] Thus, challenge strategies matter less in a uniform venire. As I argue in the next Part, practice guides show how the heterogeneity of American venires drove jury selection strategies.

IV. ASSESSING AMERICAN TRIAL LAWYERS' VOIR DIRE AND JURY SELECTION STRATEGIES

With diverse venires and expanded voir dire questioning, turn-of-the-century American lawyers developed varied jury selection strategies, often relying on demographic stereotypes and perceived community rifts. Trial practice guides, which described, justified, and promoted these strategies, are an invaluable resource in understanding their development. Judicial opinions, while useful, offer only a glimpse of courtroom tactics because peremptories, by definition, are not explained in court. And while shifts in procedural rules such as *Burr*'s effect on voir dire and the statutory expansion of jury selection in civil trials are well known, this study of trial practice guides is the first to explain how jury selection came to be used in practice.[211]

Observers have long suspected that American diversity played a role in the nation's divergent history of jury selection. The Supreme Court in *Swain v. Alabama* said as much when considering race-based challenges in 1965. "In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse," the Court pointed out, "peremptories were and are freely used and relied upon in this country, perhaps because juries

207. MIGRATION WATCH UK, BRIEFING PAPER 6.1: A SUMMARY HISTORY OF IMMIGRATION TO BRITAIN, at 7, https://perma.cc/4D8H-JDZF.

208. *Id.*

209. Richard Lawton, *Mobility in Nineteenth Century British Cities*, 145 GEOGRAPHICAL J. 206, 211-212 (1979).

210. Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 244-45 (1986) (pointing out that peremptory challenges eliminate minority groups or viewpoints, so cannot make a jury *more* representative).

211. Neither practice guides nor case law can show how *frequently* lawyers used jury selection strategies. Gomez provides some insight into this question in her study of New Mexico cases tried in the late nineteenth century: although many cases did not "present[] stakes high enough . . . to warrant sophisticated litigation strategies," almost half of 91 jury trials showed some "strategizing over jury selection." *See* Gomez, *supra* note 49, at 1176.

here are drawn from a greater cross-section of a heterogeneous society."[212] But until now, historians have not had much evidence of how, why, or when jury selection strategies became part of legal practice and culture, or what they first looked like. This Part shows how attorneys used diverse juries to develop selection tactics (and some would say abuses) and how they became a part of courtroom culture more than a hundred years ago.

American practice guides assured attorneys that careful jury selection could help them win. Reed's 1885 manual warns the young lawyer to take it seriously or risk losing.[213] Elliot and Elliot emphasized selection as a difficult task requiring great "tact and care."[214] In contrast, English practice guides rarely discuss challenges.[215] American editors of English works sometimes added advice on jury selection to make them more useful. James Kerr inserted Brown's article, *Capital Hints for Capital Cases*, including its advice on peremptory challenges, into his American edition of Harris's *Before and at Trial*,[216] and Robbins added a section on jury selection to his edition of Harris's *Hints on Advocacy*.[217]

American attorneys generally had two goals in jury selection: to eliminate potential bias and to build up potential affinity.[218] "Two great objects are to be kept in view in interrogating jurors," Elliot and Elliot explained.[219] "These are, to obtain grounds on which to base a challenge for cause, and to obtain information upon which to determine whether it is expedient to interpose a peremptory challenge."[220] Both were rooted in American diversity. Without the strong potential for bias, lawyers would not have had to push challenges for cause to remove an anti-Catholic juror or a labor unionist. Other tactics—such as

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212. 380 U.S. 202, 218-19 (1965).

213. REED, *supra* note 1, at 232.

214. ELLIOT & ELLIOT, *supra* note 59, at 646; *see also* RICHARD HARRIS, HINTS ON ADVOCACY 174 (William L. Murfree Sr. ed., St. Louis, Central Law Journal 2d American ed. 1881) [hereinafter MURFREE] (calling peremptory challenges a "heavy responsibility").

215. *See* HARRIS, ILLUSTRATIONS, *supra* note 86; RICHARD HARRIS, BEFORE TRIAL: HOW TO PREPARE YOUR CASE 63-64 (London, Waterlow Bros. & Layton, 3d ed. 1896); HARRIS, HINTS ON ADVOCACY, *supra* note 58; FREDERIC JOHN WROTTESLEY, THE EXAMINATION OF WITNESSES IN COURT (1910); EDWARD W. COX, THE ADVOCATE: HIS TRAINING, PRACTICE, RIGHTS, AND DUTIES (London, John Crockford 1852).

216. *See* RICHARD HARRIS, BEFORE AND AT TRIAL 201 (James Kerr ed., 1890).

217. ALEXANDER H. ROBBINS, A TREATISE ON AMERICAN ADVOCACY 154-55 (1904); *see also* HARRIS, HINTS ON ADVOCACY, *supra* note 58; MURFREE, *supra* note 214. Robbins's book is a reprint of English author Richard Harris's *Hints on Advocacy*, with added chapters intended to address specifically American concerns. Alexander Robbins practiced law in St. Louis, edited *The Central Law Journal* and taught at the St. Louis University Institute of Law. *Death of Alexander H. Robbins*, 8 AM. BAR ASSOC. J. 63 (1922).

218. This strategy usually worked well for defendants, plaintiffs, and prosecutors. But defendants also had an alternative strategy; they could try to divide a panel and secure a mistrial. *See* HIRSCHL, *supra* note 40, at 75; WELLMAN, *supra* note 40, at 126.

219. ELLIOTT & ELLIOTT, *supra* note 59, at 134.

220. *Id.*

removing a banker the attorney thought might side with a railroad—could only be implemented with peremptory challenges.

Challenges for cause helped shape peremptory challenges. In practice, the lawyer who lost a challenge for cause would be wise to challenge peremptorily. Brown advised counsel to count peremptory challenges before making a challenge for cause: "If you ever challenge for cause, and the challenge fail, be certain that you have not exhausted your right to a peremptory challenge, and invariably exercise it."[221] And as practice guides and case law of the time show, a challenge for cause sometimes failed even if a juror admitted to bias.[222] In such cases, a peremptory challenge stepped in to solve a problem that for-cause challenges were designed to remedy.

For the most part, however, lawyers used peremptory challenges to leverage affinity or exploit prejudice in their favor. The methods that practice guide writers recommended varied according to the case and the client.[223] Many strategies drew on common stereotypes; some seem arbitrary. Advocates assessed individual prejudice and considered relationships among panel members, playing on loyalties and divisions they expected to find in a venire drawn from various occupations, social classes, ethnicities, religions, and political persuasions.

A. Manipulating Loyalties and Stereotypes of Class and Occupation

To some extent, American trial attorneys used peremptory challenges and selection strategies to counteract more inclusive jury statutes.[224] Many practice guide writers recommended selecting intelligent, responsible jurors and felt that men of property were more likely to be such people. Wellman considered the ideal jury to be one that could "fairly represent the average intelligence of our great middle class."[225] Especially in a strong case, practice guide writer William Murfree recommended selection of the "highly intelligent and respectable" juror, who was likely "the solid man of business, *pater-familias,* church-member, of correct habits."[226] Where "character is involved," he suggested, the jury needed "men of *genuine respectability*."[227] For advocates seeking this "respectable" juror, the threat of debtors and laborers entering the jury-box could only be met

221. BROWN, *supra* note 140, at lxxxiv. *See also* David Paul Brown, *Capital Hints in Capital Cases*, 43 AM. L. REG. & REV. 321, 323 (1895).

222. *See infra* notes 266-74 and accompanying text.

223. Tactics might include pre-trial inquiries into potential jurors' reputations for racial bias where an attorney needed to protect a black client and did not want to openly ask about prejudice, pointed questions about affiliation with a temperance league in defending a saloon keeper, or inquiries about union membership if the client was an employer. *See infra* notes 299-303, 311-15, 364-65 and accompanying text.

224. *See supra* Part III.B.

225. WELLMAN, *supra* note 40, at 116.

226. MURFREE, *supra* note 214, at 175.

227. *Id.*

with challenges. But, as I explain next, class identity and occupational alliances offered many possibilities for selection strategies.

Social class and occupation were, then as now, important in delineating potential social relationships and affinity. "If the case is that of a rich man against a poor one," Elliot and Elliot claimed, "then the one side will desire poor men, the other rich men."[228] In states where labor was strong, Reed said, workingmen may "incline to deny fair verdicts to merchants and professional men contending with one of their class."[229] When, Alexander Robbins explained, an injured worker sued his employer, it was imperative to strike "any large employers of labor."[230]

Unsurprisingly, counsel preferred jurors who shared the client's profession. Reed recalled a case involving a landlord's son who shot a tenant in a quarrel. The defendant managed to empanel eleven other landlords.[231] "The predominant class upon the jury turned the scale in this doubtful case," Reed reported, "and the defendant was acquitted."[232] Lawyers believed that lower-status jurors, too, would stick together. Wellman observed that "[l]aboring men prefer their own kind," and farmers will "invariably side with farmers."[233]

But even if potential jurors shared no occupation with any of the parties, counsel could look for allied professions, or at least ones of similar status. Diverse venires usually provided some. In a case for medical malpractice, Hirschl recommended that counsel use jury selection to keep as many professional men as possible—architects, civil engineers, and factory superintendents.[234] These are men who "themselves might make a mistake once in a while, just as it is alleged this physician made a mistake."[235] Jurors who "had no occupations of moment, who had never felt the weight of responsibility," Hirschl postulated, might not excuse the defendant.[236] Sometimes a juror's profession gave him credibility with others that helped sway the other jurors; this was also something to consider. "Many a builder or expert mechanic has changed the whole twelve by knowing the case and explaining his version of it to his fellow-jurors," Wellman claimed.[237]

Practice guide writers also offered a host of bare occupational stereotypes.

228. ELLIOT & ELLIOT, *supra* note 59, at 136.

229. JOHN C. REED, PRACTICAL SUGGESTIONS FOR THE MANAGEMENT OF LAW-SUITS AND CONDUCT OF LITIGATION BOTH IN AND OUT OF COURT 65 (New York, James Cockcroft & Co. 1875).

230. ROBBINS, *supra* note 217, at 155.

231. REED, *supra* note 1, at 229.

232. *Id.*; *see also* WELLMAN, *supra* note 40, at 118 (noting that a jury of landlords will deal unjustly with a tenant).

233. WELLMAN, *supra* note 40, at 118.

234. HIRSCHL, *supra* note 40, at 84-85.

235. *Id.* at 85.

236. *Id.*

237. WELLMAN, *supra* note 40, at 118. (Wellman did not say whether this was an advantage or a danger; presumably it could be either depending on the lawyer's strategy).

Builders generally were better jurors than salesmen; ex-policemen, ex-justices, and ex-deputies were dangerous for plaintiffs; lawyers and doctors were never desirable.[238] If an attorney felt he could extrapolate a juror's intelligence from his profession, this might also be useful. "Ordinarily, it may be said, stupid jurors are best for the plaintiff," Hirschl advised.[239] "The last speech is about all their limited intellect can retain when retiring to consider of their verdict."[240]

Lawyers also had to take special care to weed out prejudice against corporations in general, and some corporations—especially railroads—in particular. There was, as Reed explained, a "common prejudice[]" in "the people generally against corporations . . . ."[241] An 1886 case from the Illinois Supreme Court highlights the feelings counsel might encounter and the difficulty some faced in removing biased jurors.[242] Voir dire in an accident case brought one juror to admit that "if he had any sympathy it would be with the 'young man that lost his limb,' and that he 'would have no sympathy for the railroad.'"[243] The Court did not view this expression as prejudice supporting a challenge for cause.[244] Instead, the Court said, it "is simply an expression of kindly feeling common to all good people, and certainly the possession of so kindly a spirit would not disqualify a citizen, otherwise competent, from acting in the capacity of a juror."[245] Corporate counsel encountered a similar problem in a Kansas trial, where a juror admitted he had "a feeling against railroads generally, which had existed for several years," and that it would take "a continual effort" to "deal with the railroad company in the same way that [he] would deal with an individual."[246] In this case, the challenge for cause failed, counsel used one of his peremptory challenges, and then succeeded in winning a reversal of the verdict against the railroad in the Kansas Supreme Court.[247]

There were, however, those whom practice guide writers heralded as good jurors for corporations, perhaps identified by their professions. Hirschl explained that "[i]n damage cases against factories, railroads or other large companies where the natural sympathy is for the plaintiff, and the defense is a technical and artificial one . . . men of strong intellectual qualities are required who will solve the matter as they would an irksome mathematical problem, but solve it correctly."[248]

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238. J.W. DONOVAN, TACT IN COURT, OR HOW LAWYERS WIN 116-17 (Detroit, Com. Pub. Co. 1885).

239. HIRSCHL, *supra* note 40, at 82.

240. *Id.*

241. REED, *supra* note 1, at 232.

242. Chicago & W.I.R. Co. v. Bingenheimer, 116 Ill. 226, 231-32 (1886).

243. *Id.* at 232.

244. *Id.*

245. *Id.*

246. Atchison, T. & S.F.R. Co. v. Chance, 57 Kan. 40, 42-43 (1896).

247. *Id.*

248. HIRSCHL, *supra* note 40, at 84.

All in all, practice guides show that advocates used jury selection both to combat class bias and to make the most of it. And with the rise of industrialization and urbanization, they sought to manipulate and often succeeded in exploiting accompanying social tensions.

B. Using Religious Loyalties and Divisions

Religious identity fostered both division and affinity in eighteenth-century America.[249] A juror's faith was one of the first things counsel looked to learn and use in putting together a jury. Practice guides and case law suggest that problems with religious bias were among the reasons attorneys asked personal and probing questions at voir dire, and among the reasons courts countenanced such efforts. For example, in *Horst v. Silverman*, a 1898 case against a Spokane shopkeeper, counsel sought to avoid bias by asking, "[f]or the purpose of enabling counsel to intelligently exercise his right of peremptory challenge," whether a juror "entertained any prejudice against the people of the Jewish faith."[250] In a Texas libel case, the court held that counsel could ask Jewish jurors about potential prejudice against a defendant accused of anti-Semitic libel.[251]

Practice guide writers such as Robbins emphasized how "[t]he advocate must keep off from the jury in his case any man whose . . . religion . . . would influence his judgment on the particular facts involved."[252] Only an incompetent lawyer would fail to make faith-based challenges, in Wellman's view. As a cautionary tale, he explained how a certain lawyer "in middle life and of excellent reputation at the Bar" neglected to challenge two "stubborn" Presbyterians when arguing a personal injury case brought against a Presbyterian publishing company.[253] Any skillful lawyer, Wellman assumed, should have known that the two jurors' religious ties would sway their thinking.

In a murder trial Hirschl recounted, jurors' attitudes towards Catholicism were so obviously problematic that they provoked challenges on both sides. One prospective juror was challenged for his membership in the American Protective Association, an anti-Catholic league, and three others because of their Catholicism.[254] Faced with a similar situation, a California court allowed

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249. *See supra* notes 195-201. Use of religion in jury selection, although controversial, continues. *See, e.g.*, Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 611 (2004) (noting "jury consultants often 'profile' religion"); Christie Stancil Matthews, *Missing Faith in* Batson: *Continued Discrimination Against African Americans Through Religion-Based Peremptory Challenges*, 23 TEMP. POL. & CIV. RTS. L. REV. 45, 63 (2013).

250. Horst v. Silverman, 55 P. 52, 52 (Wash. 1898). Although the court allowed this question, it did not permit counsel to ask if "the testimony of witnesses who professed that faith [would] receive as much credit as members of any other faith." *Id.*

251. Potter v. State, 216 S.W. 886, 888 (Tex. 1919).

252. ROBBINS, *supra* note 217, at 155.

253. WELLMAN, *supra* note 40, at 118-19.

254. HIRSCHL, *supra* note 40, at 100.

questions on whether jurors were members of an anti-Catholic group, the "Know Nothings."[255] Practice guides leave no doubt that religious divisions helped shape use of jury selection strategy.

In constructing strategies for a heterogeneous venire, attorneys had to consider the faith identity not only of clients, opponents, and jurors, but of witnesses, too. This was necessary because for many Americans at the time, faith factored into credibility. Religion "strongly, though usually unconsciously prejudice[s] people. . . . The minds of even the most honest men are biased by the fact that they belong to a certain creed or religion, and [these men] would be slow to discredit a man of their own religion," Hirschl explained.[256] "It is a practically invariable psychological fact," Hirschl wrote, "that if a witness and a juror in the case belong to the same religion while the opposing witness belongs to another the juror will be strongly predisposed to believe the witness from his own church."[257]

An arson case in Massachusetts further confirms that attorneys understood the tie between faith and credibility.[258] The prosecutor wanted to ask about jurors' biases, given that the victims were a convent of nuns.[259] Because the witnesses would include nuns and the local bishop, he wanted to know whether each juror "entertained the opinion that a Roman Catholic was not to be believed upon his oath."[260] Defense counsel, too, was alert to religious prejudice—seeking to use it in his favor. He argued that jurors *ought* to take witnesses' Catholicism into account, because

> confession and absolution being parts of the Roman Catholic faith, a witness belonging to that sect might testify what was not true, in the expectation of afterwards obtaining absolution; more especially in a case like the present, in which a Roman Catholic might be supposed to have a bias . . . this was a matter for the consideration of the jury, as affecting the credibility of the witness.[261]

Counsel's fears of religious prejudice against credibility were, as a general matter, well founded. In their selection strategies, they identified and reacted to an important source of mistrust in American society. Consider the similar case of a Jewish tanner who lost an action for breach of contract.[262] At least one biased juror told the rest of the jury "that [defendants] were Jews, and unworthy of belief."[263]

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255. People v. Reyes, 5 Cal. 347, 348 (1855).

256. HIRSCHL, *supra* note 40, at 86.

257. *Id.* at 87.

258. *See* Commonwealth v. Buzzell, 33 Mass. 153 (1834).

259. *Id.* at 154-55.

260. *Id.* at 155.

261. *Id.* at 156. This was one case in which the lawyers could not act on their concerns about religious differences. The court denied both sides' attempts to investigate jurors' religious sentiments, and the Supreme Judicial Court upheld the rulings. *Id.*

262. Weil v. Stone, 69 N.E. 698, 700 (Ind. App. 1904).

263. *Id.*

An attorney in Washington, defending an obscenity charge, was likely acting on such concerns when he asked if jurors would "attach more importance or credibility to the word of a preacher" and, more specifically, would they "attach more credence to the testimony of Dr. McInturff, a minister of the gospel, than that of any one else?"[264] This particular attempt to purge the jury of potential believers was unsuccessful; the court disallowed the questions and the Washington Supreme Court affirmed.[265] But it shows how, even aside from nationwide tensions such as Protestant distrust of Catholics, local religious affinities could drive voir dire and jury selection.

Subtler religious prejudice might be harder to expose, and cases show how failed attempts to use religious questions in challenges for cause could ultimately require peremptory strikes. In an Idaho probate case, counsel informed a juror that the matter concerned whether the deceased's children would attend a Catholic institution.[266] He then asked whether the juror had "any unqualified opinion or belief as to the merits of the action."[267] The court barred the question—but posing it served the purpose of informing the juror about the main issue.[268] Counsel then asked whether the juror "had any bias or prejudice which would prevent him from sitting and trying this case fairly and impartially."[269] The juror answered: "Well, it is a little complicated; but I am afraid I have a little prejudice. I don't know that I have any grounds for it much,—any grounds for prejudice. I don't believe I want to sit on the jury, really."[270] Counsel sought to challenge for cause because the juror was prejudiced against the Catholic Church.[271] The challenge for cause did not succeed, showing how, in some circumstances, voir dire and a peremptory challenge could make a real difference. It also suggests that where courts set a high bar for challenges for cause, they helped invite peremptory challenges.

In a similar vein, Hirschl described a case where the court rejected a challenge for cause "[a]fter hours of argument."[272] The juror "persuaded [the judge] that he would yield to the court's instructions but no doubt he came to that so reluctantly that the defense challenged him, being still afraid of him."[273] In this case, the juror was one of three Catholics stricken on religious grounds.[274]

In contrast, peremptory challenges also played a role where counsel wished to manipulate religious divisions or loyalties in unscrupulous ways that a court

264. State v. Holedger, 46 P. 652, 653 (Wash. 1896).
265. *Id.*
266. Pine v. Callahan, 71 P. 473, 476 (Idaho 1902).
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. HIRSCHL, *supra* note 40, at 100-01.
273. *Id.* at 101.
274. *Id.* at 100.

would not countenance. For example, in 1883 the Nebraska Supreme Court condemned counsel's attempts to strike jurors for cause simply because they were, like his opponent, Lutheran.[275] "No fair-minded person would permit such a consideration to affect his judgment in the slightest degree," the Court insisted.[276] There were, of course, no restrictions on striking Lutherans peremptorily. Hirschl warned trial lawyers about potential, unwitting religious bias like that the Nebraska attorney suspected among Lutheran coreligionists.[277] "Not that the juror says, 'I will believe him because he is in my church,' but that he unconsciously assumes the credibility of his brother member," Hirschl explained.[278]

Even when there was no voir dire on religion, attorneys could use careful pretrial research and peremptory challenges to play on religious loyalties. Reed recounted how a well-prepared lawyer used religious divisions in his favor.[279] A father and son indicted for murder had an ally in one of the town's two rival Baptist preachers.[280] Defense counsel went through the entire jury list in preparing for trial, marking friends and foes of the rival preachers.[281] At trial he managed to select members of the defendant's former Baptist congregation.[282] The defense prevailed, Reed explained, because the prosecutor (though a resident of the county and a Baptist) "never discovered the significance for him of the church agitation . . . ."[283] Needless to say, because peremptory challenges come with no explanation and need no court approval, such strategies did not require judicial cooperation.

Once they had secured a receptive jury, some counsel were not above playing on jurors' most virulent religious prejudices during trial. This happened to a Jewish appellant in Iowa, who told the state supreme court that the "jury was composed entirely of Gentiles [and] defendants' counsel aroused the prejudice of the jurors by an inflammatory appeal."[284] As a result, the "verdict of the jury was manifestly the result of political prejudice and religious bigotry, induced by improper remarks in argument by appellees' counsel."[285] The appeal failed because the appellant had not made a proper objection at the time of trial.[286] Similarly, in an 1891 Illinois contract case, counsel told the jury (presumably

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275. Barton v. Erickson, 15 N.W. 206, 206 (Neb. 1883).

276. *Id.*

277. HIRSCHL, *supra* note 40, at 87.

278. *Id.*

279. REED, *supra* note 1, at 230-32.

280. *Id.* at 230.

281. *Id.* at 231.

282. *Id.* Only one juror was a member of the rival congregation; the other eleven were part of the defendant's congregation or were neutral. *Id.*

283. *Id.* at 231-32.

284. Frank v. Davenport, 75 N.W. 480, 481 (Iowa 1898).

285. *Id.*

286. *Id.*

having determined that there were no Jewish jurors) that his opponent was "a Jew, a Christ-killer, a murderer of our Savior."[287] This litigant fared better; the appellate court easily concluded that "the verdict was the result of a prejudice worked up against the appellant," and declared it "almost inconceivable" that such arguments "should be either uttered or tolerated in the trial of a cause in a court of justice."[288] That trial counsel attempted such arguments, however, shows how important it could be to remove prejudiced jurors who might be receptive to them.

C. Dealing with Scruples Against the Death Penalty

While a juror's religion might show his loyalties and biases, other differences in moral beliefs could also influence jury selection. By the late eighteenth century, courts had long held that an individual's scruples (be they against slavery, theater, or alcohol) could render him unfit to serve.[289] In capital trials, then as now, counsel probed for conscientious objections to the death penalty.[290] "In criminal law," Hirschl claimed, "one of the most important considerations in serious cases is whether the juror has any conscientious or religious scruples against inflicting the death penalty."[291]

As early as the 1830s, courts permitted counsel to ask a juror "if he could in his conscience find any man guilty of an offen[s]e which would subject him to the punishment of death," and removed him if he "thought he could not."[292] Yet for-cause challenges to death penalty opponents did not always work. Some jurors, opposed on "principle" rather than by "conscience," qualified for service. The California Supreme Court explained the difference. Acceptable jurors included men opposed because "they believe that society would be benefited by

287. Freeman v. Dempsey, 41 Ill. App. 554, 556 (1891).

288. *Id.*

289. The Supreme Court upheld a challenge of a juror who "avowed his detestation of slavery to be such that, in a doubtful case, he would find a verdict for the Plaintiffs." Queen v. Hepburn, 11 U.S. 290, 297 (1813). A New York court ordered a new trial after the district court kept a juror who said "that 'he was opposed to theatrical representations'" in a suit against an opera house. Maretzek v. Cauldwell, 2 Abb. Pr. (n.s.) 407, 408 (N.Y. Sup. Ct. 1867). And the Illinois Supreme Court overturned a decision to seat a juror in a liquor laws case who admitted prejudice against drinking establishments. Carrow v. People, 113 Ill. 550, 558-59 (1885).

290. For discussions of religious sentiment and modern jury selection in capital cases, *see* MELYNDA J. PRICE, AT THE CROSS: RACE, RELIGION, & CITIZENSHIP IN THE POLITICS OF THE DEATH PENALTY 56-57 (2015); Gary J. Simson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1093 (2001); Arnold H. Loewy, *Religious Neutrality and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 191, 194 (2000).

291. HIRSCHL, *supra* note 40, at 95.

292. Jones v. State, 2 Blackf. 475, 477-78 (Ind. 1831); *see also* Logan v. United States, 144 U.S. 263, 270 (1892) (holding that a "juror who has conscientious scruples on any subject, which prevent him . . . from trying the case according to the law and the evidence, is not an impartial juror.").

the adoption of some other mode of punishment, and yet, as long as the law provides that certain crimes shall be punished with death, would feel no conscientious scruples in finding a verdict of guilty . . . ."[293] Jurors were not excused for "political prejudices, or public policy, with which conscience has no connection whatever."[294]

Unacceptable jurors were those whose scruples were more spiritual, springing "from some internal source of self-knowledge, which acknowledges no superior, bows to no authority, yields to no demonstration, and is governed by no law; . . . its teachings are not amenable to human tribunals, but rests alone with its possessor and his God."[295] While the law made a distinction between policy objections and spiritual ones, a prosecutor wanted neither sort of objector on the jury, and peremptory challenges shored up failed challenges for cause.

Sometimes jury selection in a capital case required, as it does in modern times, many venires and extensive examination. During one 1892 trial in the Northern District of Texas the district attorney asked each of fourteen veniremen if he had any conscientious scruples against the death penalty, and each answered yes.[296] It was imperative that counsel discover and remove such men because the court might not release them unchallenged, and conscientious objectors could not remove themselves.[297]

D. Drawing on Political Associations and Disunity

There were other matters of public policy dividing the nation and its juries in the nineteenth century, and attorneys exploited these differences as well. At times, identifying a potential juror's membership in a political society—such as a temperance league or a labor movement—gave counsel an easy way to sort out loyalties and divisions within the venire.[298]

Some of these associations mirrored other demographic divisions—a man's occupation, after all, might reveal his membership in a labor movement. Because the American jury, unlike its early English counterpart, would often include laborers, counsel had to be watchful. As Hirschl put it, in any suit involving a labor union "jurors will be encountered who have fixed ideas on the subject which nothing can alter."[299] An Illinois wrongful death case that went badly for

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293. People v. Stewart, 7 Cal. 140, 144 (1857).

294. *Id.*

295. *Id.* at 143. The technical distinction was so important that challenge of "principled" objectors could be grounds for reversal. *See* Stratton v. People, 5 Colo. 276, 277-78 (1880).

296. *Logan*, 144 U.S. at 270.

297. Williams v. State, 3 Ga. 453, 458 (1847).

298. Political identities still affect trial lawyers' selection strategies, and politics and demographics often correlate. *See* Revesz, *supra* note 18, at 2536-37 (arguing that peremptory challenges based on demographic characteristics skew juries' ideological makeup).

299. HIRSCHL, *supra* note 40, at 94.

the O'Fallon Coal Company in 1899 bears this out.[300] At voir dire the county court denied the company's challenge for cause against a juror who acknowledged that he was "a member of an organization known as the 'Miners' Union.'"[301] In voir dire, the man admitted that "if he sat on the jury, and agreed to a verdict against the plaintiff, he would be distrusted by the association and embarrassed on account of the verdict."[302] The mining company's counsel had exhausted his peremptory challenges, failed to win a challenge for cause, and lost the case.[303]

Other social movements were also important. As Elizabeth Bussiere has noted, a Freemason on a jury might look out for fellow Masons.[304] "Once selected," she explains, "recalcitrant Masonic jurors sometimes succeeded in 'hanging' otherwise unanimous juries, forcing judges to declare mistrials."[305] A court in Texas, perhaps with this dynamic in mind, held that a litigant may ask whether veniremen "are members of the order of Knights of Pythias or Odd Fellows."[306] Hirschl similarly advised that "membership in the same societies, the Masonic Order, the Odd Fellows, or Knights of Pythias" could "be a very strong influence" on a juror.[307] "[O]ther things being equal," a freemason juror "though intending to be perfectly honest would be inclined to believe his fellow Mason."[308]

Counsel also had to reckon with jurors' membership in temperance leagues. Attitudes towards alcohol were extremely divisive in America then—and they often mirrored class, ethnic, and religious divisions.[309] Evangelicals were commonly abstinence activists.[310] Some anti-drink crusading veiled cultural hostility towards Irish Catholic immigrants.[311]

Knowing these heated divisions, practice guide writers warned lawyers to expose temperance affiliations and to challenge accordingly. "If a dram-seller is a party," Elliot and Elliot advised, "his advocate will be careful not to allow a

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300. O'Fallon Coal Co. v. Laquet, 89 Ill. App. 13, 15, 19-20 (1899).

301. *Id.* at 19.

302. *Id.* at 20.

303. *Id.*

304. Elizabeth Bussiere, *Trial by Jury As "Mockery of Justice": Party Contention, Courtroom Corruption, and the Ironic Judicial Legacy of Antimasonry*, 34 LAW & HIST. REV. 155, 168 (2016).

305. *Id.* That a litigant and a juror were both Freemasons was not always enough to support a challenge for cause. *See* Purple v. Horton, 13 Wend. 9, 23 (N.Y. Sup. Ct. 1834); *see also* HIRSH, *supra* note 115, at 133-34. In that case, a peremptory challenge might be a good idea.

306. Burgess v. Singer Manuf. Co., 30 S.W. 1110, 1111 (Tex. Civ. App. 1895).

307. HIRSCHL, *supra* note 40, at 87.

308. *Id.*

309. JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 5-7, 72 (2d ed. 1986).

310. *Id.* at 44-48, 160.

311. *Id.* at 50-51, 55-57.

prohibitionist to sit as a juror."[312] Robbins insisted that "enthusiasts in the cause of prohibition must be challenged" in any case touching liquor laws.[313]

The problem of teetotalers as jurors in liquor license trials seems to have been a larger one than we might suppose; procedures for challenging them earned an entire section in W.W. Thornton's treatise on Indiana jury procedures.[314] In 1885, the Illinois Supreme Court overturned a decision based in part on the lower court's retention of a juryman in a liquor license dispute who "stated he was prejudiced against the liquor business."[315] The same court reversed another defendant's conviction for liquor law violations because he had not been permitted to ask jurors about their membership in a temperance league.[316]

Not all courts were so accommodating—the Kansas Supreme Court, for instance, was less sympathetic. In 1891, it upheld the lower court's retention of two temperance club members in a liquor case.[317] In voir dire, the jurors redeemed themselves by explaining that the organization's object was not to prosecute liquor law violations, "but to promote temperance among its members by moral suasion."[318] The defendant challenged the two peremptorily, and claimed on appeal that he had been forced to waste peremptory challenges on jurors the court should have removed for cause.[319]

In the contentious decades leading up to Prohibition, some jurors also harbored strong feelings *against* restrictive liquor laws. In 1907, Chicago prosecutors found themselves unable to convince local jurors to enforce their laws.[320] One commentator, urging changes in administration to improve the jury pool, argued that a series of "Sunday-closing cases . . . where seven or more juries consecutively failed to convict saloon keepers for conducting saloons on Sunday" had helped to bring the jury system into disrepute.[321] The difficulties of liquor cases underscore the utility of peremptory challenges in a politically divided society.

E. Considering Race and Ethnicity in Jury Selection

Then as now, peremptory challenges could change the racial and ethnic composition of a jury. But because so few members of some races—Native

312. ELLIOTT & ELLIOTT, *supra* note 59, at 172; *see also* HIRSCHL, *supra* note 40, at 97.

313. ROBBINS, *supra* note 217, at 155; *see also* MUNSON, *supra* note 5, at 268-69 (arguing that pub owners should be struck from certain cases).

314. THORNTON, *supra* note 186, at 83, 93-94.

315. Carrow v. People, 113 Ill. 550, 554 (1885).

316. Lavin v. People, 69 Ill. 303, 305 (1873).

317. State v. Estlinbaum, 27 P. 996, 996-97 (Kan. 1891).

318. *Id.*

319. *Id.*

320. Carl A. Ross, *The Jury System of Cook County, Illinois*, 5 ILL. L. REV. 283, 283 (1910).

321. *Id.*

Americans, Chinese Americans, and African Americans, most notably—were included in turn-of-the-century venires, it is difficult to assess how much courtroom jury selection mattered in excluding these groups.[322] For context, it is helpful to first consider racial restrictions on jury service.

1. Racial composition of turn-of-the-century venires

Some racial groups, such as Native Americans and Chinese, were routinely excluded from juries because they were barred from citizenship.[323] African Americans, too, were rare: black jurors do not seem to have appeared on northern juries until 1860, and such an appearance remained rare.[324]

There is evidence of limited African American jury service after the Civil War. In some southern jurisdictions, African Americans served regularly during the brief period of Reconstruction.[325] In a study of one Texas county, Donald Nieman found that at least from 1877 through 1884, blacks served on juries "in more than token numbers."[326] In studying Orleans Parish federal juries, Drew Kershen found that from 1879 to 1887, just under eight percent of jurors on grand juries were black.[327] There may have been considerable local variation in county systems of exclusion, even in the South. But as Michael Klarman has observed, other than in North Carolina, "blacks became noticeably less present on southern juries by the late 1880s."[328]

As one scholar has observed, in "the first three decades of the twentieth century, essentially no blacks sat on southern juries."[329] Researcher Gilbert Thomas Stephenson, working in 1910, conducted an informal mail survey of

322. *See supra* note 188 and accompanying text (discussing the disenfranchisement of various racial groups).

323. *See, e.g.*, Shepherd v. Grimmett, 31 P. 793, 794 (Idaho 1892); State v. Ah Chew, 16 Nev. 50 (1881).

324. James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L. J. 895, 910 (2004); Alschuler & Deiss, *supra* note 68, at 884-85. The appearance in 1860 of an African American on a Massachusetts jury was so unusual that it attracted attention. *Id.* During Reconstruction, significant numbers of freed slaves served in juries in South Carolina and New Orleans. *Id.* at 886. But even by the late 1800s some states had never enrolled black jurors. Defense counsel remarked that "[i]t is a *conceded* fact that a colored man has never been placed on any jury list in Delaware." Neal v. Delaware, 103 U.S. 370, 381 (1880) (emphasis added).

325. Alschuler & Deiss, *supra* note 68, at 886; GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 255, 259, 265, 267, 269-71 (1910).

326. Donald G. Nieman, *Black Political Power and Criminal Justice: Washington County, Texas, 1868-1884*, 55 J.S. HIST. 391, 401 (1989).

327. Drew L. Kershen, *The Jury Selection Act of 1879: Theory and Practice of Citizen Participation in the Judicial System*, 1980 U. ILL. L.F. 707, 758 (1980).

328. Michael J. Klarman, *The Plessy Era*, SUP. CT. REV. 303, 371 (1998). Klarman noted that "[b]lacks continued to serve on southern juries, at least through the 1880s and sometimes into the 1890s, though in smaller numbers than during Reconstruction." *Id.* at 308.

329. *Id.* at 371.

court clerks in southern states.[330] Stephenson found uniform exclusion in most counties where clerks responded.[331] About forty clerks wrote that blacks were never jurymen, with some explaining that they were not called for service.[332] There were, however, occasional black jurors in twenty or so jurisdictions, with a handful of clerks reporting significant representation.[333] One clerk in Florida said they "seldom" sat in his county, but that "a large number" served in Florida's federal courts.[334] In Louisiana, a clerk stated that black jurors made up "about one-half the panel on the petit jury," and a respondent in Mississippi wrote that there were "one or two . . . nearly every term."[335] Another Louisiana clerk explained that African Americans' limited service in the parish was appropriate "as [black] jurors do not give any trouble; they always follow the suggestions and advice of the white jurors."[336]

Were black jurors absent from venires when they were called? Or were some removed from the panel with challenges? The clerks' reports on trial lawyers' strike tactics varied; one in Mississippi wrote that no blacks served on juries because "Negroes are almost invariably challenged."[337] A clerk in Missouri asserted that lawyers there would never permit a black juror to remain; while another in North Carolina said that attorneys did not object to black jurors.[338] In describing voir dire of all-white juries in Arkansas, a clerk asserted that jury selection rooted out any prejudice against black litigants, as "the question is nearly always propounded to the juror, when it is a Negro defendant: 'Would you give the defendant the same consideration as if he was a white man?'"[339]

Unfortunately, Stephenson's methods were not systematic, and it is difficult to generalize from the responses he reported. Given the lack of statistical rigor, it is hard to know if Stephenson's work is any real indication of African Americans as veniremen. In general, statutes, tax requirements, or—more often, by the turn of the century—sheriffs and jury commissioners effectively kept African Americans off venire lists.[340] As a result, there were very few African

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330. STEPHENSON, *supra* note 325, at 253-72.
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* at 255-56.
335. *Id.* at 259, 261.
336. STEPHENSON, *supra* note 325, at 259.
337. *Id.* at 262.
338. *Id.* at 264, 267.
339. *Id.* at 255.
340. For a compilation of state statutes and constitutional provisions, see WALDREP, *supra* note 183, at 235-47. Courts regularly heard challenges to these practices. *See, e.g.*, Commonwealth v. Johnson, 78 Ky. 109, 111 (1880) (striking down a whites-only provision); Smith v. State, 111 P. 960, 960-61 (Okla. Crim. App. 1910) (holding that court should have considered evidence that sheriff and jury commissioners declined to summon persons of African descent); Montgomery v. State, 45 So. 879, 882 (Fla. 1908) (reversing given evidence of racial exclusion by local officials); State v. Peoples, 42 S.E. 814, 814 (N.C. 1902) (reversing

Americans called for jury service from the late 1800s to the early 1900s. Probably because venires were overwhelmingly white, practice guide writers do not offer much advice on race-based challenges.

2. Strategies addressing race and prejudice

Practice guides do, however, offer some advice for guarding against racial prejudice when defending a non-white client. The issue of race reveals, perhaps more than any other, how struggles to remove strongly biased jurors motivated jury selection practices. Reed recounted an experience from Reconstruction. "When the courts wherein we are practicing were re-opened in middle Georgia, after the war," he explained,

> it was idle to carry any case of a negro before a jury of the whites. We witnessed such an unbroken succession of adverse verdicts against colored litigants, that, as JEFFERSON did over slavery, we trembled for our people when we reflected that God was just, and that his justice could not sleep forever.[341]

The situation improved, Reed claimed, after 1870, but he maintained that it was still "in some parts of the South . . . folly for a native white to submit his case to a negro jury, and in other parts a negro could not get justice from a white jury."[342]

Justice Settle, of the South Carolina Supreme Court, would agree. In overturning the 1869 conviction of a black man barred from asking jurors if each "believed he could, as a juror, do equal and impartial justice between the State and a *colored* man," Settle decried "the prejudice in respect to color" he had seen in his own practice.[343] He wrote of a murder case he observed where "[t]he Court permitted the Solicitor to ask each juror if he had any feeling which would prevent him from convicting a white man for the murder of a negro, though the evidence should prove him guilty."[344] As voir dire progressed, "[s]trange and discreditable as it may appear, the Court found it necessary, in addition to the regular panel, to order three special writs of *venire*, of fifty each, before twelve men could be found who did not answer that they would not convict a white man for killing a negro."[345]

At least in theory, as Justice Settle suggested, careful voir dire provided

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based on allegations that the sheriff and commissioners of Mecklenburg County used a revised jury list "to discriminate unjustly and purposely against competent persons of the negro race").

341. REED, *supra* note 229, at 66. One must not credit Reed with any high-mindedness in matters of race. He was a Grand Giant in the Ku Klux Klan and a leader of voter suppression efforts. *See* EDMUND L. DRAGO, BLACK POLITICIANS AND RECONSTRUCTION IN GEORGIA: A SPLENDID FAILURE 153-55 (1882); T.W. HERRINGSHAW, 4 HERRINGSHAW'S NATIONAL LIBRARY OF AMERICAN BIOGRAPHY 566 (1914).

342. REED, *supra* note 1, at 65.

343. State v. McAfee, 64 N.C. 339, 340-41 (1870).

344. *Id.*

345. *Id.* at 341.

some safeguard against racial prejudice with all-white juries.[346] Fears of racial prejudice drove him, in his 1870 decision, to rule in favor of expanded voir dire.[347] Many courts held such questioning an important right, showing how the country's strong social rifts motivated enhanced jury selection procedures.[348] In 1880, the California Supreme Court reversed a Chinese defendant's conviction for robbery, holding that defendant's counsel must be permitted to ask potential jurors if, "[o]ther things being equal," each would "take the word of a Chinaman as soon as [he] would that of a white man."[349]

By 1904, the Louisiana Supreme Court considered pretrial selection procedures to be a court's primary precaution against prejudice.[350] It held that jurors trying Louis Nix, a black man charged with killing a white man, needed no parting admonition "that race, color, or previous conditions [of servitude] must not enter into the deliberations of the jury, that all persons, of whatever race or color, are equal under the law."[351] Because "[t]he time for testing prejudice on the part of jurors was on their examination on their voir dire," nothing more need be said in jury instructions.[352]

Even so, counsel were sometimes denied the opportunity to remove racist jurors for cause. A Florida juror asked if he "would or could give the evidence of an Ethiopian or descendant of the African race the same weight that [he] would that of a Caucasian or descendant of the white race" answered "No; I don't think I could."[353] But the Florida Supreme Court, in 1893, upheld the trial court's refusal to remove him.[354] It reasoned that questioning and challenging a juror for prejudice against a black *defendant* was appropriate, but questioning about whether he would believe a black *witness* should not be permitted.[355] Needless to say, disconcerting decisions such as this one reveal, once again, how attorneys might be forced to rely on a peremptory challenge after a failed for-cause challenge.

Courts varied in their concern about racial prejudice among jurors. The Washington Supreme Court recognized that jurors might believe or disbelieve a witness because of race, and acknowledged this in ruling on a defendant's request to present a white witness in his favor.[356] It awarded a new trial to allow a newly

346. *Id.* at 340-41.

347. *Id.*

348. *See, e.g.*, *id.* at 340-41; People v. Car Soy, 57 Cal. 102, 103 (1880).

349. *Car Soy*, 57 Cal. at 103.

350. State v. Nix, 35 So. 917, 918 (La. 1904).

351. *Id.*

352. *Id.* (internal quotations omitted). The Court noted that the race of the jurors was not on the record. *Id. See also* Pinder v. State, 8 So. 837, 838 (Fla. 1891) (holding defendant may ask about race prejudice as it "was of the most vital import to the defendant" and "was locked up entirely within the breasts of the jurors").

353. Jenkins v. State, 12 So. 677, 677 (Fla. 1893).

354. *Id.* at 680.

355. *Id.* at 677-78.

356. State v. Townsend, 35 P. 367, 368-69 (Wash. 1893).

discovered white witness to testify.[357] Ordinarily, the court said, it would have accepted the state's argument that a new trial was unwarranted as the additional witness would not offer anything unique; his testimony would be cumulative.[358] This case was exceptional, the court said, because "[t]he testimony adduced at the trial of the cause was exclusively the testimony of Indians."[359] The new witness was, potentially, "the only white witness in the case."[360] This might have changed the outcome because "it is a fact well known to citizens of this coast that jurors will not give the same credence to Indian testimony as they will to the testimony of respectable white people."[361] In 1916, prejudice against a black attorney provoked reversal in the South Carolina Supreme Court. There, a district court improperly retained a juror who, when an African American attorney asked him about his racial feelings, admitted "a natural resentment for one of your race pleading to a jury that I am on."[362]

Advising on hidden racial prejudice and jury selection, C. LaRue Munson of Pennsylvania recounted a strategy one attorney used to mitigate bigotry more subtly—without resorting to voir dire.[363] "Fearing a prejudice against his client, by reason of his race," Munson reported, counsel made "a thorough investigation into the character and business of the members of the panel, and found several whose prejudices would have been fatal to success had they been permitted to sit in the cause . . . ."[364] Counsel did this tactfully, with pretrial research, "and was thus enabled to properly challenge when the jury was called into the box."[365]

Wellman discussed race, too. But he offered no prophylactic solution to combat race prejudice; he simply asserted that some races acted fundamentally differently as jurors.[366] He never explained his objection to the "half-breed Indian" juror from Texas who served on a murder trial, but claimed "there never was a greater error committed in the choice of a jury . . . from the moment the Indian juror was accepted by the District Attorney all possibility of a conviction was at an end."[367]

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357. *Id.*

358. *Id.* at 369.

359. *Id.*

360. *Id.*

361. *Id.*

362. State v. Sanders, 88 S.E. 10, 12 (S.C. 1916).

363. MUNSON, *supra* note 5, at 268. Munson was a Pennsylvania attorney, president of the Pennsylvania State Bar Association, an officer in several corporations, and a Yale Law School lecturer. *See* 13 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 111 (1922). His book is in most respects a legal treatise, but it includes occasional passages of strategic advice.

364. MUNSON, *supra* note 5, at 268.

365. *Id.*

366. WELLMAN, *supra* note 40, at 126.

367. *Id.* The defendant allegedly murdered a man who had seduced his brother's wife. Presumably, Wellman assumed that Indians (or Texans) would sympathize with such a defendant.

3. Ethnicity and national origin in jury selection

Looking beyond the categories that modern Americans would define as racial, practice guide writers had much to say about using ethnicity and national origin in jury selection. Those of Irish, German, or Italian descent, among others, often escaped statutory or other legal barriers to jury service, but still provoked prejudices or loyalties. Indeed, in many courtrooms, ethnicity was perhaps the most significant source of affinity or strife that turn-of-the-century lawyers could draw on in manipulating jury composition.

Especially in the late 1800s,[368] many Americans had strong feelings about national origin. If counsel managed to secure a jury composed mainly of members of a sympathetic group, he might take advantage of ethnic solidarity. As Hirschl explained, "[t]here is no doubt that 'blood is thicker than water.' People are instinctively clannish, and those of the same nationality will side with each other rather than with an alien."[369] He advised lawyers to consider the ethnicity of attorneys, litigants, and witnesses when picking a jury.[370] "Each nationality will to some degree stand together," Wellman similarly advised.[371]

Donovan claimed that just such a dynamic led to the acquittal of a notorious diamond thief, one McCarthy, "a magnificent looking young Irishman," whose jury included seven Irishmen.[372] Defendant's counsel closed the trial with historical anecdotes and a personal appeal, which Donovan related with great drama: "[b]ehold this young man; he is no vagabond; no felon; in his veins runs the rich current of the blood of Irish princes and of kings."[373] The impressionable jury acquitted, Donovan claimed, "with nine cheers."[374]

Rivalries among ethnicities also mattered. Donovan claimed that "five Englishmen in America, matched with four Germans and three Irishmen, would hardly be harmonious in a land case."[375] Charting out stereotypical enmity, Wellman remarked that "[t]he Irish are often prejudiced against Hebrews, and

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368. Meredith K. Olafson, Note, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433, 453 (1999) (quoting Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 60 (1989)) (noting "nativist, xenophobic" sentiments prevalent in the 1880s); John L. Pollock, Note, *Missing "Persons": Expedited Removal,* Fong Yue Ting*, and the Fifth Amendment,* 41 ARIZ. L. REV. 1109, 1109-10 (1999) (explaining how rising immigration levels prompted restrictive laws in the 1880s and 1890s).

369. HIRSCHL, *supra* note 40, at 85.

370. *Id.*

371. WELLMAN, *supra* note 40, at 117.

372. J.W. DONOVAN, SKILL IN TRIALS 84 (Rochester, N.Y., Williamson Law Book Company 1891). *Skill in Trials* is a collection of anecdotes and speeches intended to inspire the young advocate.

373. *Id.*

374. *Id.*

375. J.W. DONOVAN, TRIAL PRACTICE AND TRIAL LAWYERS: A TREATISE ON TRIALS OF FACT BEFORE JURIES 32 (St. Louis, Mo., William H. Stevenson 1883).

vice versa."[376] The trial practice guides do not give examples of tensions between whites and Hispanics in the American Southwest, but their suggested strategies for ethnicity in jury selection accord with what we know about that region's juries.[377] As Laura Gomez concluded in her study of New Mexico juries, ethnicity mattered, and "[i]t appears that Mexican defendants and the lawyers who represented them were making race-based judgments about jurors at least as often as European-American defendants."[378] As an example, Gomez pointed to a rape case in which a defense attorney used four peremptory challenges against whites, leaving an all-Mexican jury. The jury convicted the Mexican defendant, but on the lesser of two possible charges.[379]

Peremptory challenges might be counsel's only hope of eliminating ethnic prejudice, because some courts were surprisingly unwilling to recognize it in a challenge for cause. One New York court refused to dismiss a challenged juror even after accepting an Irish plaintiff's evidence that both the juror and the defendants were members of the "Know Nothings," a "society [which] inculcated hostility to all Irish Catholics."[380] Another New York court similarly denied challenge of a juror who, when asked if he had "any prejudice either in favor of or against the Italians as a race," replied that "[i]t is a race I am not particularly fond of, and I do not think much of, judging from those we have here."[381] The state's highest court agreed, explaining "that the juror may have had some prejudice against the Italian race was not we think, a disqualifying circumstance . . . . The fact that the juror did not like the race to which the prisoner belonged was quite too inconclusive to justify a finding that he was incompetent."[382]

If an attorney could not or did not use peremptory challenges to remove potential ethnic prejudice, opposing counsel might take advantage of such sentiments. We can see examples of these arguments in several appellate opinions.[383] When counsel in St. Louis resorted to inflammatory arguments against Irishmen, the court of appeals reversed, citing counsel's "highly improper" closing remarks.[384] We can assume counsel would not have used this tactic with Irish jurors. The court remarked that jurors' "names, as preserved in the record, are highly suggestive of 'German lineage.'"[385]

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376. WELLMAN, *supra* note 40, at 125.

377. *See* Gomez, *supra* note 49, at 1178-79.

378. *Id.* at 1179.

379. *Id.*

380. Costigan v. Cuyler, 21 N.Y. 134, 135 (1860). The New York Court of Appeals deferred to the lower court's discretion. *Id.* at 136.

381. Balbo v. People, 80 N.Y. 484, 491 (1880).

382. *Id.* at 498.

383. *See supra* notes 263, 284, 287, 384-85 and accompanying text.

384. Fathman v. Tumilty, 34 Mo. App. 236, 237, 241 (1889).

385. *Id.* The appellate court either believed that Germans and Dutchmen were inclined to ally against the Irish, or assumed "Dutch" might stand for "Deutsch."

Economic and racial prejudice was so strong in some parts of the country, Reed warned his readers, that it might make picking a good jury impossible.[386] An attorney might need to seek a settlement or resort to arbitration.[387] "Here the lawyer can not blame himself for not being able to cure society of its evils," Reed explained.[388] "He must look about him, and do what he can in advising his unfortunate client," perhaps even advising against litigation.[389]

Hirschl endorsed ethnic challenges, but recognized that this strategy was dubious enough to need some explanation or justification.[390] He emphasized an attorney's duty to his client, describing a murder case in which "a man of one nationality" stood trial for killing his wife "who was of quite different nationality."[391] The prosecution consistently challenged men of the same nationality as the accused, while the defense challenged all the victim's compatriots.[392] This "was proper practice," Hirschl assured.[393] "Any lawyer would feel that he was delinquent in his duty if he did not do that."[394] Consider, he proposed, the situation if counsel did not make such challenges: "The case might come out all right and the lawyers feel that the challenged juror might just as well have stayed on if he was an honest man—but if he were not put off and the case did not come out right, the lawyer and doubtless his client would feel that he had made a mistake . . . ."[395] One might never know whether "the case was lost because the juror's nationality was on the opposite side."[396]

For the most part, practice guide writers embraced ethnic prejudice rather than condemned it. There were blatant racial stereotypes.[397] "Germans are stubborn, but generous," Wellman reported.[398] "Hebrews, as a rule, make fine jurors, except where they are prejudiced."[399] Armed with such platitudes, attorneys could use ethnic assumptions to pick jurors independent of case-specific considerations. Other suggestions were more subtle. A recommendation to pick a doctor or other professional, and to avoid jurors who "had no

386. REED, *supra* note 229, at 65-66.

387. *Id*. at 65-67.

388. *Id*. at 65.

389. *Id*.

390. *See* HIRSCHL, *supra* note 40, at 85-87. The importance of racial and ethnic stereotyping likely grew as the twentieth century progressed; later practice guide literature is even more explicit in describing the prejudices and temperament of jurors from diverse ethnic groups. *See* William H. Arpaia, *Hints to a Young Lawyer on Picking a Jury*, 6 J. MARSHALL L.Q. 344, 344-47 (1941).

391. HIRSCHL, *supra* note 40, at 85-86.

392. *Id*. at 86.

393. *Id*.

394. *Id*.

395. *Id*.

396. *Id*. at 85-86.

397. *See supra* notes 366-67, 398-99 and accompanying text.

398. WELLMAN, *supra* note 40, at 125.

399. *Id*.

occupations of moment"[400] might have been a suggestion to pick white, middle class jurors.

F. Studying Appearance and Mannerisms

In instructing counsel about challenges, practice guide writers often drew on more subtle categories than race, recommending close attention to other aspects of veniremen's personal appearance. "The very best means of selection is a measurement by the eye," Donovan wrote. "I never knew dishonest eyes in an honest head."[401] Perhaps the popular teaching of phrenology influenced this writer, who advised excluding "low-headed men" who "generally get stubborn."[402] Wellman described one archetypical physique to avoid: "a little man, his disposition is narrow, he shows in his face that he is self-opinionated and difficult to persuade . . . ."[403]

Donovan also endorsed selection by age, claiming that "men of 30, 40 and up to 50 believe in life, in enjoyment, in fair play, and have a hatred of meanness and mean acts."[404] Old men were undesirable—not only because they might not hear well, but because "many are fixed and rigid in their notions, and take prejudices that [the lawyer] can not conquer."[405] Young men were better for the defense because they were more forgiving. They could "appreciate the fact that generous natures may be misled, and even err unintentionally . . . ."[406]

Along with stereotypes about physical features, practice guide writers recommended attention to manners and mannerisms. An observant advocate would evaluate gestures and tone of voice when sizing up a juror. "[W]atch the way they take their seats in the box," Wellman advised.[407] "This may be the only chance to observe the juryman in action. The way he folds his coat, or brushes by the other jurymen in the jury box may give the advocate some hint of his character and habits, and disclose to him whether he is courteous, methodical, or otherwise. Sherlock Holmes claimed he could tell a man's profession if he could watch him walk across the floor."[408]

Indeed, some believed that observation, not voir dire questioning, was most telling. Robbins recommended that counsel keep the pretrial questions short,

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400. HIRSCHL, *supra* note 40, at 85.

401. DONOVAN, *supra* note 375, at 33. In his "Ten Trial Rules," Donovan advised counsel to "[s]elect young jurymen, with warm, intelligent faces." *Id.* at 29.

402. *Id.* at 32.

403. WELLMAN, *supra* note 40, at 117.

404. DONOVAN, *supra* note 375, at 32.

405. *Id.* at 33.

406. *Id.* Wellman, alternatively, recommended young men as "safer" in general, though old men were better for the defendant. WELLMAN, *supra* note 40, at 125.

407. WELLMAN, *supra* note 40, at 119.

408. *Id.*

because one could learn much through "careful observation" alone.[409]

Body language also mattered because it might reveal a hidden emotional reaction to questioning. Elliot and Elliot suggested that a challenge was in order if any voir dire questions "wounded a juror's self-esteem" or affronted him.[410] "A keen eye must be kept upon each juror, and if a question touches a tender place, or makes him wince, a challenge must be made . . . ."[411] Wellman explained that he intended some of his questioning to invoke a physical response, rather than an answer.[412] "Sometimes I make some pleasant little joke or courteous retort to the opposing lawyer, and at the same time watch closely the faces of the jury as I do so; some smile, others frown—it helps me to decide which ones I like and want."[413] Techniques using mannerisms, appearance, and emotional reactions further show that, by the late 1800s, jury selection practices had gone well beyond rooting out prejudice.

G. Strategic Use of Voir Dire to Inform and Build Rapport

Aside from manipulating jury selection, attorneys found ways to use voir dire strategically. Extended voir dire (and in particular, attorney-led voir dire) gave the advocate a chance, at the start of proceedings, to influence the jury. As Hirschl put it, "[t]here are technically two openings to the jury;" the first was jury selection.[414] In preliminary questions, counsel should build interest and expectation (although counsel should never overstate or instill "too great expectation," Hirschl advised).[415]

Practice guide writers suggested dropping hints to move the jury in counsel's favor. "An advocate who makes a favorable impression at this early juncture," Robbins related, "has quite handicapped his opponent."[416] This opportunity to address the jury was especially important for the defense, because without these intimations, jurors would hear plaintiff's argument without realizing there were two sides to the story.

If there were elements of a case that an attorney could not properly address

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409. ROBBINS, *supra* note 217, at 155. Trial lawyers were not the only ones to recognize the importance of physical observation; some appellate court judges who reviewed challenges also acknowledged its value, and so deferred to court and counsel. State v. Brooks, 5 S.W. 257, 264-65 (Mo. 1887); Basye v. State, 63 N.W. 811, 816 (Neb. 1895).

410. ELLIOTT & ELLIOTT, *supra* note 59, at 133.

411. *Id.*

412. WELLMAN, *supra* note 40, at 122.

413. *Id.*

414. HIRSCHL, *supra* note 40, at 67.

415. *Id.* at 70. Even the scope of voir dire could be tactical, and counsel might limit it, as Hirschl advised in his practice guide, in a "very small" or "trifling" case. *Id.* at 72. Counsel should not "insist upon a very searching and thorough examination of the jury," leading them "to expect some momentous case" if they might "be disappointed when the trivial little case developed." *Id.*

416. ROBBINS, *supra* note 217, at 154.

at trial, counsel might try to bring these out, more discreetly, in voir dire. In *Arnold v. California Portland Cement Co.*, for example, the California appellate court put a stop to such a tactic.[417] During voir dire, the court had improperly permitted plaintiff to ask questions implying that the defendant was insured and would not pay out of pocket for any damages.[418] At other times, however, counsel got away with this maneuver. The Second Circuit, for instance, did not see fit to reverse in a similar situation.[419] It rejected the appellant's argument that because of the "unreasonable prejudice of so many jurors against insurance companies" such questions represented "poison . . . instilled early in the trial."[420]

In formulating questions, counsel needed to consider the effect of each question, each answer, and each challenge on the remaining jurors. Elliot and Elliot recommended that counsel not leave venire members wondering about the reasons for a challenge.[421] Although "[t]he disclosure can not, as a rule, be made in express words," nevertheless questions on voir dire "can be so framed as to convey to the minds of the other members of the jury the reason for the challenge."[422] Counsel also needed to take care that a juror's answers not damage his case. Hirschl gave an example involving the competency of a testator.[423] Asked if he had an opinion on the case, one juror "said that he had a very decided one."[424] Counsel did not follow up, lest the man announce some assessment of the testator's competency in front of the other jurors.[425]

To take advantage of every strategic opportunity, counsel might ask questions even if he had already decided to use a peremptory challenge. Elliot and Elliot urged counsel to consider doing so if "there is ground for believing that his answer will do harm to the adverse party."[426] At the very least, practice guide writers recommended, counsel must be careful not to make "[a]n unfavorable impression" at voir dire.[427] "There should be no timidity, yet there need be no rudeness . . . ."[428]

Restraint in asking questions was also an important strategy. Consider the case discussed earlier in Reed's advice about religion.[429] Defense counsel filled

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417. Arnold v. Cal. Portland Cement Co., 183 P. 171, 172 (Cal. Dist. Ct. App. 1919).

418. *Id.* Counsel asked, "if you were a juror in this case, and it came to your knowledge from any source whatever, that the New Amsterdam Casualty Company was a surety for any injury to the employees of the defendant company at the time of this alleged injury, would that knowledge of that fact in any wise influence your verdict in the case?" *Id.*

419. Marande v. Tex. & P.R. Co., 124 F. 42, 44 (2d Cir. 1903).

420. *Id.*

421. ELLIOTT & ELLIOTT, *supra* note 89, at 647.

422. *Id.*

423. HIRSCHL, *supra* note 40, at 42-43.

424. *Id.* at 42.

425. *Id.* at 43.

426. ELLIOTT & ELLIOTT, *supra* note 89, at 648.

427. *Id.* at 647.

428. *Id.*

429. *See supra* notes 279-83 and accompanying text.

the jury box with members of his client's Baptist faction—but managed to avoid voir dire questions about religion.[430] The defendant's strategy worked because he investigated the panel, identifying each man's loyalties before trial.[431] Challenges were "made so discreetly" that his opponent never identified the defense lawyer's strategy.[432]

As this example shows, while extensive voir dire could be valuable, it was not a prerequisite for an effective peremptory challenge strategy. Munson advised his readers to "go over the panel of jurors" before trial, asking his client's assistance to learn their "characteristics and connections."[433] "This work should not be left to the hour when the jury is called into the box . . . ."[434] With increasing urbanization, of course, a client might not know jurors by reputation. There were other options. "If you have been wise," Donovan advised, "you have looked ahead, read your directory, and now know the occupation of each [juror]."[435] A jury list might, in addition to names, include addresses and "a title by which the person is commonly known in the community."[436] Wellman, writing in 1910, pointed out that in Massachusetts counsel could obtain lists of eligible jurors two or three weeks before trial.[437] "Any one having an important case in that term usually has the whole list of jurors looked up by some detective agency," he advised.[438] Other writers similarly advocated a thorough, pretrial investigation in addition to in-court examination.[439] Indeed, at least one judge concluded that giving defendant a list, three days before trial, for the contemplation of challenges helped justify cutting off voir dire.[440]

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430. REED, *supra* note 1, at 231-32.

431. *Id*. at 231.

432. *Id*.

433. MUNSON, *supra* note 5, at 267.

434. *Id*.

435. DONOVAN, *supra* note 3, at 227.

436. PROFFATT, *supra* note 5, § 126, at 173. A title Proffatt reported as an example was "mill boss." *Id*.

437. WELLMAN, *supra* note 40, at 115.

438. *Id*.; *see also* State v. Reeves, 11 La. Ann. 685, 686 (1856) (noting statute required jury list produced two days before trial).

439. ELLIOTT & ELLIOTT, *supra* note 59, at 131 ("Nor is the work of discovering the prejudices and circumstances of the jurors to be left to be done in the court-room."). William Murfree advised counsel to get the jury list promptly. MURFREE, *supra* note 214, at 174. Reed recommended that counsel "exhaust the city directory and laboriously inquire of many people in order to be informed fully." REED, *supra* note 1, at 232. Modern lawyers employ similar methods. *See* Amber Hollister, *A Year-End Ethics Audit: Pop Quiz*, 78 OR. ST. B. BULL. 9, 12 (Dec. 2017) (stating it is "commonplace for litigators to Google potential jurors prior to voir dire").

440. State v. Baldwin, 5 S.C.L. 309 (3 Brev.), 292-95 (S.C. Const. Ct. App. 1813).

H. Attention to Group Dynamics

Trial attorneys of the time not only considered affinities and biases of individuals, they also worked out how jurors might interact. With this in mind, Wellman preferred to question jurors in groups of four—few enough to observe individually, yet enough to allow for some interaction.[441] In Hirschl's view, plaintiff's counsel should examine jurors together.[442] "If the plaintiff has the whole twelve of the jury before him he can use his peremptories to better effect because he can tell better which of the men are least desirable by seeing them all together."[443] The stakes were high for plaintiff, because "[t]welve desirable men are required to make a large verdict for the plaintiff but one undesirable man may spoil it."[444]

Potential leaders, who could compete with the lawyer's influence over the jury, were out. "The men to be avoided on juries," Donovan explained, "are leaders, ex-officials, and unyielding debaters . . . ."[445] A trial lawyer should remember that "one man can manage a multitude," and be wary of selecting those with authority or above-average powers of persuasion.[446] But counsel should of course retain any "debaters for [his] side."[447]

Jury selection strategies gave counsel a powerful tool that their common law counterparts, faced with uniform venires and limited challenges, did not enjoy. American attorneys could try to pick a hung jury. With careful attention to group dynamics, a watchful trial lawyer could put together a discordant assembly. Diverse social groups, the theory went, would find it hard to come together for a verdict. "The defense should like a disagreement [among the jurors]," Donovan noted.[448] "If your case is desperate, lean on discordant elements to secure a division of opinion."[449] Wellman advised readers to contrive a hung jury by mixing races, nationalities, and ages.[450] A heterogeneous venire, then, gave American lawyers a troubling influence over the jury system—one they arguably maintain today. They could use social and racial divisions to undermine the jury's decisionmaking purpose.

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441. WELLMAN, *supra* note 40, at 122.
442. HIRSCHL, *supra* note 40, at 73-74.
443. *Id.* at 74.
444. *Id.* at 75.
445. DONOVAN, *supra* note 375, at 32.
446. *Id.*
447. *Id.*
448. *Id.* at 33.
449. *Id.* at 32-33.
450. WELLMAN, *supra* note 40, at 126.

I. Jury Selection in English Practice Guides

I have emphasized how early nineteenth-century American procedures and legal culture parted ways with the common law and how, as the century progressed, demographic divergence widened that divide. While I do not propose to fully evaluate and compare English practice guides from the late 1800s, it may be useful to consider them in contrast.

English practice guides are few, and for the most part do not discuss challenges.[451] The differences, however, illustrate the minor role jury selection played in English trial strategy. English and American practice guides were similar in tone, content, and organization. They treated many of the same subjects, including examination of witnesses, pretrial preparation, settlement, and addressing the jury, yet English practice guides usually omit discussion of challenges and do not discuss voir dire.[452]

Of the six English volumes I examined, only two mentioned challenges.[453] Samuel Warren's collected lectures, *The Moral, Social, and Professional Duties of Attornies and Solicitors* cautions litigators to "[l]ook sharply after your *jury panel!*"[454] Harris's *Illustrations in Advocacy*, a book of hypothetical examples, advises that "whenever there is an important case to be tried, it's just as well to look every jury-man in the face, and see if you can discover a prejudice either against the prisoner, his trade or calling."[455] Harris describes counsel's five challenges made in a conjectural burglary case.[456]

Harris's hypothetical begins with challenges; there is no voir dire.[457] The barrister challenged the first juror "without a moment's hesitation."[458] Another venireman he struck "[j]ust as he [took] the book" to be sworn.[459] The challenges were spontaneous; counsel asked no questions and took no time for reflection. The decisions show counsel's boldness and quick thinking, rather than careful research or strategy. Harris's counsel did what he could with limited information. In one example, Harris points out that a potential juror's ruddy complexion suggested he was a farmer (but a landowner, not a laborer, he seems to have

451. Simpson noted that American treatise literature expanded and English lawyers began to import American works. Simpson, *supra* note 55, at 671 (noting American treatises produced in the nineteenth century, "often of higher quality than anything available in England," started a "reverse movement" of export to England). For a list of English practice guides, see *supra* note 215.

452. Compare Harris's *Hints on Advocacy*, *supra* note 58, at 8-35, with Robbins's revised, American edition of the work, ROBBINS, *supra* note 217, at 154-55 (adding a discussion of juror challenges).

453. *See* note 215, *supra*.

454. WARREN, *supra* note 89, at 280.

455. HARRIS, ILLUSTRATIONS, *supra* note 86, at 62-63.

456. *Id.* at 62-65.

457. *Id.*

458. *Id.* at 63.

459. *Id.* at 64.

assumed).[460] Farmers, Harris advised, are overzealous in the protection of property.[461]

Warren's guide, with only one example of a challenge, also reminds readers to attend to occupation.[462] In Warren's example, counsel unobtrusively removed two tavern-keeping jurors after reading over the jury list and identifying them.[463] They were "quietly invited to retire—not knowing at whose instance."[464]

English society did not share America's religious division to the same degree, but religious or moral difference could matter in jury selection. In *Creed v. Fisher*, decided in 1854, the Court of Exchequer reviewed a churchwarden's battery claim against an Anglican clergyman.[465] The clergyman objected to one of the veniremen, a Quaker, who "ought not to act as a juryman in a case where the conduct of a clergyman of the Church of England was the matter in question."[466] The court denied the challenge—this was a civil case—but the parties agreed to withdraw the dissenter.[467]

Religious divisions and jury selection became uniquely contentious in nineteenth-century Ireland.[468] Crown prosecutors made heavy use of their stand-aside privileges, prompting criticism.[469] Periodically the overseeing attorney general sent corrective instructions that prosecutors were not to stand jurors aside because of their political or religious beliefs.[470]

The Irish experience helps to show how lack of voir dire hindered challenge strategies. Even where prosecutors were trying to make strategic strikes, they relied on information from third parties, rather than voir dire.[471] At court, the prosecutor often brought a policeman along and asked him about each venireman as his name was called.[472]

While jury selection in nineteenth-century Ireland was unusual, Harris's book also shows that religion, or at least moral scruples, could be a consideration in English challenge strategy.[473] His hypothetical lawyer rejected one juryman because he wore a blue ribbon—a symbol of the temperance movement.[474] The

460. *Id.*

461. *Id.*

462. *See* WARREN, *supra* note 89, at 279.

463. *Id.* at 279-80. Reforms in 1973 changed jury lists, removing references to jurors' occupations. Hughes, *supra* note 93, at 592.

464. WARREN, *supra* note 89, at 280.

465. *Creed*, 18 Jur. 228.

466. *Id.* at 228.

467. *Id.*

468. McEldowney, *supra* note 74, at 277-80.

469. *Id.* at 279-80.

470. *Id.* at 277-78. McEldowney reports that such instructions were delivered from 1835 to 1842, but were "often overlooked." *Id.* at 279.

471. *Id.* at 278-79.

472. *Id.* at 279.

473. HARRIS, ILLUSTRATIONS, *supra* note 86, at 63-64.

474. *Id.* at 63.

badge showed that this was likely a man of "rigid virtue," who would be unsympathetic to the defendant.[475] Certainly, an American strategist would have used a similar challenge, although he would not have had to rely on blue ribbons.

All in all, the English guides underscore challenges' rarity. The two guides that mention challenges present a total of six examples.[476] And in Harris's story, there is nothing routine about the melodramatic retelling.[477] The remaining veniremen "stared with amazement" at the first challenge—"what a stir there was"—and "looked wonderingly at one another" at the second challenge.[478]

Ultimately, the English examples show that selection strategies, though limited, were much like those used in the United States. English counsel used physical appearance along with stereotypes and general assumptions about human nature to eliminate jurors who might be prejudiced.[479] But English jury selection procedures did not allow for complex strategizing. An English barrister might eliminate a juror he suspected of being a farmer or a temperance supporter, but without voir dire and extensive peremptory challenges, he could not aspire to return a panel dominated by Irishmen, Baptists, or union men. And because English venires lacked the religious, occupational, and ethnic diversity of American panels, English counsel had no great incentives to strain the limits of procedure or try the patience of the bench in making extensive challenges.

CONCLUSION

Turn-of-the century practice guides provide an important, early account of jury selection in the United States. They show that challenge strategies were well-developed by the late 1800s. Unique legal and social conditions explain why strategic jury selection became so important in America, while it never flourished in England. Early American case law made voir dire possible, a passive judicial style allowed the procedure to expand well beyond challenges for cause, and American diversity rendered voir dire and peremptory challenges extremely useful strategically and quite necessary, at times, to root out bias. The heterogeneous American jury pool—a product of immigration, urbanization, political division, religious divides, and inclusive property requirements—made for networks of potential prejudice and affinity in every panel.

Trial lawyers quickly learned to capitalize on these relationships. They took

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475. *Id.*

476. Harris's other practice guide, *Hints on Advocacy*, does not address challenges at all, despite its close attention to the jury. *See* HARRIS, HINTS, *supra* note 58, at 9-14. The book purports to explain how jurors think, how they react to flattery, and how they respond to logic. *Id.* at 11-12. The author discusses difficulties of jurors' prejudices, but says nothing about voir dire, peremptory challenge, or challenge for cause. *See, e.g.*, *id.* at v (table of contents does not include these topics).

477. HARRIS, ILLUSTRATIONS, *supra* note 86, at 63.

478. *Id.*

479. *See supra* notes 453-78 and accompanying text.

care to seek challenges for cause and root out pernicious ethnic, racial, religious, and class prejudice against clients and witnesses. But with unfettered peremptory challenges, they could also manipulate loyalties and divisions in ways that would be familiar to critics of modern jury selection tactics. We can see from practice guides that unscrupulous jury selection was, just as Justice Breyer has characterized it in modern times, an "organized and . . . systematized" part of legal culture.[480]

It is important to keep in mind, however, that jury selection strategies used in the late 1800s were novel and are not deeply rooted in our common law heritage. Viewing them in historical context, we see that as soon as American procedures permitted any real use of peremptory challenges, lawyers began to play on stereotypes, allegiances, prejudices, and distrust to maximize their chances of winning. Some of the ugliness decried in present day practices, including the use of race, ethnicity, religion, politics, and class, has existed from these procedures' first use in the United States.

Reforming jury selection is beyond the scope of this article. But, hopefully, understanding American jury selection's problematic origins will encourage change. The system we use now is no time-honored protection against bias. Trial attorneys have long used it to take advantage of prejudice. They still make blatant racial strikes.[481]

Reining in peremptory challenges may do much to eliminate attorneys' use of race in court. Some have argued that further regulation of *Batson* procedures can reduce racial or gender-based strikes.[482] Suggestions include courts' *sua sponte Batson* objections, disallowing challenges for reasons *correlated* with race, and requiring that justifications be "case-related."[483] While such proposals have some promise, they are also complex and unwieldy. Consider Washington

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480. Miller-El v. Dretke, 545 U.S. 231, 270 (2005) (Breyer, J., concurring). To back up this description, Breyer pointed to a "jury-selection guide" and bar journal article describing stereotypes to use in selection. *Id.*

481. *See, e.g.*, Kesser v. Cambra, 465 F.3d 351, 371 (9th Cir. 2006) (reversing conviction because of race-based strikes against Native Americans); State v. John Kirk, No. 107527, 1075532019 WL 4702027 at *8 (Ohio Ct. App. Sept. 26, 2019) (reversing because of the "state's use of peremptory challenges" in "a pattern against African-American jurors"); People v. Ojeda, No. 15-CA-1517, 2019 WL 4197000, at *4–9 (Colo. Ct. App. Sept. 5, 2019); State v. Curry, 447 P.3d 7, 14-17 (Or. 2019) (reversing, concluding that prosecutor struck a black juror because of his race, and calling for reform of *Batson* challenges); *supra* notes 13-19 and accompanying text.

482. *See* B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 285 (1996); Babcock, *supra* note 20, at 1176-80.

483. Dann & Logan, *supra* note 482, at 285 (noting Arizona reformers' support of judicial intervention and rejection of a requirement that strikes require "some case-related, nondiscriminatory reason"). *But see* Purkett v. Elem, 514 U.S. 765 (1995) (holding reason for strike need not be "related" to the case). Rules adopted in Washington State render various justifications associated with race "[p]resumptively [i]nvalid" in a *Batson* hearing. Washington State Court Rules, General Rule 37(h), Jury Selection, https://perma.cc/5A85-9JSJ.

State's recent reforms. Court rules now list seven justifications for peremptory strikes as "presumptively invalid" because of their historical "associat[ion]" with discriminatory jury selection.[484] These include a venireperson's prior law enforcement contact, residence in a high-crime neighborhood, out-of-wedlock parenting, and receipt of state benefits.[485] No doubt Washington litigators will set aside "Handy Race-Neutral Explanations" they may have heretofore employed, but will they not concoct others?[486]

It seems that simply reducing the number of peremptory strikes is a step in the right direction. This may afford a compromise by acknowledging that our system of jury selection in problematic but also entrenched.[487] The challenges, at the very least, give a litigant "some degree of control over an otherwise random selection process."[488] A party with two or three challenges could still eliminate a venireperson he or she suspects of extreme opinions or bias. With fewer challenges, however, litigants would be less able to manipulate jury demographics. Challenges are inherently more effective in eliminating representatives of minority groups than in increasing minority representation.[489] Accordingly, reducing peremptory challenges should lead to more representative juries.

Some expansion of challenges for cause could likely counterbalance abolition of peremptory challenges.[490] Faced with evidence of impartiality, challenge for cause is the solution. As scholars have pointed out, leaving jury selection decisions "to an impartial trial judge, rather than an advocate, seems appropriate in light of the way in which peremptories frequently mask discrimination."[491] Judges could remove jurors who appear partial.[492] As we have seen in nineteenth-century examples, judicial stinginess in challenges for cause has encouraged peremptory challenges. District Court Judge Morris Hoffman has

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484. Washington State Court Rules, General Rule 37(h). Faced with a *Batson* violation, an appeals court in Oregon recently suggested that state adopt similar reforms. *Curry*, 447 P.3d at 14, 17-18.

485. Washington State Court Rules, General Rule 37(h).

486. People v. Randall, 671 N.E. 2d 60, 65 (Ill. Ct. App. 1996).

487. *See* Hoffman, *supra* note 44, at 140 (observing peremptories are "a deep part of the trial lawyer's psyche" and predicting that "trial lawyers will remain in control of this issue"). Barbara Babcock suggests that jurisdictions retain peremptories, but reduce them "where they are disproportionate to jury size." Babcock, *supra* note 20, at 1176.

488. Dann & Logan, *supra* note 482, at 285. This was among the reasons given for Arizona reformers' decision to retain peremptory challenges.

489. *See* Gurney, *supra* note 210, at 244-45 (noting that peremptory challenges can more easily benefit the side favored by the majority).

490. *See* Hoffman, *supra* note 44, at 139.

491. Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1717 (2006). *But see* Babcock, *supra* note 20, at 1175 (recommending against a shift to challenges for cause "because our tradition is not to trust the unilateral actions of judges").

492. Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1109 (1995) (noting Ku Klux Klan member would be removable).

observed that "[p]eremptory challenges have made all of us lazy—judges included—when it comes to challenges for cause."[493]

With less power to manipulate jury composition, trial lawyers may turn away from costly voir dire and jury selection experts.[494] If racial strikes diminish, so will contentious and resource-consuming *Batson* proceedings.[495]

A shift away from extended jury selection procedures and peremptory strikes may do much to enhance public assurance in the jury system. As it stands, peremptory challenges undermine perceptions of fairness and impartiality.[496] *Batson* has not come close to eliminating critics' doubts on this front. Courts continue to warn how racial strikes "diminish[] the public's confidence in the fairness of judicial proceedings" and are "a particularly pernicious evil because of the way [they] undercut[] public confidence in the criminal justice system, and in the reliability of the significant deprivations of life, liberty, and property by the state."[497]

Perhaps future scholars will succeed in convincing policymakers that peremptory challenges can be abolished. Modern London, after all, is demographically heterogeneous but its courts operate without peremptory challenges.[498] A recent American observer at the city's court noted that juries there "appeared more diverse than many juries that go through a lengthy jury selection in the United States because the selection was truly random and not skewed by the exercise of peremptory challenges."[499]

If the United States gives up peremptory challenges, it seems likely that only the trial lawyers—who, we have seen, are in large part the creators of such challenges—will mourn their loss. Others, including litigants, venirepeople, judges, and the public will benefit from a simpler, more representative, and more trustworthy jury system.

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493. Hoffman, *supra* note 44, at 139.

494. *See supra* notes 22-25 and accompanying text.

495. For an example of strife, *see* State v. Curry, 447 P.3d 7, 13-15 (Or. 2019) (reversing lower court's *Batson* ruling and noting the prosecutor's assertion that defense counsel was "racist because he is saying that a juror belongs on this jury simply because of his race").

496. One trial judge has stated jurors find the process "bizarre and irrational." Hoffman, *supra* note 44, at 138. In Hoffman's view, peremptory challenges are as unprincipled and unsystematic as allowing each party "two peremptory hearsay objections" at trial. *Id.*

497. People v. Ojeda, No. 15CA1517, 2019 WL 4197000, at *4-9 (Colo. Ct. App. Sept. 5, 2019); *Curry*, 447 P.3d at 10 n.3.

498. Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 86 CHI.-KENT L. REV. 537, 551-52 (2011). London's population in 2011 was only 45% "white British," with more than a dozen other groups making up the rest. Census Information Scheme: Ethnic Group Distribution 2, https://perma.cc/9KZV-V522.

499. Marder, *supra* note 498, at 552. Marder lauded the English process, which she found "dignified" and "extremely efficient." *Id.* at 553.