**Article**

# The Character of Jury Exclusion

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## INTRODUCTION

In American jury trials, cause challenges and peremptory strikes can be used to excuse otherwise eligible jurors based on their previous encounters with, or experience-based impressions of, the criminal justice system.[1] The legitimacy of this practice hinges on the view that

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1. For a discussion of the understudied phenomenon of cause-based juror exclusion, see Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury,* 118 MICH. L. REV. 785, 824 (2020), stating "the distorting effects of challenges for cause extend to noncapital cases as well, wherever prospective jurors may harbor conscientious scruples against particular enforcement practices or the criminalization of certain conduct (e.g., drug offenses, nonviolent property offenses)." *See also* ANNA OFFIT, THE IMAGINED JUROR: HOW HYPOTHETICAL JURORS INFLUENCE FEDERAL PROSECUTORS (forthcoming 2022) (manuscript at 88–93) (on file with author) (discussing how jurors' past contact with the legal system contributed to federal prosecutors' negative perceptions of them); Elisabeth Semel, Dagen Downard, Emma Tolman, Anne Weis, Danielle Craig, & Chelsea Hanlock, *Whitewashing the Jury Box: How California Perpetuates the Exclusion of Black and Latinx Jurors*, BERKELEY L. DEATH PENALTY CLINIC, at vi (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf [https://perma.cc/NQ8B-5P7P] (finding that racial disparities can arise among empaneled jurors when "[p]rosecutors are trained to strike prospective jurors who have had or whose relatives have had a negative experience with law enforcement or are distrustful of the criminal legal system. They are, in other words, instructed to exploit the historic and present-day differential treatment of Whites and people of color, especially African Americans and Latinx people, by the police, prosecutors, and the courts").

these individuals cannot fairly and impartially serve as jurors.[2] Yet this view lacks an empirical basis that would substantiate the connection between past contact with the legal system and a prospective juror's ability to assess evidence in the case before her.[3] Rather, it is a widely accepted aspect of everyday legal practice that follows from implicit assumptions shared by judges and lawyers about the effect of the legal system on the character and integrity of the public.[4] Here, the bias of legal actors is marshaled to protect the jury from the alleged bias of prospective jurors.

While legal practitioners and scholars agree that character judgments should not be permitted to influence jurors' perceptions of witnesses,[5] there is no such consensus about lawyers' and judges' character judgments of *jurors*.[6] This is particularly surprising at a time when empirical jury scholarship draws attention to the routinized and largely uncontroversial ways in which everyday practices of empanelment lead to juries that are disproportionately white and affluent.[7] Moreover, scholars have come to appreciate that lawyers are not the only source of exclusionary behavior during jury selection—or "voir dire." Judges too, typically through the use of cause challenges, perpetuate practices that entrench socio-economic and racial disparities.[8] Finally, the U.S. Supreme Court[9] and American media[10] have highlighted

2. Frampton, *supra* note 1, at 788–90.

3. See James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 17–19 (2014) for a pertinent discussion of the unfounded assumption—and resultant cost—of assuming that convicted felons will harbor pro-defense, pre-trial bias during jury selection.

4. *Id.*

5. *See infra* Part I.

6. *See infra* Part II.

7. *See generally* Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613 (2021).

8. *See* Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1426–28; Frampton, *supra* note 1, at 796–97 (citing the racial composition of Mississippi jury pools between 1992 and 2017, the author found that a majority of the cause challenges initiated by the trial court judge removed Black prospective jurors: "Although white jurors outnumbered black jurors by nearly two to one in the initial jury pools, 52.9% of the judge-proposed disqualifications were black jurors and 44.2% were white jurors").

9. Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019) ("Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process . . . . By taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system.").

10. In 2019, an investigative podcast covering the Curtis Flowers case was the

the role that jury exclusion plays in eroding confidence in the legal system.

Addressing these issues in the law and literature, this Article proposes the use of a new trial objection during jury selection, building on the principles of Federal Rule of Evidence 404(a) which prohibits reliance on prejudicial character assumptions.[11] Applied to the jury selection process, restrictions on character judgment would prevent the exercise of cause challenges that deny otherwise eligible jurors the right to participate in the legal system. Significantly, and relatedly, this reform invites a fundamental rethinking of how jury exclusion operates beyond the more widely recognized and critiqued exercise of peremptory strikes.

## I. CHARACTER EVIDENCE ON TRIAL

At the heart of the criminal legal system is an incontrovertible and uncomfortable truth: we judge each others' character. And we do so continually—from branding dishonest politicians as "liars"[12] to designating those convicted of crimes as "criminals."[13] In each case, the impulse is to make sense of the actions of strangers by linking them with immutable personality traits. This instinct is no less salient during criminal jury selection proceedings, where defense attorneys probe the likelihood that jurors' negative opinions of defendants' alleged conduct might translate to broader condemnation of their character.[14]

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first recipient of the George Polk Award in Podcast Reporting. Madeleine Baran, *In the Dark: Season Two*, APM REPS., https://features.apmreports.org/in-the-dark/season-two [https://perma.cc/AWA6-8CZS]; *Past George Polk Award Winners*, LONG ISLAND UNIV., https://liu.edu/polk-awards/past-winners#2019 [https://perma.cc/N3LK-X75E].

11. *See infra* Part III.

12. TOM DE LUCA & JOHN BUELL, LIARS! CHEATERS! EVILDOERS! DEMONIZATION AND THE END OF CIVIL DEBATE IN AMERICAN POLITICS 31 (2005) ("Character becomes important not only for its own sake, or for completion of duties, but because it becomes evidence of the good or evil, normalcy or deviance, of policies promoted by a particular character.").

13. MIKE REDMAYNE, CHARACTER EVIDENCE IN THE CRIMINAL TRIAL 196 (2015) ("When bad character evidence is introduced as evidence of a defendant's lack of credibility, it will almost always involve previous convictions. A key assumption, then, is that there is a connection between criminality—or certain types of criminality—and credibility.").

14. Under questioning by defense counsel in the prosecution of Derek Chauvin for the murder of George Floyd, one prospective juror was asked to comment on how one might go about resolving a dispute in the absence of "hard" (i.e., video) evidence. Washington Post, *Jury Selection Begins in Murder Trial for Derek Chauvin*, YOUTUBE

No area of the law addresses this tendency more fully than the rules of evidence. These rules build on more than a century of common law and seek to prevent jurors from replacing deliberation about charged offenses with conclusory impressions of the accused or witnesses.[15] In so doing, the Federal Rules of Evidence try to keep jurors from hearing character evidence that might precipitate the unfounded inference that a defendant's past unlawful act(s) should lead to the presumption of guilt in an unrelated case.[16]

Though largely neglected with respect to jury selection, character judgment has been a significant focus of advocacy and scholarship about the criminal trial.[17] This interest led in 1975 to Federal Rule of Evidence 404's codification of the common law rule, which banned using evidence of character to prove that a person's act on a particular occasion reflected a corresponding character trait.[18] Character evidence is sometimes referred to as "propensity evidence," signaling the potential for a juror to draw a shorthand connection between the presumed character trait of an individual and the assumption that person will therefore "act a certain way" as the basis of a prosecution.[19] Rule 404(b) further clarifies that evidence of a "crime, wrong, or other act"

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3:53:18 (Mar. 9, 2021), https://www.youtube.com/watch?v=bhm0cBiSF6Y [hereinafter *Chauvin Jury Selection*]. The prospective juror's response illustrates the commonsense perception that a person's credibility is a function of her perceived character. The prospective juror responded, in pertinent part:

> It does get more difficult when there's no evidence and you're just kind of taking the good word of somebody. I guess character comes into play. And if you have any previous experience with that person, you know, there's that old saying a spade's a spade, you know. If a guy's a liar he lies ten out of ten times. You know, he might just lie to you again and you'd be naïve to think otherwise, I think.

*Id.*

15. *See* Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1567 (1999) ("Federal Rules of Evidence readily can be seen as the product of the continuing codification movement in the United States."); FED. R. EVID. 102 (advancing rules and procedures aimed at helping jurors fairly and efficiently "ascertain[] the truth and secur[e] a just determination").

16. *See generally* FED. R. EVID. 404.

17. *See* FED. R. EVID. 404 advisory committee's notes (citing legal scholarship regarding the use of character evidence).

18. FED. R. EVID. 404(a)(1); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 181–82 (1998) (citing Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 592–94 (1985)).

19. Dent Gitchel, *The Admissibility (and Inadmissibility) of Character Evidence*, 47 ARK. LAW 10, 10 (2012).

is not admissible at trial to prove conduct in conformity with any character trait that is presumed on the basis of such evidence.[20]

### A. PROHIBITED USES OF CHARACTER EVIDENCE

The Federal Rules' restriction on character evidence, under Rule 404, is commonly invoked at trial when prosecutors attempt to introduce a defendant's other unsavory acts.[21] This stands to reason. Legal scholars have long recognized that the admission of evidence of past wrongdoing on the part of an accused person poses a significant challenge for criminal prosecutions.[22] In fact, a prosecutor's[23] prejudicial use of character propensity evidence is one of the main bases for criminal appeals and reversals.[24] Further, the Advisory Committee has acknowledged that Rule 404(b) is among the most cited evidentiary rules.[25]

With respect to a defendant's "other acts," Rule 404(b)(1) stipulates that evidence cannot be admitted if its aim is to prove the existence of a character trait that accounted for a person's actions.[26] Attorneys can nonetheless successfully admit such character evidence as proof of a "proper" purpose—including a person's motivation, opportunity, or plan to act in some way.[27] Even permissible openings for

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20. FED. R. EVID. 404(b)(1).

21. Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 771–72 (2018).

22. *See, e.g.*, Edward J. Imwinkelried, *Uncharged Misconduct: One of the Most Misunderstood Issues in Criminal Evidence*, CRIM. JUST., Summer 1986, at 6, 7.

23. Jessica Broderick, *Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U. COLO. L. REV. 587, 590 (2008) ("Although FRE 404(b) applies in both civil and criminal cases, it is most commonly invoked by prosecutors in criminal cases wishing to offer evidence of the defendant's other crimes, wrongs, or acts."); *see* FED. R. EVID. 404(b) advisory committee's notes to the 1991 amendment. *Contra* United States v. McClure, 546 F.2d 670, 672–73 (5th Cir. 1977) (using such extrinsic acts of an informant against the government in entrapment defense).

24. Nancy Bauer, People v. Spoto: *Teasing the Defense on Prior Bad Acts Evidence*, 63 U. COLO. L. REV. 783, 790 (1992) (citing 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404(08) (1991) (observing how Rule 404(b) is the most commonly litigated rule of evidence as reflected in reported decisions)).

25. FED. R. EVID. 404 advisory's committee's notes to 1991 amendment; Capra & Richter, *supra* note 21, at 771.

26. FED. R. EVID. 404(b)(1).

27. FED. R. EVID. 404(b)(2) (The rule specifies "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" as proper purposes); *see* discussion *infra* note 201.

character evidence are susceptible to abuse,[28] as they sidestep the rule in a way that can work to a defendant's disadvantage.[29]

In practice, a court faced with a 404(b) objection typically moves through a three-step process: the court (1) highlights that Rule 404(b) is "a rule of 'inclusion' and not exclusion"; (2) decides that the other immoral act of the defendant fits into at least one "noncharacter purpose"; and (3) "declare[s] summarily that the probative value for the proper purpose is not 'substantially outweighed' by unspecified prejudicial effect to the defendant."[30] If admitted, previous acts of a defendant, illegal or not, may have the effect of introducing the pernicious inference that because the accused committed *one immoral act*, she therefore has the *character* of someone who would commit other immoral acts—and, in all likelihood, the *illegal* act for which she stands trial.[31]

Though character judgment is a mainstay of everyday social interactions and decision-making,[32] the Federal Rules recognize that such judgment for criminal defendants is dangerous. In particular, the rules acknowledge that those accused of crimes are vulnerable to condemnation based on flawed assumptions about unalterable character traits, rather than evidence that directly links them to the wrongdoing for which they have been indicted.[33] It is precisely this prejudicial mode of conflating crime with the character of a defendant that has been subject to criticism by legal scholars, who have described it as race-neutral in theory but racist in practice.[34] Rationales for Rule 404 thus emphasize the fact that character evidence is overly persuasive, prompting jurors to "prejudge one with a bad general record and deny

28. Capra & Richter, *supra* note 21, at 831 (arguing that such "proper purposes . . . allow[] past misdeeds of criminal defendants to come before juries on a routine basis" with a "devastating effect . . . on juries [that] is well-documented").

29. Imwinkelried, *supra* note 22, at 7–8 (citing studies conducted by the Chicago Jury Project and the London School of Economics and noting that such exceptions provide a workaround in the rules of evidence that can be viewed as an end-run favorable to prosecutors that can "easily tip the balance against the defendant").

30. Capra & Richter, *supra* note 21, at 778.

31. Gitchel, *supra* note 19, at 10.

32. *Id.* ("We use our assessment of other people's character routinely in our daily lives when making such decisions as whether to eat in a person's restaurant, enter into a business transaction with him, or let him extract one of our teeth.").

33. *Id.*

34. *See generally* NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016) (examining how judges, defense lawyers, and prosecutors in Chicago's Cook County criminal courts transform race-neutral due process protections into tools of racial punishment).

him a fair opportunity to defend against a particular charge."[35] It is thought to be too distracting to be admitted for its only "slight probative value."[36] The trouble, in other words, with behavioral evidence of bad acts is that it falsely presumes character is static.[37] Despite research revealing that character poorly predicts behavior[38] and notwithstanding limiting instructions[39] and warnings by judges, laypeople—including jurors—inflate its importance at trial.[40]

It is peculiar that scholars of character evidence have largely ignored the jury selection process, where propensity inferences are in full force. In voir dire, there is little to prevent attorneys from urging the excusal of lay decision-makers—ostensibly peers of such defendants—on the basis of their own unrelated "acts," whether illegal or not.[41] The grounds for such dismissals are wide-ranging, encompassing such information as jurors' neighborhoods, family, household members, and presumed attitudes based on prior encounters with law enforcement.[42]

### B. LIMITATIONS OF FEDERAL RULE OF EVIDENCE 404

Scholarship on Rule 404(b) has also targeted its discrepancies. First, there is no clear definition of "character," resulting in blurred conceptions of its limits.[43] The rule is also not uniformly applied

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35. Michelson v. United States, 335 U.S. 469, 476 (1948).

36. FED. R. EVID. 404 advisory committee's notes; Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1919 (2012) ("Moreover, recent psychological research suggests that character is, in reality, a much weaker predictor of a person's conduct than was previously supposed.").

37. Morris, *supra* note 18, at 208.

38. *Contra* Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 423 (2006) ("New psychological studies suggest that a person's highly particularized character traits are more predictive of conduct than was originally thought.").

39. *See* FED. R. EVID. 105.

40. Anderson, *supra* note 36, at 1933 (noting that "laypeople still commonly believe that character is highly predictive" despite evidence to the contrary). This phenomenon is referred to as the "halo effect" or "fundamental attribution error." *Id*. at 1934.

41. *See infra* Part II.

42. *See, e.g.*, *Confidential Juror Questionnaire,* OFF. JURY COMM'R COMMONWEALTH, https://juryduty.majury.gov/ojcweb/public/docs/CJQ.pdf [https://perma.cc/ZV92-NF26] (including a section titled "Your Experience with the Law," containing checkboxes pertaining to a prospective juror's past experiences being arrested, being charged with a crime, or being the victim of a crime); *see also* OFFIT, *supra* note 1.

43. Deborah L. Rhode, *Moral Character: The Personal and the Political*, 20 LOY. U.

across cases.[44] In addition, more recent rules such as the rape shield[45] and those applicable to defendants accused of sex crimes [46] have expanded and contracted the rule to different ends. Indeed, the rule is malleable and complex—a fact that helps explain why it has been generative of criminal justice reform.[47]

1. Vagueness: The Federal Rules Fail to Specify What Constitutes Character Evidence

Though the Federal Rules ban most character evidence, they do not actually specify what character evidence is.[48] Courts therefore continue to grapple with whether addictions, intellectual disabilities, and sexuality can be understood as traits that should be covered by character evidence rules.[49] Empirical scholarship has also transformed psychologists' views of character traits' consistency, as the field has embraced "interactionism," which draws on earlier schools of thought—including trait theory and situationism—to make sense of character's defining and shifting features[50] by drawing on contextual information.[51] From this perspective, character is often understood, as a predisposition to behave in a certain way *in a particular social and cultural context*.

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CHI. L.J. 1, 9 (1988) ("Existing definitions of character are circular, conclusory, or both.").

44. Lisa Marshall, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1065 (2005) (discussing the judiciary's failure to abide by Rule 404's character evidence ban in the context of employment discrimination cases).

45. FED. R. EVID. 412.

46. FED. R. EVID. 413–15.

47. David P. Leonard, *The Perilous Task of Rethinking the Character Evidence Ban*, 49 HASTINGS L.J. 835, 835 (1998) (noting that the character evidence rules' "complexity is legendary, their origins obscure, and their rationales controversial").

48. Anderson, *supra* note 36, at 1914. The advisory committee's notes to FRE 405 indirectly define character as "the kind of person one is." FED. R. EVID. 405 advisory committee's notes. Anderson supports a two-fold definition of character: repeated behaviors or propensity, and morality. Anderson, *supra* note 36, at 1936–45.

49. Anderson, *supra* note 36, at 1919–20, 1924 (questioning whether "a proclivity for drinking alcohol [is] a trait of character (i.e., temperance) or a genetic disease (i.e., alcoholism)").

50. Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 754 (2008).

51. *Id.* at 758 ("[A] situational component must be factored into, included in, or incorporated into the very conception of a disposition or character trait."); Imwinkel-

The interpretation of evidence—including character evidence—is also contextual. Legal scholar Julia Simon-Kerr, for example, has argued that narrative coherence can lead one to assess strangers' character in ways that conform to normative expectations of how a reliable person should look and comport herself—even if informed by stereotypes.[52]

### 2. Inconsistency: Application of the Federal Rules Is Irregular and Therefore Fails to Remove All Problematic Character Evidence from Trials

The ambiguity of "character" and "character evidence" likely accounts for the haphazard application of Rule 404.[53] Though the Rule was designed to create a "blanket exclusion"[54] for most character evidence, trials are replete with indicia of character that our adversarial system readily exploits,[55] sometimes through Rule 404(b)(2).[56] Its critics have thus argued that the rule is confused and not used in a

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ried, *supra* note 38, at 450–51 ("To be sure, a person's genetic background, environment, and characteristics influence a person's behavior. However, consistent with Western philosophic tradition, for the most part American law assumes that persons are autonomous human beings possessed of volitional capacity.").

52. Julia Simon-Kerr, *Uncovering Credibility*, *in* THE OXFORD HANDBOOK OF LAW AND HUMANITIES 584, 587 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020) ("What bears emphasis, however, is that these credibility judgments, most particularly the ones we make of strangers, are constructed from observations that have little to do with truthfulness. Instead, they are informed much more by social notions about what types of people are reliable in particular situations and how reliable people should look and act.").

53. D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall, Modus Operandi and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of Evidence*, 24 CARDOZO L. REV. 193, 206 (2002) ("The borderline between propensity uses and non-propensity uses is ill-defined and indeterminate, and therefore the decision is heavily subject to non-doctrinal influences like the judge's idiosyncratic personal views and the skills of the lawyers at marshaling facts and engaging in rhetorically persuasive forensic argument.").

54. Marshall, *supra* note 44, at 1085. As a "blanket exclusion," it is supposed to produce "less arbitrary results." *Id.*

55. Leonard, *supra* note 47, at 837 (noting that the legal system "tolerates—and even encourages—attorneys to expose the jury to evidence of character through other means").

56. Morris, *supra* note 18, at 184 ("Rule 404(b) itself accepts the conventional fallacy that certain common uses of bad acts evidence—to show identity, for instance—do not depend on propensity reasoning, and thus, do not run afoul of the propensity ban . . . . [This] robs Rule 404(b) of any coherent purpose, and produces grave consequences for thousands of criminal and civil defendants.").

principled manner.[57]

The inconsistent application of Rule 404 comes into particular relief in the context of employment discrimination claims. Here, a litigant's success depends on a clear violation of the rule.[58] In this context, an employment discrimination claim requires proof that the employer's motivation for action was discriminatory, which can only be demonstrated by circumstantial evidence of the employer's prior acts, such as "the employer's comments, her treatment of past employees, [and] statistical comparisons between employees."[59] Under these circumstances an employee hopes to show that "because the employer has previously intended to discriminate, he [or she] is more likely to intend to discriminate in the future," such as in the specific situation litigated.[60] Another way to describe this type of proof is as a propensity inference.

Other character evidence enters the courtroom without formal acknowledgment or sanctioned admission. Such "offstage"[61] indices of character include types of evidence like styles of dress,[62] demeanor,[63] and race[64]—all of which precipitate immediate judgment in court

57. Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2159 (2018) (characterizing the rule as "illogically founded and inconsistently applied"); *see also* Phillip W. Broadhead, *Why Bias Is Never Collateral II: Necessary Limitations on Attempts to Rehabilitate Impeached Witnesses in Criminal Cases*, 34 AM. J. TRIAL ADVOC. 239, 253–55 (2010).

58. Marshall, *supra* note 44, at 1097 (noting that the lawyers and judges are all complicit in this prohibited admission of propensity evidence because "the cause of action itself requires a showing of mental state that effectively compels most plaintiffs in discrimination suits to introduce propensity proofs in order to prevail").

59. *Id.* at 1068–69.

60. *Id.* at 1080; *see also* Morris, *supra* note 18, at 195 ("[T]here is no hypothesis that renders such evidence relevant to alleged harassment or discrimination other than that these types of evidence demonstrate the continuing propensities of the defendant.").

61. Mary R. Rose, Shari Seidman Diamond & Kimberly M. Baker, *Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials*, 34 LAW & HUM. BEHAV. 310, 310 (2010) (defining "offstage observation" as information on which jurors focus that has not been "formally presented from the witness stand").

62. *See* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 875, 879 (2018) ("[C]lothing itself is communicative . . . . We should be troubled by a justice system where guilt or innocence turns on whether a defendant can afford a proper suit, or whether a law enforcement officer wears a uniform when he testifies, or whether the defendant wears glasses, or how an attorney dresses.").

63. *Id.* at 881–82 (discussing aspects of demeanor evidence which circumvent the Rules of Evidence).

64. Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 531 (2009) ("When a Black

without scrutiny or contestation.[65] Jurors can in turn use this information to make character inferences and draw conclusions about the parties and evidence before them.[66] Attorneys, who are not immune to the effects of such tacit signals of character, are just as susceptible to the incorporation of offstage information into their assessments of prospective jurors.[67] In turn, these assessments can form the basis of cause challenges (and peremptory strikes) used to justify the excusal of otherwise jury-eligible laypeople.[68]

Despite the erratic application and enforcement of Rule 404's character prohibition, the prejudicial effect of such evidence would seem to militate in favor of further limiting reliance on such information.[69] It would be a logical extension of the doctrine to apply the rule's restrictions to other aspects of the trial, including the jury selection process. The rationale for doing so is already elaborated in the justification for rape shield[70] laws—though these laws also fail to completely prohibit the use of propensity evidence.[71]

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person is judged by the color of her skin, it is . . . not the result of [the] careful weighing of evidence . . . .").

65. *See* Capers, *supra* note 62, at 868–71 (bringing attention to character evidence's unchecked entrance into the courtroom).

66. *See* Rose et al., *supra* note 61, at 317 (discussing conclusions about jurors that are made using "offstage" evidence).

67. *See* Wright et al., *supra* note 8, at 1428 ("Judges, prosecutors, and defense attorneys . . . value different characteristics in jurors.").

68. *See id.* at 1412 (noting that there are "only a few ways" in which lawyers can take their peremptory strikes too far—exclusion based on race, sex, and other protected characteristics); *see also* Will Craft, *How Did Curtis Flowers End Up with a Nearly All-White Jury?*, APM REPS. (June 5, 2018), https://features.apmreports.org/in-the-dark/curtis-flowers-trial-six-jury-selection [https://perma.cc/H4SY-VCXD] (describing the demographic effect of jurors' removal through cause challenges during the prosecution of Curtis Flowers).

69. *But see* Ted Sampsell-Jones, *Implicit Stereotyping as Unfair Prejudice in Evidence Law*, 83 U. CHI. L. REV. ONLINE 174, 188 (2017) ("Repealing Rule 404 could help to convict more guilty white defendants and also help to acquit more innocent minority defendants.").

70. *See* discussion *infra* Part I.B.3.

71. Gillian R. Chadwick's article succinctly describes the key exceptions to the character evidence ban: "(1) witness impeachment [FRE 608–09], (2) prior sex crimes [FRE 413–15], (3) the so-called MIMIC exceptions [FRE 404(b)(2)], and (4) the mercy rule [FRE 404(a)(2)]." Chadwick, *supra* note 57, at 2145.

3. Rape Shield and Sex Crime Exceptions

Rule 412's rape shield bars the introduction of the sexual history of *victims*.[72] At the same time, Rules 413, 414, and 415 allow for evidence of a *defendant's* previous sex crimes to be admitted.[73] To make sense of why propensity evidence is banned for one group and not for another, it helps to look at the probative value of the evidence involved.[74] The sexual history of a complainant in a rape prosecution, for example, will offer little indication of whether she suffered the misfortune, on a particular occasion, of having been the victim of a sex crime.[75] The rape shield[76] can thus be understood as a more particularized application of Rule 404's character ban, justified by its alignment with the accuracy-enhancing interest of cutting off lines of questioning that put the victim, rather than the defendant, on trial.[77] The traditional practice of scrutinizing a victim's sexual history in a rape trial to infer promiscuity not only hinders the reporting of such crimes but also reduces the likelihood of conviction.[78]

Still, jurors' appetites for character judgment lead to the pervasive scrutiny of victims' appearances and manner of relaying details about alleged incidents in court.[79] Moreover, research suggests that jurors rely on traditional gender stereotypes in deciding cases, thus disregarding rules, including 412, and any limiting instructions on the

72. FED. R. EVID. 412(a).

73. *See* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 23 (1994) ("If the victim has immunity from disclosure of what she has done in the past, the argument runs, then why should the defendant be taxed with his past misconduct?"); Morris, *supra* note 18, at 196 n.58 (explaining that evidence of a defendant's past sex offenses are admissible "without limitation on purposes").

74. *See* Karp, *supra* note 73, at 24 (stating that a defendant's history of committing sexual assaults is "likely to be highly probative in relation to the pending charge").

75. *Id.*

76. FED. R. EVID. 412(a) (barring any "(1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition" save for 412(b)'s listed exceptions).

77. *See* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 716 (1995) (noting the potential for inquiries into the complainant's sexual history to distract the jury from the real facts at issue).

78. Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 748 (1998); Gregory M. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 LAW & SOC'Y REV. 669, 670 (1995).

79. See *supra* text accompanying notes 61–65.

use of certain evidence.[80] For these reasons, the rape shield may not greatly improve the experience of victims.[81]

In contrast to rape shield laws, Rules 413–15 allow for the admission of evidence pertaining to similar crimes in sexual assault cases.[82] These rules also arose to promote justice.[83] Among the aims of such rules was the protection of victims who were subject to crimes committed in secret—that is, with few (or no) witnesses.[84] Another rationale hinged on the idea that someone with a past rape or child molestation conviction was likely to have "aggressive and sexual impulses," as well as the inability or lack of desire to control them.[85] Further, though these crimes in general have comparatively low rates of recidivism,[86] research examining defendants in sex offense prosecutions over longer time frames reveals a higher rate of repeat offenses.[87]

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80. Matoesian, *supra* note 78, at 672–73. *See generally* Carole Goldberg-Ambrose, *Unfinished Business in Rape Law Reform*, 48 J. SOC. ISSUES 173 (1992) (arguing for a trial-process focus for rape law reform).

81. Matoesian, *supra* note 78, at 688–89. Moreover, its failure can be traced back to the fact that the rape shield "was not designed to cover so much mundane cultural ground," like "the interactionally emergent derivation of covert inferences emanating from the patriarchal logic of sexual rationality." *Id.* at 691.

82. *See supra* note 73 and accompanying text.

83. *See* Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 361 (2019) (classifying these rules as a reaction to landmark "cases of seeming injustice").

84. Karp, *supra* note 73, at 20. This rationalization, however, can make it difficult to know where to draw the line for crimes in which character evidence is authorized. *See* Imwinkelried, *supra* note 38, at 447 (arguing that character evidence has become "vital" not only in child abuse cases and civil rights actions, but also in drug prosecutions). Because sexual assaults are the only violent crime where consent is a valid defense (so past sexual assaults are crucial to the plausibility of its occurrence on the charged occasion), scholars have argued that these crimes distinctively warrant an exception to the propensity ban. Karp, *supra* note 73, at 21.

85. Karp, *supra* note 73, at 20.

86. David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 572 (1994) (reporting a 7.7% rate of recidivism for rape in a 1989 Bureau of Justice Statistics study).

87. Rhode, *supra* note 83, at 362; *see also* Marnie E. Rice, Vernon L. Quinsey, & Grant T. Harris, *Sexual Recidivism Among Child Molesters Released from a Maximum Security Psychiatric Institution*, 59 J. CONSULTING & CLINICAL PSYCH. 381, 381–83 (1991) (finding that nearly one-third of "child molesters" reoffended within six years of their release from a psychiatric institution).

Critics, in turn, have raised due process concerns and questioned the obliteration of the presumption of innocence for such defendants.[88] They also worry that jurors will convict defendants based on their previous offenses rather than any evidence in the case on trial.[89] Indeed, the inflexibility of Rules 413, 414, and 415 may effectively require the introduction of unfounded and prejudicial categorization and character judgment of an accused individual.[90]

Thus, we see that while rape shield laws provide a model for the extension of character propensity evidence prohibitions, they exist in practice alongside the exceptions of Rules 413–415. There is an argument to be made for this discrepancy: banning character propensity evidence pertaining to victims keeps them from effectively being put on trial, while allowing it for defendants helps prosecutors overcome the evidentiary difficulties associated with these cases.[91] Nevertheless, whatever its justifications here, the admission of character propensity evidence is, as always, very risky, and it creates the possibility that a person will be judged for something entirely unrelated to the case at hand.[92] While we may accept these risks for the prosecution of certain crimes, there is no convincing argument for their presence in the jury selection process, where they only serve to exclude people with previous contact with the legal system or a well-founded and critical understanding of the limitations of that system.[93]

## II. BASES OF JUROR CHARACTER JUDGMENT

During the jury selection process, judges and lawyers often articulate concerns about juror bias based on perceptions of acts and experiences that are wholly unrelated to the proceedings for which laypeople have been summoned. For this reason, determinations of a prospective juror's ability to serve fairly and impartially are susceptible to spurious assumptions about how that juror's stated opinions and experiences might affect her impartiality in approaching different case-types. This can result in otherwise eligible laypeople being struck from jury pools for cause or, later, through use of peremptory

88. Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 77 (1995).

89. Karp, *supra* note 73, at 22.

90. *See id.* ("Rather, the 'prejudice' rationale maintains that this type of evidence carries an unacceptable risk of convicting the innocent.").

91. *See supra* notes 83–84 and accompanying text.

92. *See supra* notes 88–89 and accompanying text.

93. *See* discussion *infra* Part II.A.

strikes.[94]

Considering these risks, it is fair to scrutinize judges' excusals of jurors for cause. Though propensity inferences can be useful with respect to certain decision-making processes,[95] judges' and attorneys'[96] reliance on them to identify[97] *jurors'* prejudicial tendencies can narrow jury pools in arbitrary and unfair ways.[98] In an effort to empanel a jury committed to correctly discerning facts in the case at hand, for example, judges may dismiss those who indicate that they would be disinclined to trust a witness who was also a law enforcement agent.

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94. *See* discussion *infra* Part III.

95. *See, e.g.*, Gitchel, *supra* note 19 (acknowledging the prevalence of character assessments in everyday life).

96. Differences between jury selection proceedings that are led by attorneys, as opposed to judges, may affect the depth, length, and specificity of questioning—and, in turn, whether the questions provide sufficient opportunity to uncover jurors' biases. *See* Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 695 (2004) (indicating that brief questioning by a judge may not lead a juror to think that their biases have been exposed); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 252 (1981) (noting a study showing that judge-conducted jury selection resulted in significant time savings).

97. One means of gathering information about sources of juror bias is through juror questionnaires. *See* Cathy E. Bennett, Robert B. Hirschhorn & Heather R. Epstein, *How to Conduct a Meaningful and Effective Voir Dire in Criminal Cases*, 46 SMU L. REV. 659, 662 (1992) (expounding on questions to include in juror questionnaires). Jury questionnaires may be beneficial because they can be completed in advance while freeing prospective jurors from the pressure and constraints of having to respond to questions in the courtroom. *See* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1186–87 (2003) (providing an example in which jurors were hesitant to speak up in front of other jurors and only revealed disqualifying information when questioned individually). *Contra* Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1, 20, 39 (2007) (noting problems with jury questionnaires, such as the cost to both the jurors and the court, the limitations of intrusive and/or generically worded questions, and the inaccuracies attendant to jurors' presentations of themselves, (e.g., "[a]n individual may see himself or herself as a leader but an attorney may see that person quite differently")).

To the extent that a judge does not approve the distribution of a written jury questionnaire, research suggests the importance of facilitating a "a real and honest relationship or dialogue," with prospective jurors. Bennett et al., *supra*, at 665. The goal is to "create an environment in which [jurors] feel it is acceptable and even valued to admit biases." *Id.* at 675.

98. While narrowing down the jury pool and moving more quickly through the trial are worthy aims, both the Sixth Amendment and Due Process Clause provide another reason that attorneys should aim to keep propensity evidence out of their jury selection strategy: defendants have a constitutional right to an unbiased jury. U.S. CONST. amends. VI, XIV, § 1; Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 334 (2005).

And, to be sure, some jurors report that they hold beliefs—resulting from media consumption or common sense—that police should be taken at their word.[99] Still, the dismissal of skeptical jurors is likely to reinforce racial disparities.[100]

Attorneys may also deliberately and strategically question jurors for the purpose of unearthing overt and problematic biases, such as prejudicial attitudes about race, religion, or gender identity.[101] Routine subjects of jury selection questioning may thus appear to lawyers in the run of cases as justifiable reliance on propensity evidence aimed at "exposing possible biases, both known and unknown, on the part of potential jurors,"[102] regardless of the effect of such questioning on jurors' responses.[103]

### A. NEGATIVE ATTITUDES TOWARD LAW ENFORCEMENT AGENTS

This section discusses patterns of jury exclusion associated with dismissing people who hold negative views of law enforcement agents. Such perceptions are often based on a prospective juror's acknowledgement of systemic racism in, or previous personal contact with, the legal system.

#### 1. Acknowledgment of Systemic Racism Within the Legal System

Prospective jurors may be dismissed from jury service using cause challenges and peremptory strikes based on their experience with, or recognition of, racism as a feature of the legal system.[104] And

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99. *See* Anna Offit, *Peer Review: Navigating Uncertainty in the United States Jury System*, 6 U.C. IRVINE L. REV. 169, 176 (2016) ("The use of juror-types was complicated by cases in which jurors implied that they trusted law enforcement agents implicitly.").

100. *See* Amy Farrell, Liana Pennington & Shea Cronin, *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 LAW & SOC. INQUIRY 773, 777 (2013) ("[M]inority groups hold less favorable attitudes toward legal authorities generally.").

101. *See* Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 201, 236 (2021) (noting how some prosecutors' questioning of prospective jurors about sources of racial bias could benefit *them* as practitioners of color in a predominantly white federal bar).

102. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984); Gershman, *supra* note 98, at 349 ("The voir dire process is intended to expose juror biases based on a juror's attitudes toward such questions as race, ethnicity, religion, the media, law enforcement, the death penalty, and other subjects.").

103. *See* Bennett et al., *supra* note 97, at 666 (explaining that responses—in any form of communication—are affected by the "form and content of the statement or question").

104. *See* Hans & Jehle, *supra* note 97, at 1180 (stating that juror experiences and attitudes are prime factors in shaping perceptions of evidence).

this occurs despite the empirical reality that Black citizens face disparate treatment at the hands of law enforcement agents[105]—experiences that have no relation to the prosecution for which such a juror might be empaneled. The unregulated and arbitrary nature of juror excusal undermines the representativeness of lay participation in the American legal system.[106] Indeed, it prompts difficult questions: How should judges and lawyers approach the task of empaneling a jury in a justice system rife with injustice?[107] And what demographic disparities are reinforced by the insistence that citizens have no knowledge of—or experience with—the excesses and abuses of the criminal legal system in practice?

The jury selection process during the prosecution of Derek Chauvin offered an instructive example of how knowledge of prejudice on the part of law enforcement agents can eventually lead to a prospective juror's excusal—if not precipitate such an excusal directly.[108] In that case, prospective jurors were asked a series of questions that required them to express the extent of their agreement with propositions related to the fairness of the criminal justice system and treatment of people of color by police officers.[109]

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105. Offit, *supra* note 101, at 243.

106. *See id.* at 208 (commenting on the discretion afforded both judges and attorneys when excusing jurors).

107. See Katherine Culver, *Courting Legitimacy: Enregistering Legal Reasoning Among U.S. Criminal Trial Jurors*, 5 SIGNS & SOC'Y 1, 25 (2017) for an illustrative case in which a former juror who believed the criminal legal system was "stacked against young black males" omitted reference to this belief during jury selection and later deliberations, commenting to the author during an interview:

> I didn't let my feeling get involved, if I had let my feeling got [sic] involved . . . I know I could have convinced them not to convict this young man . . . 'cause I, when I first was questioned by the judge, and she asked could I be a fair and impartial juror, I said yes, and I try not to lie, I don't lie, so when I told her yes then I felt that I had to go in that jury room and be impartial to either side.

108. The Hennepin County residents who reported for jury service in the prosecution of former Minneapolis police officer Derek Chauvin for the killing of George Floyd were asked to complete a sixteen-page questionnaire that included sixty-nine questions, including several with sub-parts. *Special Juror Questionnaire*, HENNEPIN CNTY. DIST. CT. (Dec. 22, 2020), https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/JurorQuestionnaire12222020.pdf [https://perma.cc/Q8ET-6GPV]; *see also* Sonali Chakravarti, *Derek Chauvin and the Myth of the Impartial Juror*, BOS. REV. (Mar. 15, 2021), https://www.bostonreview.net/articles/sonali-chakravarti-blm-jury-tk [https://perma.cc/57UQ-NWAH] ("A potential juror mentioning the documented unequal pattern of racial violence at the hands of police should not automatically lead to their dismissal.").

109. *Special Juror Questionnaire*, *supra* note 108. This portion of the questionnaire included twelve sub-questions which generally probed prospective jurors' opinions

Figure 1: Chauvin Jury Selection Questionnaire[110]

9. Please circle the choice that reflects your honest opinion:

| | | Strongly Agree | Somewhat Agree | No Opinion | Somewhat Disagree | Strongly Disagree |
|---|---|---|---|---|---|---|
| a. | Discrimination is not as bad as the media makes it out to be. | 1 | 2 | 3 | 4 | 5 |
| b. | Blacks and other minorities do not receive equal treatment as whites in the criminal justice system. | 1 | 2 | 3 | 4 | 5 |
| c. | Police in this country treat whites and blacks equally. | 1 | 2 | 3 | 4 | 5 |
| d. | Police in my community make me feel safe. | 1 | 2 | 3 | 4 | 5 |
| e. | I support defunding the Minneapolis Police Department. | 1 | 2 | 3 | 4 | 5 |
| f. | Minneapolis police officers are more likely to respond with force when confronting black suspects than when dealing with white suspects. | 1 | 2 | 3 | 4 | 5 |
| g. | Because law enforcement officers have such dangerous jobs, it is not right to second guess decisions they make while on duty. | 1 | 2 | 3 | 4 | 5 |
| h. | The criminal just system is biased against racial and ethnic minorities. | 1 | 2 | 3 | 4 | 5 |
| i. | I do not trust the police. | 1 | 2 | 3 | 4 | 5 |
| j. | People today do not give our law enforcement officers the respect they deserve. | 1 | 2 | 3 | 4 | 5 |
| k. | Local police departments try to cover up excessive force rather than correct it. | 1 | 2 | 3 | 4 | 5 |
| l.. | I think that news reports about police brutality against racial minorities is only the tip of the iceberg. | 1 | 2 | 3 | 4 | 5 |

At one point during the proceedings, an anonymous prospective juror was asked to explain why he noted strong agreement that the criminal justice system was biased against racial and ethnic minorities.[111] He responded, "At the time that I had done that questionnaire I knew, or I do know now, about, you know, mandatory minimums and things like that that are biased against racial minorities, statistically," before clarifying that this knowledge predated his jury summons.[112] Others shared similar understandings of disparate policing practices, including a prospective juror who defense counsel dismissed using a

about systemic bias, including excessive use of force by the Minneapolis Police Department and other law enforcement agencies. *Id.*

110. *Id.*

111. *Chauvin Jury Selection*, *supra* note 14, at 2:46:20.

112. *Id.*

peremptory strike on the grounds that he "expressed strong opinions"[113] despite the juror's repeated assertion that he was willing to set such opinions aside if empaneled.[114] This was not the only prospective juror who recounted negative personal experiences with the Minneapolis Police Department. Another noted that his father had been subject to a racially motivated traffic stop, contributing to his own distrust and dim view of the city's law enforcement personnel.[115]

This trial is just one high-profile example of the broader phenomenon of juror exclusion based on critical impressions of law enforcement. The same issue was confronted head-on in a novel Massachusetts case in 2019, *Commonwealth v. Williams*, in which the defendant appealed his conviction by citing a juror's dismissal from service for cause after stating that the justice system is rigged against young Black men.[116] The same prospective juror noted that although this view—rooted, as it was, in her work with low-income young people—affected "the lens that [she] view[ed] the world through," she could impartially assess evidence in the present case.[117] Though the Supreme Judicial Court of Massachusetts agreed that the prospective juror should not have been dismissed for cause on the basis of an accurate perception of a biased legal system,[118] the conviction was not

113. *Id.* at 4:14:27 (showing that the dismissal of this prospective juror precipitated a *Batson* challenge by the prosecution since he was the second person of color defense counsel sought to excuse using a peremptory strike).

114. *Id.* The government highlighted in its *Batson* challenge argument that defense counsel chose not to strike a white prospective juror (#2) who shared a similar account of a past aggressive encounter with law enforcement. *Id.* For a discussion of the comparative juror analysis deployed by the government in its argumentation, see generally Offit, *supra* note 101, at 210–22. Although the judge ultimately denied the government's *Batson* challenge, he agreed that the dismissal of two Hispanic jurors satisfied the *Batson* doctrine's requirement that a prima facie case of discrimination be established. *Chauvin Jury Selection*, *supra* note 14, at 4:18:50.

115. See *Chauvin Jury Selection supra* note 14, at 7:21:10, where the prospective juror expressed his beliefs that the Minneapolis Police Department has a history of corruption and that he feels intimidated in the presence of city police officers; *see also* Joy Purdy, *Potential Jurors in Ahmaud Arbery Case Face Questions About Race*, NEWS4JAX (Oct. 18, 2021), https://www.news4jax.com/news/local/2021/10/19/Jacksonville-attorney-examines-questions-asked-to-potential-jurors-in-ahmaud-arbery-case [https://perma.cc/6D6Y-8X3M] (reporting that prospective jurors summoned for the high-profile prosecutions of the three men charged with killing Ahmaud Arbery in Glynn County, Georgia, were asked to register their agreement with the statement "[p]olice in this country do not treat Black and white people equally").

116. 116 N.E.3d 609, 612 (Mass. 2019).

117. *Id.* at 612–13.

118. *Id.* at 617 n.6 (citing extensive empirical data showing disparate treatment in the criminal justice system on the basis of race).

overturned.[119] Significantly, however, the court stated that the prevailing norm in assessing proposed cause challenges should be altered in subsequent cases—that is, a juror should not be expected to "set aside an opinion born of the prospective juror's life experiences or belief system," though they ought to agree to set aside opinions related to the *case at hand*.[120]

Similarly, in *Mason v. United States*,[121] which reached the District of Columbia Court of Appeals in 2017, a prospective juror stated during jury selection that she believed Black men in D.C. were treated unfairly by the criminal legal system.[122] The trial court concluded that her beliefs stemmed from her suspicion that racial profiling had influenced an out-of-state case against her brother.[123] The trial court had disqualified this prospective juror for cause on the basis of this perception despite its veracity.[124] The D.C. Court of Appeals proceeded to

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119. *Id.* at 622 ("[T]he defendant has not shown that the resulting dismissal of the prospective juror for cause resulted in prejudice. We therefore decline to set aside the verdict.").

120. *Id.* at 616. The court also expressed its conclusion:

> that holding particular beliefs about how African-American men are treated in the criminal justice system should not be automatically disqualifying . . . . However, jury selection ultimately was incomplete because the judge did not inquire further to determine whether, given the prospective juror's beliefs based on her life experiences, she nevertheless could fairly evaluate the evidence and follow the law.

*Id.* at 613–14. Judge Peter A. Cahill instructed jurors along similar lines during jury selection proceedings in the prosecution of Derek Chauvin by stating to one prospective juror:

> You have to essentially be a blank slate. It's okay to come in with some knowledge about the case. It's okay to even have opinions; It's even okay to have strong opinions about the case. But as a juror you have to put all that aside. Some people will say, 'I can't do that. I've got these very strong opinions; I cannot put them aside; I cannot be . . .' and very honestly they say they can't be fair and impartial. Some people even with strong opinions can say, 'I understand my role and actually I feel I have the self-discipline to be able to do that—to put aside what I've heard before and decide just on what I hear in court and to follow the law which obviously comes from the court.' Do you think you could do that?

*Chauvin Jury Selection*, *supra* note 14, at 3:31:00.

121. 170 A.3d 182 (D.C. 2017).

122. *Id*. at 185.

123. *Id*.

124. *Id.* The court noted the data the defendant cited, which indicated that thirty-five percent of all adults and sixty-eight percent of Black people believed that "blacks are treated less fairly than whites in the courts." *Id.* (citing *King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities*, PEW RSCH. CTR. (Aug. 22, 2013), https://www.pewresearch.org/social-trends/2013/08/22/kings-dream-remains-

find that the excusal of this prospective juror for cause was erroneous because "[s]tanding alone, the belief that the criminal-justice system is systemically unfair to blacks is not a basis to disqualify a juror."[125] The juror's belief, in the court's view, was neither uncommon nor irrational.[126]

It is difficult to predict when, and whether, a prospective juror's view that Black Americans are treated differently or unfairly by the criminal legal system will be interpreted by judges as legitimate grounds for excusal.[127] In fact, more overt instances of biased opinions have been viewed as acceptable. In two cases, *Commonwealth v. Long*[128] and *Commonwealth v. Clark*,[129] potential jurors—who were white—indicated that they had particular biases that were directly relevant to the cases for which they could be empaneled. Yet they could not say with confidence in either case that they would be able to set those beliefs aside at trial.[130] In these cases, *neither* juror was dismissed for cause.[131]

The lack of consistency associated with courts' willingness to excuse overtly prejudiced white prospective jurors for cause is a stark reminder of the intransigence of racism. Perversely, it seems that for jurors who have experienced discrimination or misconduct at the

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an-elusive-goal-many-americans-see-racial-disparities [https://perma.cc/V8MP-YHC7]); *see also* John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, PEW RSCH. CTR. (May 21, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system [https://perma.cc/JS4G-KPF2] ("[A]round nine-in-ten black adults (87%) said blacks are generally treated less fairly by the criminal justice system than whites . . . .").

125. *Mason*, 170 A.3d at 187.

126. *See id*. ("Moreover, there is no basis for an inference that potential jurors holding that belief are necessarily unable to be impartial. To the contrary, potential jurors who hold that belief might well be particularly attentive to making sure that they perform their function impartially.").

127. *See id.* at 183–84 (finding a reversible error where the trial court dismissed a potential juror for such views).

128. 647 N.E.2d 1162 (Mass. 1995) (finding reversible error where a judge did not dismiss a biased juror for cause).

129. 846 N.E.2d 765, 768, 773–74 (Mass. 2006) (holding that the trial court judge erred in declining to excuse for cause a juror who believed that "African-Americans as a group were more likely to commit crimes because of their economic status than people of other racial or ethnic groups" where the juror's answers to the judge's questions concerning those views were "not sufficient to resolve concerns about potential prejudice" to the defendant).

130. *Long*, 647 N.E.2d at 1165; *Clark*, 846 N.E.2d at 773.

131. *Long*, 647 N.E.2d at 1165; *Clark*, 846 N.E.2d at 765.

hands of law enforcement agents, being kept in the jury box might require the explicit denial or repudiation of the factors—including racial profiling—that may have led to these encounters. Unbiased jurors, in other words, must deny the existence of a biased legal system—or face exclusion.

Prospective jurors' skepticism of law enforcement is not surprising given the likelihood that poor and Black citizens will have personal or second-hand experience with the misdemeanor legal process, as today more than twenty percent of the country's population have a criminal record.[132] Scholars have observed a similar phenomenon in the course of researching how police both instigate and punish instances of "disorderly conduct" in communities of color.[133] In this respect, police officers can provoke the very "contempt" that serves as grounds for unfounded and disparate arrests.[134] Negative opinions of the legal system, as discussed in the sections that follow, are thus often grounded in legitimate recognition of law enforcement agents' treatment of the most vulnerable and marginalized members of a community.

Over the past decade, the Black Lives Matter (BLM)[135] movement has gained momentum in North America and the United Kingdom in response to police-inflicted violence against and harm of Black people.[136] In light of the BLM's critique of law enforcement, it is unsurprising that the movement has emerged as a focus of jury selection

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132. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, at xxix (Tenth Anniversary ed. 2020) (noting that those with criminal records are "overwhelmingly poor and disproportionately people of color").

133. *See generally* Christy E. Lopez, *Disorderly (mis)Conduct: The Problem with "Contempt of Cop" Arrests*, AM. CONST. SOC. (2010), http://cdn.ca9.uscourts.gov/datastore/library/2015/08/10/Velazquez_ContemptOfCop.pdf [https://perma.cc/Z9GB-BXKN] (describing this phenomenon through the exemplary case of Professor Henry Louis Gates, Jr., who was arrested for disorderly conduct by police responding to a 911 call reporting a burglary at Professor Gates' home).

134. Eric Nalder, *Obstruction of Justice*, SEATTLE POST-INTELLIGENCER, February 28, 2009 (on file with Minnesota Law Review).

135. According to their website, BLM

> is a global organization . . . whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes. By combating and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy, we are winning immediate improvements in our lives.

*About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about [https://perma.cc/G7FJ-PVAX].

136. *See* Jose A. Del Real, Robert Samuels & Tim Craig, *How the Black Lives Matter Movement Went Mainstream*, WASH. POST (June 9, 2020), https://www

questioning. Here again a puzzle emerges: citizens' identification with non-violent activism aimed at promoting racial equality[137] can result in the prohibition of such individuals' participation in the legal system.

In *People v. Silas*,[138] for example, an otherwise eligible prospective juror named Crishala Reed was the subject of multiple cause challenges due to prosecutors' beliefs that her support for the BLM movement signaled potential support of criminal activity.[139] Though the cause challenges were denied by the district court judge, they resulted in Reed's dismissal from the jury pool through a peremptory strike.

Recognizing the misleading and inaccurate conclusions about jurors that can be drawn from such involvement, activists and practitioners have urged courts not to allow participation in BLM to lead to dismissal from jury service.[140] Using this type of civic engagement as the only grounds for a juror's excusal can result in disparately subjecting Black prospective jurors to additional scrutiny.[141] This has led

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.washingtonpost.com/national/how-the-black-lives-matter-movement-went-mainstream/2020/06/09/201bd6e6-a9c6-11ea-9063-e69bd6520940_story.html [https://perma.cc/BSJ3-SCBZ] (describing the growth of the BLM movement since 2012).

137. The Armed Conflict Location and Event Data Project (ACLED) recorded over 10,600 demonstration events across the United States between May 24 and August 22. Over 10,100 of those were peaceful, and fewer than 570 involved demonstrators engaged in violence. Over eighty percent of these demonstrations were connected to the BLM movement or to the COVID-19 pandemic. *Demonstrations & Political Violence in America: New Data for Summer 2020*, ACLED (Sept. 3, 2020), https://www.acleddata.com/acleddatanew/wp-content/uploads/2020/09/ACLED_USDataReview_Sum2020_SeptWebPDF_HiRes.pdf [https://perma.cc/X5EQ-ERLN].

138. 284 Cal. Rptr. 3d 48, 55, 81 (Cal. Ct. App. 2021). See State v. Gresham, No. A15-1691, 2016 WL 7338718 (Minn. Ct. App. Dec. 19, 2016), for a similar Minnesota case.

139. Andrew Karpan, *When Can a Juror Say Black Lives Matter?*, LAW360 (Aug. 9, 2020), https://www.law360.com/articles/1299398 [https://perma.cc/Q4D3-K54H]. Knowing Ms. Reed stated in her questionnaire that she supported the BLM movement, the prosecutor asked her if she supported destroying property. The prosecutors noted that Ms. Reed "rolled her eyes before telling them that she did not support destroying property that was not her own." *Id.*; *see also* Abbie Vansickle, *You Can Get Kicked out of a Jury Pool for Supporting Black Lives Matter*, MOTHER JONES (July 8, 2020), https://www.motherjones.com/crime-justice/2020/07/you-can-get-kicked-out-of-a-jury-pool-for-supporting-black-lives-matter [https://perma.cc/7EBP-V9DD]. Ms. Reed stated: "I felt targeted . . . . It was a life-changing experience for me." *Id.* The California Court of Appeals has since reversed the conviction in that case on the grounds that the trial court's BLM-related reasons for striking Ms. Reed as a juror were "plainly tied to race." People v. Silas, 284 Cal. Rptr. 3d 48, 55, 81 (Cal. Ct. App. 2021).

140. Brief for Amici Curiae Roderick and Solange MacArthur Justice Center & ACLU et al. in Support of Defendants-Appellants, People v. Silas, 284 Cal. Rptr. 3d 48 ( Cal. Ct. App. 2021).

141. See Valdez v. People, 966 P.2d 587, 595 (Colo. 1998) for an example of a court

some to view BLM-related questioning as tantamount to "interrogating a juror's . . . Blackness."[142]

Some courts have permitted jury selection questions related to citizens' participation in, and attitudes toward, protests and protesters.[143] As both lines of questioning suggest, the anti-discrimination norms articulated in 1986 by *Batson v. Kentucky*[144] have seen little meaningful adherence as cause challenges are exercised. Instead, "justifications" used to strike Black prospective jurors for familiarity with or participation in social justice efforts permeate the jury selection process even beyond the poorly regulated exercise of peremptory strikes.[145]

2. Personal Contact with the Legal System

Today, seventy-seven million Americans, roughly one third of the country's adult population, have a criminal record.[146] In twenty-seven states, and in federal court, a felony conviction will render a person

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chastising a prosecutor's questioning of prospective jurors regarding race, when the case did not have any "apparent racial issues." This is potentially problematic since racial issues are often under the surface and influence perceptions of non-white defendants.

142. Karpan, *supra* note 139.

143. *Juror Questionnaire*, https://jurylaw.typepad.com/pepper_spray_proposed_questionnaire.pdf [https://perma.cc/UF4N-944R]; *see also* Maxine Bernstein, *Trial over Police Pepper Spray Reveals Challenge of Picking a Federal Jury During Pandemic and Protests in Portland*, OREGONIAN (Oct. 6, 2020), https://www.oregonlive.com/crime/2020/10/trial-over-police-pepper-spray-reveals-challenge-of-picking-a-federal-jury-during-pandemic-and-protests-in-downtown-portland.html [https://perma.cc/W5DF-ZNTD] (reporting that a U.S. district court judge asked jurors if "[a]nything about recent protests would cause [them] not to be neutral in this case," to which one prospective juror responded: "I don't like the way things have been handled in Portland.").

144. 476 U.S. 79 (1986) (articulating a stern adherence to the long-existing notion that race-based preemptory challenges in jury selection are unconstitutional).

145. When a researcher conducted a study that

QUOTElooked at more than 700 cases in California, she found that peremptory challenges had been used to eject Black jurors more than 70% of the time. In her opinion, the *Batson* process isn't working on the state level. Out of 142 *Batson* objections that the state's high court had ruled on between 1989 and 2019, her report found that the state's appeals court had found prosecutorial prejudice in only three."ENDQUOTE

Karpan, *supra* note 139.

146. Chidi Umez & Rebecca Pirius, *Barriers to Work: People with Criminal Records*, NCSL (July 17, 2018), https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx [https://perma.cc/SB6P-2CJF].

permanently ineligible for jury service.[147] Other states, including Illinois and Iowa, allow judges to remove jurors with felony convictions from jury pools using a cause challenge.[148] Aside from receiving a summons for jury service, most jurors' contact with the legal system will take the form of a misdemeanor—in 2015 alone, an estimated thirteen million misdemeanor charges were filed.[149] This means that a citizen is as likely to face a misdemeanor charge as he or she is to attend a four-year college or seek treatment from a doctor for the flu.[150] Like access to education and healthcare in this country, however, the effects and impact of the misdemeanor system are highly correlated with class and race.[151] Some of the most prevalent charges, including for marijuana possession[152] and driving with a suspended driver's license,[153] disparately target people of color and those who cannot afford to pay fines. Those arrested for misdemeanor offenses are also disproportionately poor.[154] What this means, in practice, is that only between ten and thirteen percent of those required to post bail at arraignment can afford to do so.[155] Black citizens are thus more

147. Arizona, Alaska, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming are among the states that render those convicted of felonies ineligible to serve as jurors for life. Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduced Jury Diversity by Excluding People with Criminal Records*, PRISON POL'Y INITIATIVE (Feb. 18, 2021), https://www.prisonpolicy.org/reports/juryexclusion.html [https://perma.cc/JM4Y-A3YB]; *see* Brian C. Kalt, *The Exclusion of Felons from Jury Services*, 53 AM. U. L. REV. 65, 150–57 (2003) (cataloguing laws in each state nearly twenty years ago); *see also* Erik Ortiz, *Most Former Felons in California Are Now Eligible for a New Role: Jury Duty*, NBC NEWS (Jan. 1, 2020), https://www.nbcnews.com/news/us-news/most-former-felons-california-are-now-eligible-new-role-jury-n1108726 [https://perma.cc/DL32-AHUL].

148. Kalt, *supra* note 147, at 152; *see also* Binnall, *supra* note 3, at 4 fig.1.

149. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 41 (2018).

150. *Id.*

151. *Id.* at 51–53; *see also* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 1 (2018) (noting that residents of low-income neighborhoods have "frequent encounters with law enforcement for low-level offenses that result in tickets, summonses, or arrests").

152. *Drug War Statistics*, DRUG POL'Y ALL., https://www.drugpolicy.org/issues/drug-war-statistics [https://perma.cc/7AZ5-6AMD] (noting that over 350,000 people were arrested in 2019 for possessing marijuana).

153. NATAPOFF, *supra* note 149, at 50.

154. *Id.* at 53.

155. KOHLER-HAUSMANN, *supra* note 151, at 135 (citing *Annual Report 2014*, N.Y.C. CRIM. JUST. AGENCY (Apr. 2016), https://www.nycja.org/publications/cja-annual

likely to face arrest for misdemeanors. In New York City in 2015, for example, forty-six percent of arrestees were Black—a figure that reflects higher levels of policing in predominantly low-income and minority neighborhoods.[156]

The frequent and unequal impact of low-level criminal charges on ordinary people's lives led sociolegal scholar Issa Kohler-Hoffman to characterize the misdemeanor legal process as a form of social control.[157] Though the subjects of this process may never be incarcerated, many are forced to confront the "procedural hassle" and degradation associated with an arrest, police custody, court appearances, and the strain of these encounters on one's employment prospects.[158] Misdemeanor convictions, as a result, have a significant and lasting imprint on a person's life. This can include long-term debt and other financial pressures caused by unpaid tickets, fines, or other processing fees.[159] Then, of course, there is the impact of a criminal record on a person's access to public benefits including low-income housing and food stamps.

Unsurprisingly, those charged with minor offenses exhibit greater skepticism toward the government.[160] In her study of America's misdemeanor system, Alexandra Natapoff noted this skepticism

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-report-2014 [https://perma.cc/7AZ5-6AMD] (noting some defense attorneys' mantra that "bail means jail")); Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH 13, 22 (Dec. 2, 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf [https://perma.cc/9PLX-DKHK].

156. KOHLER-HAUSMANN, *supra* note 151, at 51, 97 ("Certain individuals, namely, young men of color, tend to have many police contacts over short periods because, among other reasons, these policing tactics are highly spatially concentrated."). Relatedly, it is estimated that by the age of twenty-three, fifty percent of Black men in the United States will have faced arrest. NATAPOFF, *supra* note 149, at 62 (citing *Table 29: Estimated Number of Arrests*, FBI UNIF. CRIME REPORTING (2015), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29 [https://perma.cc/65K5-9GVC]).

157. KOHLER-HAUSMANN, *supra* note 151, at 10 ("The most common penal outcomes experienced by misdemeanor defendants are not removal to total institutions or the burden of a permanently spoiled identity. Rather, they involve a set of ongoing entanglements with and obligations to various organs of the criminal justice system—from police to courts to private social service providers—and result in people cycling in and out of various legal statuses over time, often based on how they perform under these obligations.").

158. *Id.* at 80.

159. *Id.* at 1.

160. *See* William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 180–81 (2001) ("[R]are is the African-American

in the reflections of her research participants, who expressed frustration and disappointment in a government with which they only had negative encounters.[161] Indeed, as Natapoff observed, "[t]he petty-offense process teaches this cynical, destructive lesson in civics to 13 million Americans each year."[162] The jury system, which summons nearly thirty-two million prospective jurors to court annually,[163] has the potential to impart a more hopeful message, premised on democratic representation in the legal system. Yet it does not do so in practice. One reason is the acceptability of the biased hunt for bias among prospective jurors.

### B. FAVORABLE ATTITUDES TOWARD LAW ENFORCEMENT AGENTS

This Section examines the issues posed by prospective jurors who view law enforcement agents positively. These perceptions are often shaped by personal contact or media consumption. For attorneys, this makes them a risk. On the one hand, unwavering support for, and trust in, law enforcement may be deemed a source of bias that justifies a person's removal from the jury pool. On the other, if the favorable view of law enforcement is derived from television or movies, jurors may be subject to the "*CSI* Effect," and have a skewed or entirely erroneous understanding of what evidence means and what it actually shows.

#### 1. Police Allegiance

During jury selection, attorneys typically look to determine whether prospective jurors believe that law enforcement agents are more or less credible than other witnesses.[164] Attorneys thus regularly ask prospective jurors about their views of police officers and

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who cannot relate a tale of having been stopped by police in an affluent neighborhood or followed closely at the heels around a clothing store. As one black law professor recently put it, 'If I'm dressed in a knit cap and hooded jacket, I'm probable cause.'" (quoting Tanya E. Coke, Note, *Lady Justice May Be Blind, but Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 333–50 (1994)).

161. NATAPOFF, *supra* note 149, at 37.

162. *Id.*

163. *See* Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, NAT'L CTR. STATE CTS. 13 (Apr. 2007), https://www.ncsc-jurystudies.org/__data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf [https://perma.cc/HFH4-VQ9A].

164. *See* United States v. Martinez, 981 F.2d 867, 870–71 (6th Cir. 1992) (describing the district court's evaluation of the jury panel's attitude toward police officers, including their aptitude for showing favoritism for or against the police during jury deliberations).

other law enforcement agents and government officials, seeking information on how these jurors might perceive witnesses who come from these groups.[165] Such jury selection questions often focus on a person's past contact with law enforcement agents and, relatedly, on their impressions of those who work in such roles. An example of such a question posed during jury selection might include the following, delivered by a judge:

> I will be instructing the jury at the end of the trial [that] the testimony of the law enforcement officer should be treated the same as the testimony of any other witness and that the jury should not give either greater or lesser weight to the testimony of a witness just because the witness is a law enforcement officer. Do any of you have such strong feelings about law enforcement [or] the police—either positive or negative—that you would have difficulty following that instruction?[166]

Other versions of this question during jury selection emphasize the importance of judging law enforcement and non-law enforcement witness credibility by the "same standards."[167] In some cases, jurors are invited to share whether they view law enforcement work as "difficult" or "important"—thereby warranting greater deference and respect.[168] In other cases, prospective jurors' feelings toward government officials, more broadly, have been conflated with their attitudes

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165. Cathy E. Bennett and colleagues list a number of possible questions that can be directed toward a jury pool to elicit possible juror bias regarding law enforcement officers. Bennett et al., *supra* note 97, at 670 ("'All of the State's witnesses are either police officers or employed by the police department or a police organization. What are your feelings about that?' 'When you think about the police department in your city, what's the first thing that comes into your mind?' 'What have you heard about your local police department?' 'How reliable, do you feel, is a police officer's testimony? Why?' . . . 'How often do you think police officers testify? Well, if I told you that not only do they testify constantly, but that they also take courses in testifying in court, what would you think? How do you think this will affect how a police officer appears in the court and while testifying?' 'How reliable do you think a police officer's judgments and observations are compared to yours?' 'What would you think or feel if you saw a police officer avoid directly answering a question?'").

166. Sara Kropf, *Why Judges Should Stop Asking Jurors About Police Officer Witnesses During Voir Dire*, GRAND JURY TARGET (May 15, 2019), https://grandjurytarget.com/2019/05/15/why-judges-should-stop-asking-jurors-about-police-officer-witnesses-during-voir-dire [https://perma.cc/9BM8-K8L5].

167. *Sample Juror Questionnaire*, FED. JUD. CTR., http://www.fjc.gov/sites/default/files/2012/dpen0023.pdf [https://perma.cc/BU49-9MZM] (asking questions regarding other experiences with law enforcement, including having friends or family who work in law enforcement, having being been personally questioned by law enforcement agents, etc.)

168. *See, e.g.*, *Juror Questionnaire*, *supra* note 143.

toward the police. [169] In each context, an empirically-unfounded picture of jurors' views can result.

After engaging in such questioning, judges and lawyers may refrain from asking follow-up questions that might clarify the context of jurors' views.[170] This can lead to the removal of jurors "for cause" who might have explained that their personal feelings would not have detracted from their fair consideration of evidence.[171] If a judge or attorney concludes that a juror's stated perception constitutes an "unequivocal belief" about a police officer's likelihood to tell the truth, this imputation of juror bias—however inaccurate—will justify the juror's dismissal.[172] Modes of questioning prospective jurors that suggest a "predisposition" to view witness credibility in a certain way can thus facilitate the removal of jurors for cause.[173] There is little to prevent an attorney who merely suspects a prospective juror's bias, absent follow-up questioning, from exercising a peremptory strike to dismiss such a person.[174] Toward deploying both types of jury strikes, judges

169. United States v. Nash, 910 F.2d 749, 755 (11th Cir. 1990) (quoting a trial court's jury instruction with approval).

170. Todd Oppenheim, *Too 'Woke' for the Jury Box*, MARSHALL PROJECT (May 2, 2018), https://www.themarshallproject.org/2018/05/02/too-woke-for-the-jury-box [https://perma.cc/2LNF-4MZN].

171. See discussion *infra* Part II.B.2.

172. Bennett et al., *supra* note 97, at 699. This concept is analogous to the "White Coat Syndrome," where "jurors mechanistically defer[] to certain experts because of their field of expertise." Neil Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 AM. J. PUB. HEALTH 137, 139 (2005) (quoting Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCH. PUB. POL'Y & L. 242, 255 (1997)).

173. Bennett et al., *supra* note 97, at 699 (noting that "[s]uch a predisposition" on the part of a prospective juror "prevents impartial judging of witnesses' credibility"). However, the trial court "has the discretion to determine whether such prejudice for police officers exists." *Id.* The role of the judge in deterring attorneys from striking jurors through intentional—though at times relentless—rehabilitation can influence the formation and composition of a jury. *See, e.g.*, Hans & Jehle, *supra* note 97, at 1194 ("Even when prospective jurors are able to recognize their biases and disclose them, the judge may still elicit a false response that is more in line with the desirable answer. If a judge asks if the prospective juror could be impartial and the prospective juror replies no, the judge may continue that it is the juror's duty to follow the law and ask the question again. Prospective jurors may give in to the pressure to comply and say they can be impartial, even though their real feelings have not changed.").

174. Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 326 (2005) ("Even if this line of questioning does not convince a judge to excuse for cause, the series of voir dire questions provides important evidence for the attorney to use in considering the exercise of a peremptory strike. . . . Requesting an excusal for cause has to be considered in the totality of the attorney's strategy: 'I don't challenge for cause unless I'm 99% sure that the

and attorneys aim to gather information that might serve as a basis for imputing attitudes toward law enforcement witnesses to the laypeople before them.[175]

2. The "*CSI* Effect"

Jurors are often asked which television shows they watch.[176] One aim of such a question is to determine whether their understanding of investigative and legal processes is gleaned from fictional dramas—something scholars call the "*CSI* Effect."[177] Here, rudimentary—and usually inaccurate—knowledge of evidence collection and law enforcement practices follows from consumption of popular television shows.[178] The *CSI* Effect presents a problem, as jurors are instructed to rely on the evidence and information presented within the context of a trial, rather than anything learned from engagement with external

judge is going to grant it. Because then I've got to use a peremptory. I can't let the juror sit after he knows I tried to excuse him because there might be some animosity.'" (citation omitted)); Thomas G. Hooper, Note, United States v. Lancaster*: The Fourth Circuit Reverses Course on Jury Voir Dire in "Swearing Contest" Cases*, 76 N.C. L. REV. 233, 235 (1997) (describing defense attorney strategy).

175. *See* Hooper, *supra* note 174, at 235 ("In a criminal case in which jurors are likely to decide the defendant's guilt or innocence based upon whether they believe the testimony of the defendant or the testimony of a police officer, the defendant would obviously benefit from knowing whether a juror believes that police officers are automatically due more credibility than other witnesses.").

176. Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials*, 41 LOY. U. CHI. L.J. 119, 145–46 (2009) (noting that judges often lead the questioning of jurors in federal court).

177. This is a modern equivalent to the "Perry Mason Syndrome" from the 1960s, where, in response to the television show, juries waited expectantly for "defense attorneys to coerce an admission from the prosecution's star witness upon cross-examination," and believed that lawyers' failure to meet such expectations meant that he or she had done "something wrong." Michael Mann, *The "CSI Effect": Better Jurors Through Television and Science?*, 24 BUFF. PUB. INT. L.J. 211, 213–14, 220–22 (2006).

178. *See* Caroline L. Kinsey, *CSI: From the Television to the Courtroom*, 11 VA. SPORTS & ENT. L.J. 313, 313 (2012). *Contra* Wyatt Feeler, *Can Fiction Impede Conviction? Addressing Claims of a "CSI Effect" in the Criminal Courtroom*, 83 MISS. L.J. 1, 12 (2014) (noting that several studies cast doubt on the existence of the effect); Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 367 (2006) (describing the results of study that showed that "specifically watching *CSI* or a similar show did not have a causative impact on juror demands for scientific evidence as a condition of a guilty verdict in most criminal case scenarios"). While I am going to discuss the concept based on this more generic definition, Edward J. Imwinkelried has identified other definitions of the term. Edward J. Imwinkelried, *Dealing with Supposed Jury Preconceptions about the Significance of the Lack of Evidence: The Difference Between the Perspective of the Policymaker and That of the Advocate*, 27 T.M. COOLEY L. REV. 37, 38 (2010).

media.[179]

One of the premises of a television show like *CSI*, for example, is the idea that "people lie, but science always tells the truth."[180] After encountering various storylines in which forensic tests and techniques perfectly identify suspects,[181] jurors may bring unrealistically high expectations to the capacities of crime scene investigators, laboratory technicians, and prosecutors who appear at trial. When, invariably, the colloquially understood "science" of a case is not relied upon as a primary source of evidence for a variety of reasons (perhaps because it is not plausible "outside of Hollywood"[182] or because the police department cannot afford certain technologies),[183] jurors may question the reliability of law enforcement work and bring unfounded sources of doubt to their deliberations.[184] Alternatively, if the evidence produced at trial resembles that which is commonly used in a

179. Lawson, *supra* note 176, at 149 (including "knowledge learned from television, newspapers, independent investigations, or other unauthorized sources").

180. Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435, 441 (2007); Kinsey, *supra* note 178, at 319 ("*CSI* raises the stature of scientific evidence to virtual infallibility by manipulating viewers into believing forensic science is impenetrable and far more effective and accurate than it really is."). This belief forms the basis of one of the questions asked by judges to discern biases on this topic. *See* Lawson, *supra* note 176, at 146 (reporting Federal District Court Judge Marcia Cooke's experience of asking jurors, among other questions, if they realize that many of the "scientific" measures used in CSI and similar shows do not exist).

181. *See* Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1065 (2006) ("The popularity of *CSI* lies in its ability to simplify the messy uncertainties of real-world crime. *CSI*'s plots are consistent with the strong psychological need to achieve closure following the commission of a crime.").

182. Mark A. Godsey & Marie Alou, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI-Effect,"* 17 TEX. WESLEYAN L. REV. 481, 481–82 (2011); Kinsey, *supra* note 178, at 322 ("Due to the inaccuracies of forensic evidence and as a result of the cultivation theory, *CSI* viewers may believe it is possible to use an exit wound to make a mold of a weapon, detect a lie by the shift of someone's eye, or predict the time of an individual's death by evaluating the rate at which a segment of metal may rust, when in reality these mechanisms do not exist in real life, and if found to exist, would unlikely pass muster under the *Daubert* or *Frye* tests for courtroom admissibility of scientific evidence.").

183. Donald E. Shelton, *Juror Expectations for Scientific Evidence in Criminal Cases: Perceptions and Reality About the "CSI Effect" Myth*, 27 T.M. COOLEY L. REV. 1, 31 (2010) (citing Shelton et al., *supra* note 178, at 28) ("The Wayne County jurors, in large part, were of the belief that their local police departments had technologies that would allow them to perform fingerprint, ballistics, hair and fiber, and DNA analysis. The data reveals that jurors typically expect some form of technology in all criminal cases.").

184. Kinsey, *supra* note 178, at 319 (citing N.J. Schweitzer & Michael J. Saks, *The*

television show, jurors may accept scientific conclusions without appropriate scrutiny.[185]

Because jurors are more likely to view evidentiary practices they have seen on television as accurate and relevant,[186] attorneys and judges see value in identifying prospective jurors whose responses suggest they may reach conclusions based upon the "*CSI* Effect." Attorneys may also draw attention to jurors' television preferences[187] to reinforce the importance of distinguishing fictionalized cases from those presented in court.[188] This approach, when used, may have the advantage of reinforcing preferred modes of evidentiary assessment while rehabilitating jurors perceived to harbor biases that would warrant excusal for cause. In short, while positive—and unrealistic—views of law enforcement can pose their own challenges, lawyers appear more confident that these can be overcome by drawing a distinction between the fact and fiction of investigative technique.

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*CSI Effect: Popular Fiction About Forensic Science Affects the Public's Expectations About Real Forensic Science*, 47 JURIMETRICS 357, 358 (2007)); *see also id.* at 323 (describing a case in which the defendant was acquitted and the jury foreman, when interviewed after the trial, "informed prosecutors he watched *CSI* and believed investigators should have conducted 'extensive fingerprinting, DNA testing, and other forensics, and that he did not think the prosecutors did enough.'" (quoting Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70, 71 (2006))).

185. Mark A. Godsey & Marie Alou refer to this concept as the "Reverse *CSI* Effect." Godsey & Alou, *supra* note 182, at 483–84; *see also* Kinsey, *supra* note 178, at 319, 321–22 (discussing "cultivation theory" which posits that "'heavy, long-term exposure' to recurrent messages alters the reality of frequent television views, and they begin to 'perceive the real world as resembling what they see on television, and adopt attitudes conforming to that visage." (quoting Kimberlianne Podlas, *The "CSI Effect" and Other Forensic Fictions*, 27 LOY. L.A. ENT. L. REV. 87, 98 (2007))). The "White Coat Syndrome," mentioned briefly above, is related to this type of tacit acceptance of scientific knowledge. *See* Vidmar, *supra* note 172.

186. Kinsey, *supra* note 178, at 322 (quoting Jeffrey Heinrick, *Everyone's an Expert: The CSI Effect's Negative Impact on Juries*, TRIPLE HELIX, Fall 2006, at 59).

187. *Contra* Feeler, *supra* note 178, at 4 ("Mentioning these shows may suggest to jurors that they have unrealistic expectations for evidence, when in fact they may not."); *id.* at 43 ("As with telling jurors that the government has no duty to conduct scientific tests, telling them that 'the real world is not like *CSI*' is an open invitation to jurors to give the government a pass on missing scientific evidence.").

188. THE HANDBOOK OF ATTITUDES 300 (Dolores Albarracín, Blair T. Johnson & Mark P. Zanna eds., 2005) ("[T]he effects of viewing frequency [of television shows] on people's beliefs can be reduced or eliminated by calling their television watching habits to their attention[.]").

## III. THE NEED FOR A CHARACTER PROPENSITY OBJECTION DURING JURY SELECTION

As discussed in the last Part, the Federal Rules prevent jurors from hearing most character evidence due to the prejudicial conclusions they might draw about a witness's propensity to act in a manner that is consistent with past behavior—particularly if that witness is a criminal defendant. Yet during jury selection, there is no bar to juror assessments that hinge on the same objectionable line of reasoning. A lawyer's exercise of peremptory strikes may be viewed, to this end, as a quintessential example of the deliberate reliance on what is otherwise prohibited reasoning.[189]

The *only* safeguard to the prejudicial or otherwise unsubstantiated character judgment of jurors is the *Batson* challenge. But this comes late in the jury selection process and is aimed exclusively at combatting lawyers' use of peremptory strikes to remove jurors based on race, sex, and other protected characteristics.[190] Current anti-discrimination law is thus underinclusive both in the form of juror questioning it authorizes, and in its presumption that judges do not sanction exclusion during the cause challenge phase of proceedings. Cause challenge questioning in particular, which this Part will consider in addition to peremptory strikes, is overseen by judges and overwhelmingly informed by appraisals of character despite the scanty information typically elicited from prospective jurors.

As it stands, a narrow set of trial objections are available to lawyers with concerns about jury exclusion. These include challenges to questions posed to prospective jurors on the grounds that such questions misstate the law,[191] are excessively intrusive or embarrassing,[192] or compel jurors to commit to reaching verdicts on the basis of hypothetical scenarios.[193] Lawyers may also recommend that prospective

189. *See generally* Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 167 (1989) (discussing the historical breadth of rationales supporting the exercise of peremptory strikes).

190. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

191. *See, e.g.*, Goldman v. Ridenour, 383 S.W.2d 539, 541 (Mo. 1964).

192. Davis v. State, 633 A.2d 867, 871 n.1 (Md. 1992) ("Under common law rules of voir dire, jurors need not answer any questions likely to humiliate or embarrass them. The determination of which questions needed to be answered, however, rested within the trial judge's discretion." (citing J. Alexander Tanford, *An Introduction to Trial Law,* 51 MO. L. REV. 627, 638–39 (1986))).

193. *See, e.g.*, State v. Moeller, 616 N.W.2d 424, 442 (N.D. 2000).

jurors be excused for cause,[194] dismissed using an allotted number of peremptory strikes,[195] or make fair cross-section objections to the constitution of a jury pool.[196] Finally, a lawyer may object to the composition of a jury at the conclusion of the jury selection process.[197]

A majority of the trial objections lawyers utilize during the jury selection process concern biased behavior that may be elicited or reinforced among prospective jurors through questioning. With the narrow exception of *Batson* challenges which lawyers can raise in response to an adversary's discriminatory use of a peremptory strike, few trial objections seek to regulate the prejudicial assumptions that can underlie the questioning of jurors. Addressing this gap, this Part proposes a remedy for juror discrimination[198] in the context of *both* cause challenges and peremptory strikes:[199] the application of a Rule 404 trial objection aimed at keeping character judgment out of decisions to dismiss jurors for cause.

*Batson* challenges seek to deter and correct for the prejudicial use of peremptory strikes. By contrast, a Rule 404 objection available during jury selection would target a judge's reliance on character inferences about jurors as the basis of a cause challenge. In this regard, it would draw on the Federal Rules' well-established recognition that actions unrelated to the case at hand should not inform imputations of bias. Moreover, in the interest of maintaining fair procedures for assessing and empaneling jurors throughout the jury selection process, the deployment of a Rule 404 could help facilitate *Batson* challenges. The objection would accomplish this by unearthing judges' and lawyers' inaccurate and prejudicial conclusions about jurors during the earlier cause challenge phase of voir dire. In this respect, the ob-

194. *See, e.g.*, 47 AM. JUR. 2D JURY § 193 ("Challenges for cause are the means by which partial or biased jurors should be eliminated . . . ." (citing United States v. Gonzalez, 214 F.3d 1109 (9th Cir. 2000))).

195. FED. R. CRIM. P. 24(b).

196. *See* Taylor v. Louisiana, 419 U.S. 522, 531 (1975) (using the language of a fair "cross-section" to strike down the jury selection method used in Louisiana).

197. *See* Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 PEPP. L. REV. 243, 269 (2002).

198. While for the most part this Article focuses on race, these arguments may extend to sex and socioeconomic status, with some building analogies based on scholarly work on rape trials. See *infra* text accompanying note 242, for example.

199. Thomas Ward Frampton, *What Justice Thomas Gets Right About* Batson, 72 STAN. L. REV. ONLINE 1, 14 (2019) (noting how Justice Thomas' dissent in *Batson* highlighted the way in which "*Batson*'s narrow emphasis . . . 'blinded the Court'" to challenges for cause).

jection would strengthen the deterrent effects of current anti-discrimination law governing jury selection[200] by expanding its reach and impact on the composition of juries.

As a preliminary matter, it is critical to recognize that discriminatory practices during the cause challenge phase of jury selection complement the well-documented use of peremptory strikes to disproportionately remove Black jurors.[201] Here, attorneys can circumvent *Batson*'s deterrent and remedial effects[202] by disingenuously arguing that an irrelevant aspect of a juror's background or past should be viewed as grounds for his or her dismissal. In the interest of seeking justice[203] or zealously advocating for one's client,[204] attorneys can toe the line of legality, finding surreptitious ways to circumvent rules without recourse. As a result, the spirit of the anti-discrimination law governing jury selection can be violated even if the letter of the law is not.

The absence of an explicit character evidence "ban" during jury selection proceedings means that attorneys can make spurious claims about the supposed partiality or bad character of Black jurors based

200. *See, e.g.*, Zalman & Tsoudis, *supra* note 174 (describing prosecutors' reluctance to strike Black jurors due to concern that they would be perceived as racist and subject to a *Batson* challenge); OFFIT, *supra* note 1, at 73 (describing the extent to which the *Batson* doctrine influences prosecutors' efforts to empanel Black jurors rather than suffer the reputational harm associated with perceived bias or an adjudicated *Batson* violation).

201. Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 394 (2019) (citing Purkett v. Elem, 514 U.S. 765, 768 (1995)). Rule 404, of course, is not without its own practical limitations, as it creates openings for character evidence to facilitate propensity inferences under certain circumstances. In practice, for example, Federal Rule of Evidence 404(b)(2) permits the admission of character evidence for uses that license creative lawyers to merely relabel such evidence as "intent" or "identity"—perhaps with the knowledge that jurors will likely consider the evidence for its prohibited purpose (making inferences based on character judgments). *See* FED. R. EVID. 404(b)(2) ("[Character] evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."); Morris, *supra* note 18, at 191 (arguing that in drug trafficking crimes, courts often violate the propensity ban by allowing evidence of previous drug involvement to establish "plan, motive, or intent" in a drug offense even though "the drug history is relevant only because it "prove[s] the character of" the accused); *see also* Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1, 2 (2007).

202. Frampton, *supra* note 199, at 14–15.

203. K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 286 (2014) ("It is equally well known that the prosecutor's duty is to do justice, not to obtain convictions.").

204. MODEL RULES OF PRO. CONDUCT pmbl., paras. 2, 8–9 (AM. BAR ASS'N 2018).

on information provided during jury selection, such as residence in a heavily policed neighborhood, rental (as opposed to ownership) of one's home, or contention that white people receive preferential treatment under the law.[205] As with Rule 404(b)(2) and the *Batson* workaround for peremptory strikes, no anti-discrimination laws currently in place would be violated. The disparate impact of such questioning demonstrates the clear need for a jury selection objection that can promote representative juries. For these reasons, the jury system's integrity would be enhanced by the application of Rule 404 principles to jury selection to prohibit cause challenges, and (later) peremptory strikes, based solely on propensity inferences that use proxies for race.

### A. CAUSE CHALLENGES REQUIRE REGULATION

Cause challenge determinations are rarely appealed, as the standard of review is abuse of discretion.[206] As a result, they are considered "[e]ffectively standardless, insulated from meaningful review, and profoundly racially skewed."[207] Because there is no procedural recourse for the misuse of a cause challenge, such as a *Batson* challenge applied to an illegal peremptory strike, parties have little to guide them in assessing such strikes beyond sometimes ambiguous statutory language. In practice, many jurors are removed based on an attorney or judge's belief (or tacit acceptance) that individuals could not be unbiased due to their race or socioeconomic status.[208]

In addition to the potential for racial disparities, the lack of clear and uniform regulation of cause challenges makes it difficult to determine what qualifies as "bias," which is one of the primary authorized reasons to strike a juror for cause. Bias, in general terms, is understood to refer to a juror's inability to impartially participate in a trial.[209] Yet there is no principled way to establish when the partiality

205. Mason v. United States, 170 A.3d 182, 187 (D.C. App. 2017) ("[T]here is no basis for an inference that potential jurors holding that belief are necessarily unable to be impartial.").

206. *Id.*

207. Frampton, *supra* note 1, at 821.

208. *See id.* at 788 ("Our myopic focus on peremptory strikes, however, has led to the neglect of an adjacent problem: equivalent racial disparities pervade the exercise of challenges for cause."); *see also* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1621 (2018) (detailing a dataset that shows that prosecutors were 3.24 times more likely to use challenges for cause on Black jurors than white jurors).

209. STEVEN LUBET, MODERN TRIAL ADVOCACY 529–30 (3d ed. 2004).

of a juror should disqualify her.[210] Explicit articulations of bias are also extremely infrequent.[211] Because impartiality can only be determined through a subjective assessment of a juror's state of mind, similar to the aforementioned difficulties introduced by employment discrimination claims, attorneys are often left to draw conclusions about juror bias through character inferences based on racial stereotypes.[212]

Research reveals another problem with the current regime: in both the civil and criminal contexts, the limited scope of much jury selection questioning provides the court with inadequate information from which to predict favorable or unfavorable juror behavior or perspectives.[213] Attorneys, as a result, must challenge jurors based on data that is unlikely to reveal bias. In the absence of comprehensive questioning and elaboration on the part of jurors, it is unsurprising that an attorney's strike decisions may hinge on a person's appearance—or other aspects of demeanor—that can serve as proxies for race.[214]

Just as there is "no question that propensity would be an 'improper basis' for a defendant's conviction,"[215] at trial, it is an improper basis for a juror to be struck for cause during jury selection. Even if attorneys do not make explicit pronouncements about juror character, Rule 404 implicitly acknowledges the prevalence of character judgment throughout trial, suggesting that its regulation should implicate lay and professional legal actors alike. Such judgment calls, for example, will undoubtedly stem from information about prospective jurors' criminal records, and histories of arrest elicited by judges and

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210. *See, e.g.*, Skilling v. United States, 561 U.S. 358, 386 (2010) ("For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." (quoting United States v. Wood, 299 U.S. 123, 145–46 (1936))).

211. Frampton, *supra* note 1, at 824.

212. *See supra* notes 57–59 and accompanying text.

213. John Campbell, Jessica Salerno, Hannah Phalen, Samantha Bean, Valerie Hans, Less Ross & Daphna Spivack, *An Empirical Examination of Civil Voir Dire: Implications for Meeting Constitutional Guarantees and Suggested Best Practices* 1, 83 (Denver Legal Stud., Research Paper No. 20-11, 2020) https://www.ssrn.com/abstract=3584582 [https://perma.cc/8NYH-2WBF] ("[T]he limited voir dire used in many courts does almost nothing to predict jury behavior, nor does it provide information to the court or the parties about which jurors can/should remain.").

214. For an analogous discussion of some of the consequences of reliance on demeanor evidence, in the context of jurors' assessments of witnesses, see generally Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158 (2020).

215. Old Chief v. United States, 519 U.S. 172, 182 (1997).

lawyers.[216] When attorneys rely on stereotypes to fill in gaps in jurors' responses during jury selection, propensity inferences can be determinative of lawyers' empanelment decisions.[217]

In the absence of protective evidentiary rules, such as applications of Rule 404 to defendants' past acts and the rape shield,[218] conventional jury selection practice will continue to both authorize and facilitate anti-Black discrimination. To avoid this exclusionary outcome, Rule 404 should be extended to jury selection. As the next Section will demonstrate, sociolegal research provides a helpful framework, as well as empirically grounded rationales, for understanding how courtroom practice both reflects and constitutes discrimination in both the jury and legal system more broadly.

### B. CHARACTER JUDGMENT CONTRIBUTES TO JURY DISPARITIES

During jury selection, attorneys—or the judge, depending on the jurisdiction and whether one is in state or federal court[219]—question the jury pool with the goal of striking individuals who cannot fairly and impartially consider evidence in the case before them.[220] A lawyer's use of propensity evidence to strike prospective jurors, however, is not always scrutinized for its relevance or veracity. Inquiries into a juror's attitude toward law enforcement agents, media consumption, and acknowledgment of their own explicit biases have become so commonplace they often appear on juror questionnaires.[221]

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216. *See generally* Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387 (2017) (discussing the extent to which juror arrest records serve as a proxy for racial exclusion during jury selection and proposing corrective procedural reform); *cf.* Goodman, *supra* note 201, at 2 (summarizing how admitting character evidence with racial connotations under Rule 404(b) leads to injustice).

217. The cause challenge itself implies the attorney's lack of confidence in that juror to remain openminded and unbiased in the trial (based on the potential juror's responses to questions that had racial implications); *cf.* Goodman, *supra* note 201, at 5, 11, 20 (describing a powerful combination of prior bad act evidence and racial stereotypes, which can influence jurors).

218. Matoesian, *supra* note 78, at 669.

219. *See* Gregory E. Mize & Paula L. Hannaford-Agor, *Building a Better Voir Dire Process*, JUDGES' J., Winter 2008, at 4, 6 tbl.1.

220. *See* Barbara O'Brien, Catherine M. Grosso & Abijah P. Taylor, *Examining Jurors: Applying Conversation Analysis to Voir Dire in Capital Cases, A First Look*, 107 J. CRIM. L. & CRIMINOLOGY 687, 689 (2017).

221. *See, e.g.*, *Juror Questionnaire for Criminal Cases: Form JURY-002*, JUD. COUNCIL OF CAL. (Sept. 1, 2018), https://www.courts.ca.gov/documents/jury002.pdf [https://perma.cc/JKF9-KWER]; *Recommended Uniform Juror Questionnaire: Sample Form 56*, ALA. JUD. SYS. (Jan. 10, 2001), https://judicial.alabama.gov/docs/library/rules/

Nonetheless, while voir dire strategy may involve seemingly innocuous assessments of laypeople,[222] the selective emphasis on, and interpretation of, particular characteristics can result in the disparate empanelment of white and more affluent jurors. To the extent that cause challenges rely on empirically unfounded[223] assumptions about jurors' dispositions, they function as an end-run around anti-discrimination law meant to deter jury exclusion.[224]

As we have seen, jurors are susceptible to dismissal for simply acknowledging the empirical reality of racism in the legal system.[225] Yet cause challenges, unlike peremptory strikes, have been relatively understudied in legal scholarship[226] despite the fact that they often initiate the process of skewing the racial makeup of a jury pool.[227] Some background here is instructive. Cause challenges involve "instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror."[228] Notably, cause challenges are unlimited and subject to approval by the court.[229] Attorneys who wish to propose a cause

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crsam56.pdf [https://perma.cc/7BB4-253L]; *Jury Qualification Questionnaire*, LAKE CNTY., OH. COMMON PLEAS CT.—GEN. DIV. (Jan. 28, 2019), https://www.lakecountyohio.gov/common-pleas/document/jury-qualification-questionnaire [https://perma.cc/9UN7-PH9B].

222. Hans & Jehle, *supra* note 97, at 1179 (noting that attorneys have relied on demographic characteristics and stereotypes in jury selection that are "only slightly less preposterous than the avoidance of bald men and people with green socks").

223. Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 10 (1997) ("The research on the effects of juror differences suggests that the fears are largely exaggerated."); *see also* Barbara Allen Babcock, *Jury Service and Community Representation*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 460, 463 (Robert E. Litan ed., 1993) ( "The fifty-year-old black janitor [she] struck from the jury that would have tried [her] twenty-year-old African American client for armed robbery might indeed have resented him. But he might also have seen himself or his son or the whole suffering race and felt the deepest empathy for the accused. Similarly, the prosecutors who dismissed African American women might have mistakenly deprived the People's jury of stern protectors of law and order.").

224. *See* Saks, *supra* note 223, at 49 ("[I]t will be far easier to improve the performance of juries by making their task more manageable for them than by trying somehow to change the people who serve as jurors.").

225. *See* sources cited *supra* note 221.

226. Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC'Y REV. 513, 542 (2008).

227. Frampton, *supra* note 1, at 801 ("At the end of voir dire, with over 100 jurors removed for cause, 45 jurors advanced to the peremptory-strike stage: 35 were white (78%) and only 10 were black (22%). Thus, before peremptory strikes began, challenges for cause had already eliminated most black prospective jurors from the pool.").

228. Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981).

229. Frampton, *supra* note 1, at 788.

challenge must articulate a specific reason (some sort of identified actual or implied bias) for the strike.[230] Because the rationales supporting cause challenges must be presented to the judge, some contend that they carry less risk of masking bias than peremptory strikes.[231] In practice, this means that an attorney or judge's rationalizations for such challenges have more creatively denied—or concealed—the proxies for race on which they may be based.

Theoretically, at least, the available reasons that an attorney may challenge a juror for cause are always "narrowly specified"—though they vary by jurisdiction.[232] The Colorado Rules of Civil Procedure, for example, delineate seven available reasons to challenge a juror for cause.[233] The most pertinent to this discussion are "(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action"; and "(7) The existence of a state of mind in the juror evincing enmity against or bias to either party."[234] New York, in contrast, enumerates six reasons for which a cause challenge would be allowed, including the possibility that a prospective juror may have "(b) . . . a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial."[235] California has only three available grounds for exercising a cause challenge: general

230. Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the "*Batson *Function" to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147, 149 (1990).

231. Catherine Ross Dunham, *Third Generation Discrimination: The Ripple Effects of Gender Bias in the Workplace*, 51 AKRON L. REV. 55, 86 (2017).

232. Frampton, *supra* note 1, at 788.

233. COLO. R. CIV. P. 47(e).

234. *Id.*; *see also* WYO. STAT. ANN. § 1-11-203 (West 2021) (containing a nearly identical code to Colorado's law); TEX. CODE CRIM. PROC. ANN. art. 35.16.10 (West 2021) (same but providing a procedure to decipher whether "there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence the juror in finding a verdict"). *But see* LA. CODE CRIM. PROC. ANN. art. 797 (2021) (combining the two reasons listed above from Colorado into one by stating, "[t]he juror is not impartial, whatever the cause of his partiality").

235. N.Y. CRIM. PROC. LAW § 270.20 (McKinney 2021). The other acceptable reasons relate to whether a person (1) does not have the qualifications to serve; (2) is related or connected in some way to someone involved in the trial; (3) is currently testifying or planning to testify as a witness in a previous hearing or proceeding in the trial; (4) is serving on the grand jury that found the indictment for the case or served on a jury previously for the same incident; or (5) would be uncomfortable recommending the death penalty based on moral or other objections, if the charge is punishable by death. *Id.*

disqualification, implied bias, and actual bias.[236] Once an attorney suggests challenging a prospective juror for cause, the judge decides whether to rehabilitate that juror through additional questioning.[237]

### C. PROPOSING A CHARACTER PROPENSITY BAN FOR JURY SELECTION

This Section outlines a proposed expansion of Federal Rule of Evidence 404(a) that would bring the rule into use during jury selection. This expansion would allow attorneys to object to the judge or opposing counsel's reliance on character propensity information as the impetus for a bias-based cause challenge. In particular, this rule 404(a)-based jury selection objection would help deter the exclusion of prospective jurors whose critical view of the legal system is based on direct experience of unjust treatment.

#### 1. The Mechanics of a Rule 404 Jury Selection Objection

A new Rule 404 trial objection during jury selection would provide lawyers with the opportunity to rehabilitate prospective jurors for whom a cause challenge was proposed on the basis of presumed bias. The objection would be triggered by a judge's conclusion that a prospective juror warrants excusal for cause, but it would precede the juror's actual dismissal from the courtroom. At this point, either party could choose to raise a Rule 404 objection to the active cause challenge. This would precipitate a rehabilitative line of questioning of the juror at sidebar.[238]

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236. CAL. CIV. PROC. CODE § 225(b)(1)(A)–(C) (West 2021). As a point of contrast, Florida has twelve, including "The juror is a surety on defendant's bail bond in the case." FLA. STAT. ANN. § 913.03 (West 2021).

237. *Contra* Mark W. Bennett, *Getting Clamorous About the Silence Penalty*, 103 IOWA L. REV. ONLINE 1, 3 (2018) ("Judicial rehabilitation of potential jurors is easy, but unwise. No matter how biased a potential juror professes to be, virtually any judge, even those of modest skill or less, can persuade (I think coerce) the juror into claiming that they can now follow the law in the judge's instructions."); *see also* Montgomery v. Commonwealth, 819 S.W.2d 713, 718 (Ky. 1991) ("[O]bjective bias renders a juror legally partial, despite his claim of impartiality.").

238. To avoid the possibility that differences in the framing or phrasing of lawyers' questions might yield disparate responses by prospective jurors, these questions would conform to a script. *See* Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations*, 16 J. EMPIRICAL LEGAL STUD. 515, 541 (2019); *see also* Transcript of Oral Argument at 27–28, Flowers v. Mississippi, 139 S. Ct. 2228 (2019) (No. 17-9572) (during which Justice Kagan comments on prosecutors' practice of formulating leading questions—or tag questions—that influence (if not dictate) prospective jurors' responses).

At this juncture, the juror in question would be asked whether he or she would "put aside opinions formed based on his or her life experiences or belief system[s]."[239] Upon this prospective juror's affirmative response, the judge would then ask whether he or she could "put aside his or her preconceived notions about the *case to be tried*."[240] If the prospective juror agreed with this assertion, the cause challenge would fail and voir dire would continue. Supporting a lawyer's ability to interrogate the rationale behind a cause challenge before a judge's ruling on such a challenge would serve as a meaningful check on otherwise unrestrained judicial discretion in this context. And a judge's decision to dismiss a prospective juror who is committed to fairly and impartially assessing evidence and following the law could open a pathway to appeal.

This check on *attorney* bias during voir dire would reduce dependency on character propensity inferences during jury selection in at least two critically important ways. First, drawing the distinction between setting aside one's opinions and life experience, on the one hand, and setting aside attitudes about a *particular case*, on the other, is an essential first step in preventing lawyers from allowing stereotypical thinking to orient their assessments of juror character. Relatedly, enabling prospective jurors to respond directly to follow-up questions about presumed biases would at least authorize, if not empower, them to intervene directly to combat inaccurate or disingenuous efforts to disenfranchise them from jury participation.[241]

Second, if a judge concluded that a prospective juror should *not* be excused for cause due to a particular opinion or experience, this finding could prevent the challenging attorney from invoking this opinion or experience when later making a peremptory strike. That is, a juror successfully rehabilitated after facing a cause challenge that hinged on a character stereotype could not be subject to a peremptory strike based on that stereotype once it had been determined to be inaccurate. The integration of a Rule 404-based trial objection during the cause challenge phase of jury selection would thus confer the secondary, and equally consequential, benefit of putting on record a party's *failed* attempt to dismiss a prospective juror based on a mischaracterization of that person.

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239. *See* Commonwealth v. Williams, 116 N.E.3d 609, 615 (Mass. 2019).

240. *Id.* (emphasis added).

241. See generally B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993) for a relevant discussion of framing a central goal of jury reform efforts as empowering lay decision-makers rather than conceiving of them as passive actors.

The efficacy of this proposed trial objection for cause challenges would hinge on an attorney's ability and willingness to identify ways in which the jury selection process—and legal institutions more generally—tacitly reinforce historically racist associations with particular beliefs (e.g., skepticism toward law enforcement agents) and experiences (e.g., negative encounters with law enforcement agents).[242] Addressing jury exclusion in this manner would not involve directly accusing a judge or attorney of engaging in prejudicial decision-making, as in the case of most *Batson* challenges.[243] This is an important feature of such a reform, since explicit racial animus is not the sole cause of systemically racist legal processes and outcomes.[244] Just as sociolinguist Gregory M. Matoesian suggested that gender is created in the context of patriarchally minded rape prosecutions, the jury selection process is an arena in which race is constructed within a "moral order"[245] of white-centricity and the "epistemological practice of the adversarial system of justice."[246]

When searching for signs of discrimination, it would be important to consider the number, form,[247] or type of questions asked of Black prospective jurors as compared to white jurors, as well as the grounds for challenging Black prospective jurors as compared to white jurors.[248] It is worth noting, in this vein, that the disparate ques-

242. Ideas analogized from Matoesian, *supra* note 78, at 682–83 ("[I]n the rape trial the incipient sexual relationship and rules of behavior are not generic or structural standards governing the coequal sexual preferences of males and females. Rather, they represent what I refer to as the *patriarchal logic of sexual rationality* . . . .").

243. *Cf.* Washington State's new *Batson* regime prohibiting a party from exercising a peremptory strike if an impartial objective party—who is presumed knowledgeable about the workings of institutional and implicit racial bias—could conclude that race or ethnicity was a factor in the strike. *See* WASH. CT. GEN. R. 37(f) ("For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.").

244. ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE 7 (1998) ("Racial bias in . . . a race-laden policy need not be the result of racism per se."). See also Matoesian, *supra* note 78, at 682–83 for a discussion of the extent to which exclusionary outcomes may result from legal processes that appear superficially agnostic to the racial identities of its participants.

245. Matoesian, *supra* note 78, at 696.

246. *See id.* at 694.

247. Frampton, *supra* note 1, at 806 ("Prosecutors thus ask leading questions of black prospective jurors designed to elicit disqualifying responses, while largely ignoring white prospective jurors.").

248. *See* WASH. CT. GEN. R. 37(g).

tioning of prospective jurors of color may *itself* be perceived and experienced as hostile or embarrassing to jurors[249]—exposing them to scrutiny about personal topics in a room full of strangers.[250] And questioning that probes contact with the legal system, like other sensitive subjects that may be proxies for race, may be experienced as degrading.[251]

The language of Rule 404 should serve only as a starting point for thinking about how to combat propensity inferences. It is clear that courts and attorneys require guidance on how to recognize and respond to discriminatory forms of judgment.[252] This would include instruction on words, phrases, and even certain reactions by attorneys that can have the cumulative effect of excluding certain people from participating in the legal system as jurors, as well as elaboration of the fact that race (and gender) are poor predictors of juror attitudes.[253] The ultimate aim of this proposed trial objection is to improve the inclusivity of the jury system for all eligible to participate in it.[254] Promoting greater jury representativeness would both enhance the perceived legitimacy of the legal system by further incorporating historically-suppressed voices and facilitate fairer case outcomes for defendants.[255]

As this proposed procedural reform would likely uncover proxies for race that can trigger prejudicial propensity inferences, it would also complement state court efforts to reform the *Batson* doctrine. Washington State Courts' General Rule 37, discussed in the next Section, offers an instructive example of how a court has tried to identify statements that can subject prospective jurors to disparate excusal in

249. Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 LAW & SOC'Y REV. 601, 623 (2005) ("Jurors appearing for jury selection are indeed vulnerable, especially with respect to their personal privacy.").

250. Johnson, *supra* note 216, at 408.

251. *Id.*

252. Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 101 (1996) ("The court's pre-*Batson* cases on grand and petit jury discrimination reflected a commitment to the view that one might rationally glean some hint of a person's perspective from his or her race or gender.").

253. *Id.* (noting that social characteristics including race and gender became "flatly irrational predictors of juror perspective").

254. *See* Binnall, *supra* note 216, at 16–17 (arguing by analogy that jurors with felony records feel similarly to those who have been racially prejudiced).

255. Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1523–26 (2015).

the context of lawyers' use of peremptory strikes.[256] Limiting the subject matter of questions by steering clear of such proxies, I argue, can prevent prospective jurors from facing trials of their own as a precursor to carrying out a civic duty.[257]

### 2. A Rule 404(a) Jury Selection Objection Would Strengthen the *Batson* Doctrine

Though a Rule 404-based trial objection would not fundamentally change the discretionary nature of peremptory strikes, the rehabilitative questioning triggered by such an objection would enhance *Batson*'s deterrent effect. First, it would help judges adjudicate *Batson* challenges by ruling out rationales for juror dismissals flatly contradicted by jurors themselves. In this manner, the reform would pave the way for a more transparent approach to the jury selection process in general. A trial objection aimed at identifying and remediating stereotypical grounds for cause challenges would have the added and significant benefit of putting on record bases of juror assessment that are objectionable under *Batson*. In this way, it would help address a longstanding limitation of the *Batson* doctrine: reliance on pretextual grounds for juror dismissal.[258]

Concern about peremptory strike-based exclusion has already begun to prompt state-level reform aimed at addressing the deficiencies of current anti-discrimination law.[259] A common critique of the *Batson* doctrine, supported by empirical research, holds that disingenuous "race-neutral" rationales for peremptory strikes can circumvent

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256. *See* WASH. CT. GEN. R. 37(h); *cf.* Goodman, *supra* note 201, at 21; . Goodman also proposed a "Racial Reference Exclusion Rule," which could also be used in jury selection. Goodman, *supra* note 201, at 53. The rule "would give defense attorneys a firm basis for objecting to the use of racial references and to the indirect use of racial generalizations and stereotypes." This approach is similar to the *Batson* doctrine insofar as the prosecution has the chance to "make an offer of proof as to the permissible non-racial inferences based upon the evidence" before the judge rules on it. *Id.* at 53–54.

257. Even defendants accused of sex crimes do not risk having significant aspects of their lives put on trial to the extent that prospective jurors of color with frequent past law enforcement contact might, due to the far-reaching scope of questioning currently allowed. Karp, *supra* note 73, at 21–22 (speaking of defendants accused of sex crimes, Karp writes "[t]hey do not indiscriminately admit evidence of all the bad things the defendant may have done in the course of his life, but only admit evidence of criminal offenses of the same type as those with which he is formally charged").

258. *See generally* Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585 (2012).

259. *See generally Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUST. INITIATIVE (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/BF6C-YD3M].

the law's requirement that eligible jurors not face exclusion based on race.[260] Since lawyers rarely concede that race or racial stereotypes play a determinative role in their strike decisions, courts often fail to identify or seek to remedy discriminatory strikes of otherwise eligible jurors.[261]

The Supreme Court of Washington sought to address this problem by reforming the grounds for assessing *Batson* challenges. In a criminal case in which prosecutors used their last peremptory strike to remove the sole Black juror on the panel, the court decided to accept the state's "race-neutral" reasons for exercising the strike on the grounds that they did not reflect purposeful discrimination on the part of the challenged lawyer.[262] But the case was reversed on appeal. As a result, the Supreme Court adopted a new framework for assessing peremptory strikes, supplanting inquiries into *explicit* racial animus with an objective test that asked whether challenged strikes *could be viewed* as discriminatory by a hypothetical outside observer.[263] This new framework took the form of a new rule which, among its innovations, flagged certain rationales for the excusal of Black jurors as unacceptable for their historical association with racist stereotypes. Among these now "presumptively invalid" grounds for striking Black jurors was the identification of such jurors as:

> (i) [H]aving prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.[264]

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260. *See generally* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1535 (2012).

261. Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1077–78 (2011) ("[B]efore a trial court can find a *Batson* violation it must determine that an attorney has (1) exercised a racially motivated peremptory challenge and (2) lied to the court in an effort to justify the strike. The trial court must find all of this based almost solely on the attorney's demeanor. Accordingly, trial courts rightly hesitate to make damning findings *Batson* requires on such paltry evidence. Add to this the fact that attorneys may not even be aware of the racial motivation for their own strikes, as well as the administrative difficulty of remedying *Batson* violations, and it should come as no surprise that *Batson*, in application, is all form and little substance.").

262. *See* State v. Jefferson, 429 P.3d 467, 472 (Wash. 2018).

263. WASH. CT. GEN. R. 37.

264. *Id.* at 37(h).

The rule also identified examples of juror conduct historically associated with jury exclusion in the state of Washington.[265] In addition, the rule identified examples of courtroom conduct that attorneys could once cite with impunity to make sweeping generalizations and discriminatory conclusions about potential jurors: "sleeping, inattent[ion], or staring or failing to make eye contact; exhibit[ing] a problematic attitude, body language, or demeanor; or provid[ing] unintelligent or confused answers."[266] Building on Washington's new rule, state courts in California,[267] Oregon,[268] and Connecticut[269] may soon strengthen their own guidelines for *Batson* adjudication, targeting practices that lead to the disparate excusal of Black jurors. Other jurisdictions may follow the lead of the Arizona Supreme Court by moving to eliminate peremptory strikes altogether beginning in 2022.[270]

In part, this new wave of jury reform reflects the growing recognition that lawyers draw on inferences that have nothing to do with impartiality when evaluating and ultimately striking jurors. Currently, evidentiary rules preclude jurors from considering character propensity, as it is widely understood that these considerations would lead to problematic and dubious conclusions about witnesses' trustworthiness or a defendant's culpability. Meanwhile, lawyers are permitted to probe a person's character and draw conclusions about their suitability for jury service that are no less unsound. Lawyers too are prone to follow poorly-substantiated and prejudicial lines of reasoning. The application of Rule 404(a)'s character propensity ban within the context of juror questioning and assessment is therefore congruent with contemporary reform efforts aimed at tackling the stereotypes that inform juror strike decisions.

## CONCLUSION

To meaningfully address juror exclusion, the American legal system must fully—and explicitly—reject the notion that a particular "background characteristic" is determinative of a juror's perception of

265. *Id.* at 37(i).

266. *Id.*

267. *See, e.g.*, People v. Bryant, 253 Cal. Rptr. 3d 289 (Cal. Ct. App. 2019).

268. *See, e.g.*, State v. Curry, 447 P.3d 7 (Or. App. 2019).

269 Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson, Conn. Jud. Branch 21–23 (Dec. 31, 2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf [https://perma.cc/GZ7U-GTYH].

270. *Arizona Bans Use of Peremptory Strikes in State Jury Trials*, BLOOMBERG L. (Aug. 30, 2021), https://news.bloomberglaw.com/us-law-week/Arizona-bans-use-of-peremptory-strikes-in-state-jury-trials [https://perma.cc/6RGU-J975 ].

evidence in an unrelated case.[271] Much work remains to be done. In courtrooms around the country, attorneys argue that prospective jurors—many of whom are Black or poor—*could not possibly* remain impartial in a case due to past direct or second-hand contact with the legal system. Such a propensity inference, which is largely permitted in the contemporary court, relies on the same kind of inference that the Federal Rules bar during witness testimony. That such rules should hold for witnesses and defendants but not for prospective jurors is not only nonsensical but unjust. We can begin to address this source of persistent exclusion in our legal system by extending the current protections of Rule 404(a) to cover jury selection.

"The point here," Bennett Capers writes of our moment, "is not just that this history is important. It is that we have not yet untethered ourselves from history. Social science literature makes clear that race is still a factor in credibility determinations."[272] To achieve meaningful anti-discrimination reform, we cannot pretend that ours is a legal system of racial blindness.[273] Rather, we must acknowledge the continued use of stereotypes and other unjustified inferences, and address the sites of legal practice where these stereotypes and inferences are permitted to exclude people from the legal process. Reform itself can also be a symbol of our continued commitment to justice. To legal actors and prospective jurors, we can affirm our belief in the dignity[274] and value of the public, and the importance of an inclusive legal system through the creation of a Rule 404(a) objection for use during jury selection. Ultimately, we will not have a more representative legal system until we have a more reflexive one—and this means grasping that a prospective juror can believe that the system is unjust *and* yet still participate sincerely in the attempt to do justice through it.

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271. Rose & Diamond, *supra* note 226, at 539.

272. Capers, *supra* note 62, at 889–90 (citing James W. Neuliep, Stephanie M. Hintz, & James C. McCroskey, *The Influence of Ethnocentrism in Organizational Contexts: Perceptions of Interviewee and Managerial Attractiveness, Credibility, and Effectiveness*, 53 COMM. Q. 41, 52 (2005)).

273. Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1245 ("I believe that the first step in ridding the jury system of racial bias is to tell the truth about the prevalence and effect of bias. This includes naming the stereotypes that are at play whenever a person of color enters a courtroom.").

274. Leonard, *supra* note 47, at 841 ("Trials should seek both determination of truth and protection of individual dignity.").