Cross-Sectional Challenges: Gender, Race, and Six-Person Juries

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After two grand juries failed to indict the police officers that killed Michael Brown and Eric Garner in 2014, our nation has engaged in polarizing discussions about how juries reach their decision. The very legitimacy of our justice system has come into question. Increasingly, deep concerns have been raised regarding the role of race and gender in jury decision-making in such controversial cases. Tracing the roots of juror decision-making is especially complicated when jurors' race and gender are factored in as considerations. This Article relies on social science research to explore the many cross-sectional challenges involved in the jurors' decision-making in the George Zimmerman case. To analyze how the Zimmerman jurors' race and gender may have affected their decision-making in the case, this Article presents empirical studies evaluating the effect of race and gender on juror decision-making in criminal cases. The aim of this Article is to create dialogue about an important challenge for our justice system: How can we fulfill the constitutional mandate that juries be diverse? How can we overcome the barriers to fulfilling this ideal? This Article's suggestions also include focusing on the prosecutor's special obligations to serve justice by selecting a jury that adequately represents the community from which it is drawn. These and other changes are crucial to ensuring that communities accept even the most controversial jury decisions as legitimate.

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INTRODUCTION

On February 26, 2012, twenty-eight-year-old neighborhood watch coordinator George Zimmerman shot and killed Trayvon Martin in Sanford, Florida, a suburb of Orlando.[1] Martin, a seventeen-year-old boy, had been returning from a snack run when he encountered

[1] Lizette Alvarez, *Justice Department Investigation Is Sought in Florida Teenager's Shooting Death*, N.Y. TIMES (Mar. 16, 2012), http://www.nytimes.com/2012/03/17/us/justice-department-investigation-is-sought-in-florida-teenagers-shooting-death.html; Campbell Robertson & John Schwartz, *Shooting Focuses Attention on a Program That Seeks to Avoid Guns*, N.Y. TIMES (Mar. 22, 2012), http://www.nytimes.com/2012/03/23/us/trayvon-martin-death-spotlights-neighborhood-watch-groups.html.

Zimmerman.[2] Martin was not armed.[3] Nearly two months later, after much political turmoil, George Zimmerman was charged with second degree murder.[4] In July of 2013, a jury acquitted Zimmerman of all charges related to Martin's death.[5]

Widespread protests greeted the jury's verdict in this case.[6] Commentators questioned the jurors' objectivity,[7] their understanding of the case,[8] and whether or not they were racially biased.[9] The first juror to speak publicly about the verdict was a White woman interviewed by CNN just days after the verdict was announced. Her interview added to the public sentiment that the verdict may have been biased by reinforcing racial tropes about the criminally violent threat posed by Martin.[10] Many commentators have ignored the multiple factors at work in this particular case. This Article examines the jury's verdict in light of social science research on jury decision-making, including the work on gender and racial dynamics in the context of

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[2] Kara Dapena, *Timeline of Events: Seven Deadly Minutes*, MIAMI HERALD (May 23, 2012), http://media.miamiherald.com/static/Trayvon%20Timeline/TrayvonMapNew19.swf.

[3] Alvarez, *supra* note 1.

[4] Lizette Alvarez & Michael Cooper, *Prosecutor Files Charge of 2nd-degree Murder in Shooting of Martin*, N.Y. TIMES (Apr. 11, 2012), http://www.nytimes.com/2012/04/12/us/zimmerman-to-be-charged-in-trayvon-martin-shooting.html.

[5] Manuel Roig-Franzia, *Zimmerman Found Not Guilty in Killing of Trayvon Martin*, WASH. POST (July 14, 2013), http://www.washingtonpost.com/national/zimmerman-trial-jurors-request-clarification-on-manslaughter-instructions/2013/07/13/3a26dbbe-ec0c-11e2-aa9f-c03a72e2d342_story.html.

[6] Michael Pearson et al., *Verdict Doesn't End Debate in Trayvon Martin Death*, CNN (July 16, 2013), http://edition.cnn.com/2013/07/15/justice/zimmerman-verdict-protests/.

[7] Earl Ofari Hutchinson, Opinion, *Zimmerman Trial Juror b37 Reconfirms Glaring Juror Racial Bias*, HUFFINGTON POST (July 17, 2013), http://www.huffingtonpost.com/earl-ofari-hutchinson/zimmerman-trial-juror-b37_b_3611614.html.

[8] Former federal prosecutor Tanya Miller said: "What is really clear when we hear this juror [identified as B-29] speak is that she really misunderstood the law. She did not appropriately apply the law to the facts because she didn't understand it." *The Situation Room* (CNN television broadcast July 26, 2013) (transcript available at http://edition.cnn.com/TRANSCRIPTS/1307/26/sitroom.01.html).

[9] *See, e.g.*, Richard Gabriel, Opinion, *Race, Bias, and the Zimmerman Jury*, CNN (July 16, 2013), http://edition.cnn.com/2013/07/16/opinion/gabriel-bias-zimmerman/; William Saletan, Opinion, *Jury Rigged: Did Racism Skew the Zimmerman Verdict?*, SLATE (July 17, 2013), http://www.slate.com/articles/news_and_politics/frame_game/2013/07/zimmerman_jury_bias_did_racism_or_stand_your_ground_skew_the_verdict.html.

[10] *Anderson Cooper 360 Degrees* (CNN television broadcast July 15 & 16, 2013) (transcripts available at http://transcripts.cnn.com/TRANSCRIPTS/1307/15/acd.01.html and http://edition.cnn.com/TRANSCRIPTS/1307/16/acd.01.html).

six-person juries. We argue that the Zimmerman verdict is the product of several intersecting factors at play in this case and cannot be singularly attributed to any one of them.

Part I of the Article details the crime itself, including the law enforcement response and the trial. The second part of the Article discusses "stand your ground" statutes, which received significant attention in the wake of Martin's killing. In an effort to analyze how the Zimmerman jurors' race and gender may have affected their decision-making in the case, Part III details a host of systematic empirical studies evaluating how race and gender affect juror decision-making in criminal cases. Part III also examines the empirical research on group decision-making dynamics, including impacts of jury size. Part IV analyzes the constitutional requirement that juries be diverse and the barriers to fulfilling this ideal. This part also argues that intersectionality theory helps explain the jury's decision-making in controversial cases like Zimmerman's, as well as public and media reactions to the verdicts. The Article concludes by calling for stronger measures to ensure a fair cross-section of communities is represented on juries. This includes recognition of the distinct obligations of the prosecutor to serve justice by selecting a jury that adequately represents the community from which it is drawn. Above and beyond the case-specific constitutional imperatives that are served by representative juries, the measures this Article calls for are crucial to ensuring that communities accept even the most controversial jury decisions as legitimate.

I. A CONFRONTATION ON A RAINY SUNDAY NIGHT

A. *The Accounts*

Using eyewitness accounts and cell phone records, the Miami Herald reconstructed the events leading up to Trayvon Martin's death.[11] According to that reconstructed version, at approximately 6:24 PM, Martin, who was five feet eleven inches and 158 pounds, left the local 7-11 store where he went to purchase snacks.[12] Martin had been staying with his father, Tracy Martin, and his father's girlfriend, in a Sanford gated community, the Retreat at Twin Lakes, where George Zimmerman also lived.[13] As Martin walked back to his father's home, he chatted on the cellphone with a friend.[14] At 7:09 PM, George

[11] Dapena, *supra* note 2.
[12] *Id.*
[13] *Id.*
[14] *Id.*

Zimmerman called 911 from his SUV to report a "suspicious teenager" walking near the clubhouse of the housing development.[15] Zimmerman, who was the neighborhood watch coordinator,[16] was not on patrol when he first saw Martin, but rather was on a run to the store.[17] At the time, Zimmerman had a Kel Tec nine-millimeter semi-automatic handgun in his possession, which he always wore holstered while on neighborhood patrols.[18] At 7:11 PM, Zimmerman pursued Martin on foot for about fifteen seconds, then was advised by the 911 operator to stop.[19] Zimmerman responded that he would stop the pursuit.[20] After a back-and-forth conversation with the police who indicated they were on their way, Zimmerman asked the police to call him when they arrived at the development's entrance.[21] Two and a half minutes after Zimmerman's call to police ended, Martin's call with his friend was dropped.[22] At 7:16 PM, a neighbor called 911 because she heard someone outside crying for help.[23] Seconds later, a gunshot was heard prompting six more neighbors to call 911.[24] At 7:17 PM, the first police officer arrived to find Trayvon Martin shot, just 200 feet from his father's backyard.[25] Paramedics pronounced Martin dead at 7:30 PM.[26] When the police arrived, George Zimmerman claimed that he had shot Trayvon Martin in self-defense.[27] Because Florida has a "stand your ground" law, which alters the common law duty to retreat before justified use of deadly force,[28] Sanford police did not arrest Zimmerman at the scene.[29] The Seminole County prosecutor, under whose jurisdiction it was to prosecute the crime, conducted an inquiry into the incident on February 26, 2012 and declined to prosecute.[30]

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[15] *Id.*

[16] *Id.*

[17] Dapena, *supra* note 2.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Dapena, *supra* note 2.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (May 23, 2012), http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/.

[28] FLA. STAT. § 776.013 (2005), *amended by* 2014 Fla. Sess. Law Serv. Ch. 2014–195 § 4 (West); *see infra* notes 56–65 and accompanying text.

[29] *Id.*

[30] Alvarez & Cooper, *supra* note 4.

After nationwide protests[31] and social media outcry,[32] the Justice Department launched an investigation.[33] Florida governor Rick Scott appointed a special prosecutor[34] in the case, and on April 11, 2012, Zimmerman was charged with second degree murder.[35]

> Florida's second degree murder statute provides:
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> The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.[36]

Zimmerman entered a plea of not guilty.[37] The trial started in June of 2013, just over a year later.[38]

B. *The Trial*

On June 10, 2013, Zimmerman's trial began with jury selection.[39] The jury that heard the case was comprised of five White women and one Hispanic woman;[40] five of the six were mothers.[41] Defense attorney

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[31] *Trayvon Martin Rallies Spread Across the United States—In Pictures*, THE GUARDIAN (Mar. 27, 2012), http://www.theguardian.com/world/gallery/2012/mar/27/trayvon-martin-marches-across-us-pictures.

[32] Matt Gutman & Seni Tienabeso, *Interest in Trayvon Martin Shooting Spurred by Celebrity Tweets and Petition*, ABC NEWS (Mar. 21, 2012), http://abcnews.go.com/US/celebrity-tweets-petitions-spur-trayvon-martin-shooting-probe/story?id=15970224.

[33] *Justice Department, FBI to Probe Florida Teen's Death*, CNN (Mar. 19, 2012, 9:23 PM), http://www.cnn.com/2012/03/19/justice/florida-teen-shooting/.

[34] *Gov. Rick Scott Appoints Special Prosecutor for Trayvon Martin Case*, TAMPA BAY TIMES (Mar. 22, 2012), http://www.tampabay.com/news/politics/gubernatorial/gov-rick-scott-appoints-special-prosecutor-for-trayvon-martin-case/1221406.

[35] Alvarez & Cooper, *supra* note 4.

[36] FLA. STAT. § 782.04(2) (2010), *amended by* FLA. STAT. § 782.04 (2012) and FLA. STAT. § 782.04 (2014).

[37] *Zimmerman's Not Guilty Plea Flew Under the Radar*, CBS NEWS (Apr. 24, 2012), http://www.cbsnews.com/news/zimmermans-not-guilty-plea-flew-under-the-radar/.

[38] Richard Luscombe, *Jury Selection Begins in George Zimmerman Trial*, THE GUARDIAN (June 10, 2013), http://www.theguardian.com/world/2013/jun/10/george-zimmerman-trayvon-martin-trial-begins.

[39] *Id.*

[40] Cara Buckley, *6 Female Jurors Are Selected for Zimmerman Trial*, N.Y. TIMES (June 20, 2013), http://www.nytimes.com/2013/06/21/us/6-female-jurors-are-selected-for-zimmerman-trial.html?_r=0.

[41] Alyssa Newcomb, *George Zimmerman Juror Says 'In Our Hearts, We Felt He Was Guilty,'* ABC NEWS (July 25, 2013), http://abcnews.go.com/US/george-zimmerman-juror-murder/story?id=19770659.

Don West's opening statement quickly revealed the difficulty of selecting unbiased jurors for this controversial and well-publicized case. West told the following joke:

> "Knock. Knock," West said.
> "Who's there?"
> "George Zimmerman."
> "George Zimmerman who?"
> "Ah, good. You're on the jury."[42]

West's joke implied that jurors who had been selected were rather simple-minded or out-of-touch, and thus unaware of this highly publicized case.[43] In striking contrast to this characterization, the jurors' job as decision makers in this particular trial was especially challenging.[44] First, the nation closely watched this trial.[45] The media extensively covered every aspect of the trial, from the selection of jurors to the pronouncement of the verdict.[46] Jurors must have been aware of the weight of their decision, as the HLN network televised each day of the trial.[47] There was also the issue of keeping straight the evidence, a complication that comes with more contested or more

[42] *George Zimmerman Trial Opens with Curses, Knock-Knock Joke*, NEWS 13 (June 24, 2013, 6:41 PM), http://mynews13.com/content/news/cfnews13/news/article.html/content/news/articles/cfn/2013/6/24/opening_statements_t.html.

[43] *See* Jelani Cobb, *George Zimmerman's Trial Begins, With a Knock-Knock Joke*, THE NEW YORKER (June 24, 2013), http://www.newyorker.com/news/news-desk/george-zimmermans-trial-begins-with-a-knock-knock-joke.

[44] *See* Patrik Jonsson, *Zimmerman Trial: For Jury, Anguished Task to Resolve Death of Trayvon Martin*, CHRISTIAN SCI. MONITOR (July 12, 2013), http://www.csmonitor.com/USA/Justice/2013/0712/Zimmerman-trial-For-jury-anguished-task-to-resolve-death-of-Trayvon-Martin.

[45] Erin Donaghue, *"We Want Peace for Trayvon:" Miami Community Leaders Call for Calm Ahead of George Zimmerman Verdict*, CBS NEWS (July 10, 2013), http://www.cbsnews.com/news/we-want-peace-for-trayvon-miami-community-leaders-call-for-calm-ahead-of-george-zimmerman-verdict/.

[46] *See, e.g.*, Lizette Alvarez, *Running, a Fight and Then a Shot, a Witness Testifies in Zimmerman's Trial*, N.Y. TIMES (June 25, 2013), http://www.nytimes.com/2013/06/26/us/witness-portrays-zimmerman-as-neighborhoods-eyes-and-ears.html?_r=0; Erin Donaghue, *George Zimmerman Trial: Trayvon Martin "Viciously Attacked" Former Neighborhood Watch Volunteer, Defense Says in Opening Statement*, CBS NEWS (June 24, 2013), http://www.cbsnews.com/news/george-zimmerman-trial-trayvon-martin-viciously-attacked-former-neighborhood-watch-volunteer-defense-says-in-opening-statement/; Dana Ford, *Juror: 'No Doubt' That George Zimmerman Feared for His Life*, CNN (July 16, 2013), http://www.cnn.com/2013/07/15/justice/zimmerman-juror-book/.

[47] Eric Kelsey, *Gavel-to-Gavel Zimmerman Trial Coverage Hints at CNN's New Path*, REUTERS (July 13, 2013), http://www.reuters.com/article/2013/07/13/us-usa-florida-shooting-television-idUSBRE96C05D20130713.

complex cases.[48] Over the course of the month-long trial,[49] approximately sixty witnesses testified.[50] The witnesses ranged from Martin's and Zimmerman's mothers[51] to medical personnel who treated Zimmerman,[52] and to dueling audio experts who testified about the source of the scream heard by neighbors.[53] The crime had no eyewitnesses.[54] On July 13, 2013, after sixteen and a half hours of deliberation, the jury acquitted Zimmerman of all charges.[55]

II. "STAND YOUR GROUND" LAWS

Much of the intellectual controversy among legal scholars that followed the trial involved worries that the jury's verdict was too heavily influenced by Florida's "stand your ground" law.[56] Many jurisdictions have enacted "stand your ground" or "make my day" laws which alter the common law by taking away the duty to retreat.[57] Rather than acting as a defense, these laws provide immunity from criminal prosecution or tort immunity to the individual who defends him or herself in the proper set of circumstances.[58] Under the common law,

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[48] *See* Matthew A. Reiber & Jill D. Weinberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 U. CIN. L. REV. 929, 963 (2010) ("The survey results . . . show that comprehension declines as factual complexity increases.").

[49] *See George Zimmerman Case Timeline*, NEWS 13, http://mynews13.com/trayvon-timeline.html (last visited Nov. 14, 2015).

[50] *List of Witnesses Called in the George Zimmerman Trial*, NEWS 13 (July 10, 2013), http://mynews13.com/content/news/cfnews13/news/article.html/content/news/articles/cfn/2013/6/28/george_zimmerman_wit.html.

[51] *See* Greg Botelho et al., *Mom vs. Mom as Martin, Zimmerman Mothers Differ on 911 Call Screams*, CNN (July 5, 2013), http://www.cnn.com/2013/07/05/justice/george-zimmerman-trial/.

[52] *List of Witnesses Called in the George Zimmerman Trial*, *supra* note 50.

[53] *Id.*

[54] *See id.*

[55] Dana Ford, *A Verdict and More: Get Caught Up on the George Zimmerman Case*, CNN (July 15, 2013), http://www.cnn.com/2013/07/14/justice/zimmerman-recap/.

[56] *See, e.g.*, F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizens Use of Deadly Force*, 21 GEO. MASON L. REV. 623 (2014); Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors' Discretion, and the Stand Your Ground Law*, 23 U. FLA. J.L. & PUB. POL'Y 271, 287 (2012); Elizabeth B. Megale, *Disaster Averted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL ADVOC. 255, 314 (2013); Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1, 2 (2014); *cf.* Elizabeth Berenguer Megale, *A Call for Change: A Contextual-Configurative Analysis of Florida's 'Stand Your Ground' Laws*, U. MIAMI L. REV. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397887 (arguing that "stand your ground" makes little if any difference in this and other self-defense cases).

[57] *See, e.g.*, ALA. CODE § 13A-3-23 (2007).

[58] Elizabeth Bosek et al., 16 FLA. JUR 2D *Criminal Law—Substantive Principles/Offenses* § 523 (2015).

if one encounters a threatening assailant outside one's home, one has a duty to avoid confrontation before using deadly force. By contrast, when one is acting in a jurisdiction that has a "stand your ground" law, if confronted by a threatening assailant when walking down the street, there is no duty to avoid confrontation before using deadly force.[59]

"Stand your ground" complicates the traditional common law approach.[60] Traditional common law notions of self-defense are predicated on a variety of factors: 1) that the individual asserting the defense is engaged in lawful activity; 2) that the individual is not the aggressor in a situation; 3) that the individual holds a reasonable belief that he or she is in immediate danger of unlawful bodily harm from an adversary; and 4) that the individual uses force proportional to the threat posed.[61] Generally, if individuals are unlawfully attacked outside of the home, they are required to take steps to avoid using deadly force.[62] Traditionally, an individual may be justified in using deadly force in self-defense only if he or she "reasonably believes that the other is about to inflict unlawful death or serious bodily harm."[63]

Like the common law, "stand your ground" statutes require proportionality—force must be met with similar force.[64] If deadly force is used, the individual seeking justification must have had a reasonable belief that deadly force was required to prevent the commission of a felony, death, or serious bodily harm to him or herself or another.[65]

A. *"Stand Your Ground" in Florida*

The Florida Legislature enacted its "stand your ground" statute, section 776.013, effective October 1, 2005, to offer a greater right of self-defense to its citizens. At the time Zimmerman was charged, Florida's statute read:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or

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[59] *Id.*

[60] Lawson, *supra* note 56, at 287.

[61] 40 AM. JUR. 2D *Homicide* § 134.

[62] 40 AM. JUR. 2D *Homicide* § 159; L.W.B., Annotation, *Homicide: Duty to Retreat When Not on One's Own Premises*, 18 A.L.R. 1279 (1922).

[63] WAYNE R. LAFAVE, CRIMINAL LAW § 10.4(b) at 541 (4th ed. 2003).

[64] 40 AM. JUR. 2D *Homicide* § 134.

[65] Jay M. Zitter, Annotation, *Construction and Application of "Make My Day" and "Stand Your Ground" Statutes*, 76 A.L.R. 6TH 1, 9 (2012).

another or to prevent the commission of a forcible felony.[66]

The main import of this statute for cases involving deadly force is to eradicate any duty to retreat if one reasonably believes that such force is necessary to prevent one's own or another's death or great bodily harm.[67] Rather than acting in the traditional manner as a defense that the defendant could assert to escape liability if charged,[68] Florida's "stand your ground" statute goes much further. By design, the statute wholly immunizes defendants from any of the negative effects of prosecution.[69] Under the Florida statute, defendants may escape tort liability and prosecution in criminal cases.[70]

Previous Florida cases in which defendants asserted their rights under the "stand your ground" law have involved circumstances far removed from the situation in which George Zimmerman encountered Trayvon Martin. In *State v. Gallo* for instance, the defendant, Alphonse Orlando Gallo, and the victim, Patrick Barbour, knew each other.[71] They argued outside a nightclub over a debt that Barbour allegedly owed Gallo.[72] Things got heated between the two men and an armed confrontation ensued, involving not just Gallo and Barbour, but two other men.[73] Barbour was killed, and prosecutors charged Gallo with second degree murder.[74] When Gallo argued immunity, both trial and appeals courts agreed that he had immunity from prosecution under Florida's "stand your ground" law.[75]

The relationship between weapons and criminality has meant that legislatures enacting "stand your ground" statutes are often blindingly clear about the fact that they do not wish those engaged in illegal activity to find protection in "stand your ground" laws.[76] Thus, courts have rejected the defense in situations where individuals engaged in

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[66] FLA. STAT. § 776.013(3) (2005) (current version at FLA. STAT. § 776.012(2) (West 2014).

[67] *See* State v. Smiley, 927 So. 2d 1000, 1001 (Fla. Dist. Ct. App. 2006).

[68] *Id.*

[69] *See* FLA. STAT. § 776.013 (2005), *amended by* 2014 Fla. Sess. Law Serv. Ch. 2014-195 § 4.

[70] *See Smiley*, 927 So. 2d at 1002.

[71] 76 So. 3d 407 (Fla. Dist. Ct. App. 2011).

[72] *Id.* at 408.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 409.

[76] For example, both LA. REV. STAT. ANN. § 14:20(C) (2014) and OKLA. STAT. tit. 21, § 1289.25(D) (2011) use essentially the same language as Florida's 2005 statute, explicitly declaring no duty to retreat if a person "is not engaged in an unlawful activity." *See* FLA. STAT. § 776.013 (2005), *amended by* 2014 Fla. Sess. Law Serv. Ch. 2014-195 § 4 (West).

illegal behavior have sought immunity from prosecution. One example from Florida, *Darling v. State*, involved a convicted felon who went to a housing project to purchase marijuana.[77] Though he was by law prohibited from carrying a weapon,[78] a previous experience purchasing drugs at the same location persuaded the defendant to arm himself.[79] Though the defendant was not able to purchase drugs at this particular time, someone on the street accosted him and a gunfight ensued.[80] Ultimately, the gunfight resulted in a bystander's death.[81] The defendant attempted to avoid criminal liability by relying on the "stand your ground" statute to argue that he was responding to another's threat.[82] The trial court, using reasoning later upheld on appeal, found that because the defendant was a felon in possession of a firearm, he could not rely on the "stand your ground" statute.[83]

B. *How "Stand Your Ground" Laws Work on the Ground with Defendants as a Function of Race*

Anecdotal and systematic evidence suggests that prosecutors have applied "stand your ground" laws differentially depending upon the defendant's race. Anecdotally, one can point to Marissa Alexander, a thirty-two-year-old Black Floridian who was unable to rely on "stand your ground" at trial in 2010.[84] Prosecuted by Angela Corey, the same special prosecutor assigned to the Zimmerman case,[85] Alexander was charged with aggravated assault after she discharged a warning shot into the wall during an altercation with her abusive husband.[86] No one was injured during the altercation.[87] The judge in Alexander's case rejected her use of Florida's "stand your ground" statute, and after convicting Alexander on three counts of aggravated assault, sentenced her to twenty years in prison.[88]

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[77] Darling v. State, 81 So. 3d 574 (Fla. Dist. Ct. App. 2012).

[78] *Id.* at 578.

[79] *Id.* at 576.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Darling*, 81 So. 3d at 578–79.

[84] Billy Kenber, *Marissa Alexander Case in Spotlight After Zimmerman Trial*, WASH. POST (July 15, 2013), http://www.washingtonpost.com/politics/2013/07/15/6030be5a-ed5c-11e2-9008-61e94a7ea20d_story.html.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* The Zimmerman trial created significant buzz about Alexander's case, especially since the special prosecutor assigned to the Zimmerman case also prosecuted Alexander's case. Following a successful appeal to Florida's First District

Even more compelling than anecdotal cases like that of Alexander is systematic evidence, which compares how Blacks and Whites fare when attempting to rely on "stand your ground" statutes. One study, conducted by John Roman and P. Mitchell Downey of the Urban Institute, examined this issue using 2005–2009 data from the FBI's supplementary homicide report, which includes all reported homicides in the United States.[89] The only homicides applicable in "stand your ground" cases are justifiable homicides,[90] which constitute fewer than 2% of the overall number of homicides during this time period.[91] After separating out the justifiable homicides, the authors tried to find situations in which the facts resembled those in the Zimmerman/Martin case—a single shooter and single victim who were both civilians and strangers, and the victim was killed by a handgun.[92]

"Stand your ground" laws have two significant impacts, according to Roman and Downey's study.[93] The first involves whether or not a jury or judge will find a homicide justified.[94] The authors' research revealed that in states with "stand your ground" laws, judges or juries found 13.6% of the homicides to be justified. In states without "stand your ground" legislation judges or juries found only 7.2% to be justified.[95]

The second impact of these types of laws, as revealed by Roman and Downey's study, pertained to the relationship between conviction and the race of both the perpetrator and the victim.[96] The authors examined the kinds of cases most likely to be justified and found that "the scenario with the highest probability of being justified is much like the Martin case—a single, white civilian handgun shooter who is a stranger to (and older than) the Black victim."[97] According to this

Court of Appeal, Alexander's conviction was overturned and her case remanded. *See* Alexander v. State, 121 So. 3d 1185 (Fla. Dist. Ct. App. 2013). In November 2014, Alexander accepted a plea bargain. Larry Hannan, *Alexander takes deal in criminal case; out of jail Jan. 27*, FLA. TIMES-UNION (Nov. 24, 2014, 6:30 PM), http://jacksonville.com/news/crime/2014-11-24/story/alexander-takes-deal-criminal-case-out-jail-jan-27.

[89] John Roman & P. Mitchell Downey, *Stand Your Ground Laws and Miscarriages of Justice*, URBAN WIRE (Mar. 29, 2012), http://blog.metrotrends.org/2012/03/stand-ground-laws-miscarriages-justice.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] Roman & Downey, *supra* note 89.

[96] *Id.*

[97] *Id.*

research, "stand your ground" laws exacerbate the already-existing racial disparities in justifiable homicide cases:

> Overall, the rate of justifiable homicides is almost six times higher in case [sic] with attributes that match the Martin case. Racial disparities are [also] much larger, as [W]hite-on-[B]lack homicides have justifiable findings 33 percentage points more often than [B]lack-on-[W]hite homicides. "Stand Your Ground" [(SYG)] laws appear to exacerbate those differences, as cases overall are significantly more likely to be ruled justified in SYG states than in non-SYG states . . . .[98]

While it is much more likely that judges or juries will find that single White shooters of Blacks have justifiably killed his or her victims, this did not mean, of course, that the Zimmerman verdict was a foregone conclusion. Out of 70,000 cases, only twenty-three homicides had similar facts to the Martin case, and of those, only nine (39%) were ruled justifiable homicides.[99]

Roman and Downey argue that their research suggests that because Florida is a "stand your ground" state, Zimmerman would be exempted from the need to demonstrate to the jury that the shooting was justified.[100] While ultimately that did not occur due to the immense public and political outcry,[101] the defense spent a significant amount of time offering evidence of justification predicated on the logic of "stand your ground."[102] Moreover, "stand your ground" laws encourage the wide-scale arming of individuals.[103] It is unlikely that Zimmerman, who told 911 dispatchers that Martin had something in his hands (candy and tea),[104] would have exited his car and pursued Martin had he not

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[98] JOHN K. ROMAN, RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA 9 (2013), http://www.urban.org/uploadedPDF/412873-stand-your-ground.pdf. As the author details, in "stand your ground" states, Black defendants are less successful than White defendants in obtaining a justifiable homicide determination as compared to Black defendants relative to White defendants in non-"stand your ground" states.

[99] Roman & Downey, *supra* note 89.

[100] *Id.*

[101] *See Zimmerman to Argue Self-defense, Will Not Seek 'Stand Your Ground' Hearing*, CNN (May 1, 2013), http://www.cnn.com/2013/04/30/justice/florida-zimmerman-defense/.

[102] *See* Lizette Alvarez, *In Zimmerman Case, Self-defense Was Hard to Topple*, N.Y. TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/us/in-zimmerman-case-self-defense-was-hard-to-topple.html?pagewanted=all&_r=0.

[103] *See* STEVEN JANSEN & M. ELAINE NUGENT-BORAKOVE, EXPANSIONS TO THE CASTLE DOCTRINE 12 (2007), http://www.ndaa.org/pdf/Castle%20Doctrine.pdf (noting that a possible negative consequence of expanding the castle doctrine is "[e]scalations in violence that may not have otherwise occurred if people were not carrying weapons for self-defense").

[104] Botelho, *supra* note 27.

been armed.[105] These laws, then, not only exacerbate racial disproportionalities in outcomes of justifiable homicides,[106] but also increase lethal violence against Blacks overall.[107] Thus, one study found that "[c]ontrolling for population, the number of homicides of Black people that were deemed justifiable in Stand Your Ground states more than doubled between 2005 and 2011—rising from 0.5 to 1.2 per 100,000 people—while it remained unchanged in the rest of the country."[108]

III. GRAPPLING WITH THE EVIDENCE: ISSUES OF RACE AND GENDER

Against the backdrop of Florida's "stand your ground law," the Zimmerman jury also grappled with ambiguous and complicated evidentiary issues. No one saw the entire encounter between Martin and Zimmerman at close range.[109] The defense argued that George Zimmerman had shot Trayvon Martin because he feared for his life.[110] Key to that assertion was a 911 recording of a voice screaming for help.[111] The defense put on nine witnesses who maintained that the voice on the recording was Zimmerman's,[112] whereas the prosecution put on witnesses who identified the voice as Martin's.[113] From the prosecution's perspective, a clear size and force differential existed between the victim and defendant; the armed Zimmerman outweighed Martin by more than forty pounds.[114] There is also the innocence factor that the prosecution sought to make salient for the

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[105] Author Jeannine Bell is grateful to Tracey Meares for this point.

[106] NAT'L URBAN LEAGUE ET AL., SHOOT FIRST: 'STAND YOUR GROUND' LAWS AND THEIR EFFECT ON VIOLENT CRIME AND THE CRIMINAL JUSTICE SYSTEM 7 (2013), http://maig.us/186JLnh.

[107] *Id.* at 4.

[108] *Id.* at 7.

[109] Yamiche Alcindor, *Witnesses in Trayvon Martin Case Offer Differing Accounts*, USA TODAY (June 3, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-06-03/trayvon-martin-case-witness-statements/55349480/1.

[110] *See* Z*immerman to Argue Self-defense, Will Not Seek 'Stand your Ground' Hearing*, *supra* note 101.

[111] Lizette Alvarez, *Trayvon Martin's Father Says Screams on 911 Tape Were His Son's*, N.Y. TIMES (July 8, 2013), http://www.nytimes.com/2013/07/09/us/friends-testify-that-zimmerman-is-the-one-screaming-for-help-on-911-call.html?_r=0.

[112] *Id.*

[113] *Id.*

[114] *See A Review of the Evidence Released in the Trayvon Martin Case*, TAMPA BAY TIMES (May 17, 2012), http://www.tampabay.com/news/a-review-of-the-evidence-released-in-the-trayvon-martin-case/1230750; *Documents in the Trayvon Martin Case*, N.Y. TIMES (May 18, 2012), http://www.nytimes.com/interactive/2012/05/17/us/trayvon-martin-documents.html.

jurors: Martin, a teenager, was on a snack run and had no history of violence.[115]

Conversely, the defense constructed a narrative of Martin as a prototypical criminal threat,[116] tying Zimmerman's reaction to him to a series of burglaries that occurred in the housing development over the prior year.[117] Why did the jurors ultimately accept Zimmerman's story (or reject the prosecution's version)? What might have been expected given research on how juror demographics, defendant and victim demographics, and jury dynamics interact in criminal cases?

A. *The Development of Empirical Jury Research*

Systematic empirical research on jury decision-making dates back to the 1950s with the launching of the University of Chicago Jury Project.[118] The Chicago Jury Project brought together lawyers and social scientists to broadly study the jury as an American legal institution.[119] One focus within this pioneering endeavor was on jury dynamics in criminal trials, with early insights drawn from field research conducted with jurors sitting on criminal cases in both Chicago, Illinois and Brooklyn, New York.[120] The Project culminated in a nation-wide survey of 555 judges regarding their experiences presiding over criminal trials, which was published by lead researchers Harry Kalven and Hans Zeisel in *The American Jury*.[121] This book reported on how and why juries and judges diverged in case assessments and verdict preferences, which occurred in about a quarter of the 3576 cases described by the surveyed judges in the questionnaires.[122]

Kalven and Zeisel's insights set the ball rolling on several strands of research that continue to this day[123] and that have implications for

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[115] *Trayvon Martin*, BIOGRAPHY.COM., http://www.biography.com/people/trayvon-martin-21283721 (last visited Feb. 18, 2015).

[116] *George Zimmerman Lawyers Release Data from Trayvon Martin's Cellphone*, THE GUARDIAN (May 23, 2013), http://www.theguardian.com/world/2013/may/23/zimmerman-lawyers-trayvon-martin-texts.

[117] Erin Donaghue, *George Zimmerman Trial: Chris Serino, Lead Detective in Case of Trayvon Martin Killing, Takes Stand Again Tuesday*, CBS NEWS (July 10 2013), http://www.cbsnews.com/news/george-zimmerman-trial-chris-serino-lead-detective-in-case-of-trayvon-martin-killing-takes-stand-again-tuesday/.

[118] Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).

[119] *Id.*

[120] *Id.* at 747.

[121] HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966).

[122] *Id.* at 55–56.

[123] *See, e.g.*, DANIEL GIVELBER & AMY FARRELL, NOT GUILTY: ARE THE ACQUITTED INNOCENT? (2012); Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and*

understanding the verdict in the Zimmerman case. For instance, one significant finding was that when juries disagreed with judges, the jury was typically more lenient on criminal defendants.[124] In about 85% of the disagreements, the jury voted to acquit where the judge deemed the appropriate verdict to be a conviction.[125] Kalven and Zeisel argued that the tendency toward leniency, relative to the trial judges' assessments, was not due to jurors' comprehension problems, but rather seemed to occur in close cases in which the juries were thought to be "liberated" from the strength of the evidence, allowing them to make judgments in light of other factors, including "sentimentality."[126] Thus, the "liberation hypothesis" was born, prompting a line of research regarding conditions under which "extra-legal" factors, such as racial or other stereotypes,[127] in-group favoritism,[128] empathy,[129] or other such phenomena exert influence on jury outcomes.[130]

Finally, the findings from the field study portion of the Project found that jurors' verdict preference, pre-deliberation, was the best predictor of verdict outcome.[131] This suggested that perhaps the group deliberation process was less important in most cases than thought to be. In light of this hypothesis, a number of scholars subsequently set out to uncover how juries come to decisions: Is it as simple as a "majority rules" vote that causes minority members to join the crowd, or are there other dynamics at play?[132] Moreover, do jurors make

Contemporary Understanding, 39 CRIM. L. BULL. 33 (2003). *See also* Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005) (recent partial replication of this classic study).

[124] KALVEN & ZEISEL, *supra* note 121, at 58–59.

[125] *Id.* at 61 (converting ratio of 8:1).

[126] *Id.* at 164–66.

[127] DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL EMPIRICAL ANALYSIS 399 (1990); Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAV. SCI. & L. 61 (1995); Marian R. Williams & Melissa W. Burek, *Justice, Juries, and Convictions: The Relevance of Race in Jury Verdicts*, 31 J. CRIME & JUST. 149 (2008).

[128] Norbert L. Kerr et al., *Defendant-Juror Similarity and Mock Juror Judgments*, 19 LAW & HUM. BEHAV. 545 (1995).

[129] *See generally* Bette L. Bottoms et al., *Explaining Gender Differences in Jurors' Reactions to Child Sexual Assault Cases*, 32 BEHAV. SCI. & L. 789 (2014).

[130] BALDUS ET AL., supra note 127, at 403–04. For a direct test of the liberation hypothesis using pretrial publicity influence as the dependent variable, see Dennis J. Devine et al., *Strength of Evidence, Extra Evidentiary Influence, and the Liberation Hypothesis: Data from the Field.*, 33 LAW & HUM. BEHAV. 136 (2009).

[131] Broeder, *supra* note 118, at 747.

[132] See REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 22–23 (1983) for information on the "story model" of deliberations.

decisions about their verdict preferences prematurely, before the conclusion of evidence and arguments?[133]

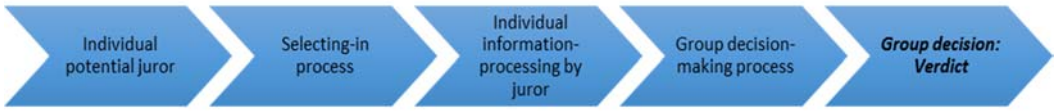
Jury research along these lines began to flourish within several years of *The American Jury*'s publication,[134] and psychologists, in particular, have produced a substantial proportion of this work.[135] Numerous tangents of this body of research and multiple ways to map it exist. For the purposes of this Article, this research will be broken down in its sequential order to describe relevant research that speaks to influences, at both the individual and group levels, on the jury's decision, beginning with the potential *venire* person through to the final verdict in a criminal matter. As the diagram below models, there are multiple stages and levels in the jury process which can influence verdict outcomes above and beyond the testimony, evidence, and arguments in a given case. Put simply, how a case is understood and assessed will vary as a function of the individuals tasked with fact-finding and the unique group dynamics of the jury unit. Therefore, how individuals are identified for selection, who is seated and who is excluded, and how that assemblage of individuals relates and undertakes the fact-finding task will matter, to varying degrees, for the outcome determination.

[133] Robert MacCoun, *Experimental Research on Jury Decision-making*, 30 JURIMETRICS J. 223 (1990).

[134] Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-five Years*, 16 LAW & SOC. INQUIRY 323 (1991).

[135] *See* DENNIS J. DEVINE, JURY DECISION MAKING: STATE OF THE SCIENCE (2012) [hereinafter DEVINE, JURY DECISION MAKING]; Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001) [hereinafter Devine et al., *45 Years*]. For a collection of recent work by psychologists, see 1 JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES (Joel D. Lieberman & Daniel A. Krauss eds., 2009).

Figure 1: Stages and Levels of Influence of Jury Decision-making:



This Article views this as a path-dependent, cumulative effects model, in which the earlier-stage outcomes shape later-stage processes. In other words, each stage involves processes that themselves may be subject to bias, extra-legal influence, and error, and those biases and errors move on in consequential ways through the subsequent steps.[136] This Article will primarily focus on individual-level juror attributes and how they interact with defendant and victim characteristics. It will then move on to examine group-level processes that lead to a jury verdict, with a focus on how jury composition shapes outcomes, including members' demographic make-up, case characteristics and decision-making criteria, and jury size.

B. *Demographic, Experiential, and Attitudinal Variability of Jurors*

1. Juror Characteristics and Judgment

Despite the mythological legal ideal of the juror as a "blank slate,"[137] potential jurors arrive at courthouses with a diverse array of life experiences, which emerge in part from their social and demographic backgrounds. These life experiences influence jurors' perceptions, knowledge bases, attitudes, and beliefs. Individual characteristics can, in turn, condition how jurors understand and judge case information.[138] Some psychological research has demonstrated that individual juror characteristics can matter in juror decision-making for cases involving criminal charges, and the degree of influence typically varies as a function of case facts.[139] Personality

[136] For a full discussion of such a model in the capital case context, see Mona Lynch and Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW AND SOC'Y REV. 69 (2011).

[137] *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 6 (1988).

[138] DEVINE, JURY DECISION MAKING, *supra* note 135.

[139] *See generally id.* at 103–16.

traits like dogmatism[140] and authoritarianism,[141] for instance, have been shown to predict conviction-proneness.[142] Attitudes about punishment, especially capital punishment, can also influence judgment processes and verdict preferences.[143] Because death penalty attitudes are central to the capital jury qualification process,[144] they have been most extensively studied.[145] Generally, research indicates that support for capital punishment predicts both conviction-proneness[146] and premature judgments of guilt.[147]

2. Juror-Defendant Interactions

Juror characteristics can also interact with defendant characteristics. For instance, a number of studies have demonstrated a "similarity-leniency effect,"[148] whereby jurors who share demographic features with the defendant, including gender, socio-economic status, and especially racial or ethnic identity, are acquittal-prone in weak-evidence cases. Conversely, studies have also shown a "Black sheep effect," whereby similar jurors are guilt-prone in strong-evidence cases.[149]

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[140] Heather M. Kleider, Leslie R. Knuycky & Sarah E. Cavrak, *Deciding the Fate of Others: The Cognitive Underpinnings of Racially Biased Juror Decision Making*, 139 J. GEN. PSYCHOL. 175 (2012) (discussing the issues of cognitive capacity of jurors, evidence type, and racial bias in outcomes).

[141] Douglass J. Narby, Brian L. Cutler & Gary Moran, *A Meta-Analysis of the Association Between Authoritarianism and Jurors' Perceptions of Defendant Culpability*, 78 J. APPLIED PSYCHOL. 34 (1993).

[142] Carol M. Werner, Dorothy K. Kagehiro, & Michael J. Strube, *Conviction Proneness and the Authoritarian Juror: Inability to Disregard Information or Attitudinal Bias?*, 67 J. APPLIED PSYCHOL. 629, 629 (1982).

[143] For a review, see Mona Lynch, *The Social Psychology of Capital Cases*, *in* JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES 157 (Joel D. Lieberman & Daniel A. Krauss eds., 2012).

[144] *Id.*

[145] *Id.* For an example of such work, see Craig Haney, Aida Hurtado & Luis Vega, *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619 (1994).

[146] William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 104 (1984) (explaining that death penalty attitudes predict conviction proneness through differential interpretation of evidence).

[147] W. J. Bowers, M. Sandys & B. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1531 (1998).

[148] DEVINE, JURY DECISION MAKING, *supra* note 135, at 113.

[149] *Id.*

The other side of this coin, of course, is out-group bias, whereby defendants with dissimilar demographics from jurors will be generally disadvantaged.[150] Experimental mock jury research on capital penalty-phase decision-making has demonstrated that White men may be particularly prone to exercising out-group bias, in that they are significantly more likely to sentence a Black male defendant to death than they are to sentence an otherwise identical White male defendant.[151] Notably, in this study, racially disparate sentencing was isolated to the White male participants as a subgroup, suggesting that in-group/out-group biases may be particularly problematic for this group.[152] More generally, a meta-analysis of thirty-four mock jury studies involving nearly 7400 participants indicates that "participants were more likely to render guilt judgments for other-race defendants than for defendants of their own race."[153] Taken together, these findings appear to suggest that racial identification with the defendant can be an important moderator of verdicts, particularly in equivocal cases.

Because the vast majority of criminal defendants are men,[154] there would seem to be the potential for a gender-based out-group bias among women jurors for most criminal cases. Moreover, while "literally hundreds of jury studies have measured participant gender[,] . . . [f]ormal hypotheses or even explicit expectations regarding participant gender are actually rather rare."[155] Of the body of research that has focused on gender differences and lay judgment in criminal cases, most studies have used various sexual assault

[150] *E.g.*, R. Michael Bagby & Neil A. Rector, *Prejudice in a Simulated Legal Context: A Further Application of Social Identity Theory*, 22 EUROPEAN J. SOC. PSYCHOL. 397, 397–406 (1992). But see Jan-Willem van Prooijen & Jerôme Lam, *Retributive Justice and Social Categorizations: The Perceived Fairness of Punishment Depends on Intergroup Status*, 37 EUROPEAN J. SOC. PSYCHOL. 1244, 1244–55 (2007), where in-group/out-group relational status mediates this effect.

[151] Lynch & Haney, *supra* note 136, at 87 (finding that White male mock jurors sentenced the White male defendant at rates similar to women and non-Whites (60% versus 62%), but were significantly more punitive toward the Black defendant than their peers (84% versus 64% death sentences)).

[152] *Id.* at 86.

[153] Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627 (2005).

[154] The Bureau of Justice Statistics survey of the nation's seventy-five largest counties in 2009 (the most recent survey available) indicates that 83% of felony defendants that year were men and 17% were women. BRIAN A. REAVES, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 5, http://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

[155] DEVINE, JURY DECISION MAKING, *supra* note 135, at 111.

scenarios to test hypotheses.[156] Much of that research suggests that women are more conviction-prone[157] than men, which may stem from either out-group bias against the defendant or in-group empathy for the victim.[158]

For instance, an experimental study that varied the gender of both victim and defendant in a child sexual abuse case found that "women jurors were generally more pro-victim in their case judgments than were men jurors."[159] Nonetheless, the gender of victim did not mediate women's assessment of the case, but it did so for men, in that they rated male victims as more responsible for the crime than female victims.[160] Moreover, female mock jurors were no more sympathetic to the female defendant than were male jurors (both groups, but especially the male jurors, were more lenient toward the female defendant),[161] suggesting that perhaps females are less prone to in-group biases than males.[162]

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[156] For child sexual assault studies, see Bette L. Bottoms et al., *A Review of Factors Affecting Jurors' Decisions in Child Sexual Abuse Cases*, *in* THE PSYCHOLOGY OF EYEWITNESS MEMORY 1 (2007) [hereinafter Bottoms, *Review*]; Bette L. Bottoms, Suzanne L. Davis & Michelle A. Epstein, *Effects of Victim and Defendant Race on Jurors' Decisions in Child Sexual Abuse Cases*, 34 J. APPLIED SOC. PSYCHOL. 1 (2004); Bette L. Bottoms & Gail S. Goodman, *Perceptions of Children's Credibility in Sexual Assault Cases*, 24 J. APPLIED SOC. PSYCHOL. 702 (1994). For a review of studies on rape, see Amy Grubb & Julie Harrower, *Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim*, 13 AGGRESSION & VIOLENT BEHAV. 396 (2008).

[157] In the case of rape, see, for example, Nancy Brekke & Eugene Borgida, *Expert Psychological Testimony in Rape Trials: A Social Cognitive Analysis*, 55 J. PERSONALITY PSYCHOL. 372, 372, 384 (1988); Kathleen McNamara, Frank Vattano & Wayne Viney, *Verdict, Sentencing, and Certainty as a Function of Sex of Juror and Amount of Evidence in a Simulated Rape Trial*, 72 PSYCHOL. REP. 575 (1993). In the case of child sexual abuse, see Natalie J. Gabora, Nicholas P. Spanos & Amanda Joab, *The Effects of Complainant Age and Expert Psychological Testimony in a Simulated Child Sexual Abuse Trial*, 17 LAW & HUM. BEHAV. 103 (1993); Jodi A. Quas et al., *Effects of Victim, Defendant, and Juror Gender on Decisions in Child Sexual Assault Cases*, 32 J. APPLIED SOC. PSYCHOL. 1993 (2002). Schutte and Hosch conducted a meta-analysis of experimental studies deploying both child sexual abuse and rape case scenarios and found that women were more conviction-prone than men across all the included studies. James W. Schutte & Harmon M. Hosch, *Gender Differences in Sexual Assault Verdicts: A Meta-Analysis*, 12 J. SOC. BEHAV. & PERSONALITY 759 (1997). Women have also been found more likely to support detention when asked to evaluate "sexually violent predators" involving an adult victim. *See* Laura S. Guy & John F. Edens, *Juror Decision-making in a Mock Sexually Violent Predator Trial: Gender Differences in the Impact of Divergent Types of Expert Testimony*, 21 BEHAV. SCI. & L. 215 (2003).

[158] Sheila R. Deitz et al., *Measurement of Empathy Toward Rape Victims and Rapists*, 43 J. PERSONALITY & SOC. PSYCHOL. 37 (1982) (reporting higher rates of empathy for rape victims among women in comparison to men).

[159] Quas et al., *supra* note 157, at 2009.

[160] *Id.* at 2005.

[161] *Id.*

[162] Devine's review of the literature on juror gender concurs with this. *See* DEVINE,

Outside of the sexual assault/abuse context, which potentially triggers greater gender differences in judgment due to the nature of the cases, only a small handful of studies systematically examine the effect of juror gender on judgment.[163] Consistent with the sex-related case paradigms, experimental research finds that women are also more conviction-prone than men in elder abuse cases, for male and female defendants, and for male and female victims.[164] Also, several death penalty mock jury studies report on juror gender in sentence verdict preferences. These studies find that men are more likely than women to "qualify" as capital jurors,[165] and men are more likely to favor a death sentence than women when making a penalty judgment even among those death qualified.[166]

A body of research also suggests that laypersons' stereotypes about crime interact with a defendant's race in a biasing manner. For instance, in mock jury studies, minority defendants charged with stereotypical "street crimes" were treated more harshly than White defendants, whereas White defendants were treated more harshly when accused of "white collar" crimes.[167] Stereotyped judgments appear to derive from both racial and class cues about the defendant. In another example, White mock jurors demonstrate bias against a Latino defendant charged with auto theft, relative to an otherwise identical White defendant, when the defendant is also characterized as being of a low socio-economic status, but not when he is portrayed as being of a higher socio-economic status.[168] Moreover, the Latino defendant of a low socio-economic status was treated more harshly in

JURY DECISION MAKING, *supra* note 135, at 112.

[163] *Id.*

[164] Jonathan M. Golding et al., *The Effect of Gender in the Perception of Elder Physical Abuse in Court*, 29 LAW & HUM. BEHAV. 605 (2005).

[165] Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481 (2009) [hereinafter Lynch & Haney, *Capital Jury*]; Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337 (2000) [hereinafter Lynch & Haney, *Discrimination*]; Monica K. Miller & R. David Hayward, *Religious Characteristics and the Death Penalty*, 32 LAW & HUM. BEHAV. 113 (2008).

[166] Lynch & Haney, *Capital Jury*, *supra* note 165, at 486; Lynch & Haney, *Discrimination*, *supra* note 165, at 346.

[167] Randall A. Gordon, et al., *Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions*, 128 J. SOC. PSYCHOL. 191 (1988); *see also* Christopher S. Jones & Martin F. Kaplan, *The Effects of Racially Stereotypical Crimes on Juror Decision-making and Information-processing Strategies*, 25 BASIC & APPLIED SOC. PSYCHOL. 1 (2003).

[168] C. Willis Esqueda, R.K.E. Espinoza & S. Culhane, *The Effects of Ethnicity, SES, and Crime Status on Juror Decision Making: A Cross-Cultural Examination of European American and Mexican American Mock Jurors*, 30 HISPANIC J. BEHAV. SCI. 181 (2008).

this study than all others, even for the "white collar" crime of embezzlement.[169] On the other hand, no in-group favoritism for the Latino defendant was demonstrated: Latino jurors treated White and Latino defendants similarly no matter the crime or the perceived socio-economic status of the defendant.[170] Contributing to the overall bias against non-White defendants is the widely-held presumption that, absent any countering information, laypersons "see" minority defendants as lower class and view White defendants as belonging to a higher socio-economic status.[171]

Psychological research has also pinpointed several conditions in which out-group bias of this sort is either muted or even reversed. For example, Samuel Sommers and his colleagues have found that when race is made salient by making it relevant to the fact pattern in a mock criminal case, the bias of White jurors against Black defendants is attenuated, whereas without such "notice" of race's relevancy, Whites demonstrate negative racial bias.[172] Moreover, several mock juror studies examining White participants' judgments of "hate crime" cases have found that they produce higher rates of guilt and more punitive recommendations for sentencing against White defendants than Black defendants.[173] In this case, race is not only salient, but racial animus is a central element to the crime, which undoubtedly contributes to the guilt ratings as well as the sentence recommendations.

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[169] *Id.*

[170] *Id.*

[171] Jeffrey E. Pfeifer & Daniel J. Bernstein, *Expressions of Modern Racism in Judgments of Others: The Role of Task and Target Specificity on Attributions of Guilt*, 31 SOC. BEHAV. & PERSONALITY 749, 755 (2003) (finding "subjects were significantly more likely to perceive the defendant as black when he was portrayed as a low, as opposed to high, social status individual and more likely to perceive him as white when the defendant was portrayed as a high social status individual").

[172] Ellen S. Cohn, Donald Bucolo, Misha Pride & Samuel R. Sommers, *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953, 1964–65 (2009); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1376 (2000); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 220 (2001) [hereinafter Sommers & Ellsworth, *White Juror Bias*]; *see generally* Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009) [hereinafter Sommers & Ellsworth, *Race Salience*] (generally summarizing research on the race salience effect).

[173] Phyllis B. Gerstenfeld, *Juror Decision Making in Hate Crime Cases*, 14 CRIM. JUST. POL'Y REV. 193 (2003); Amy Marcus-Newhall, Laura Palucki Blake & Julia Baumann, *Perceptions of Hate Crime Perpetrators and Victims as Influenced by Race, Political Orientation, and Peer Group*, 46 AM. BEHAV. SCIENTIST 108 (2002).

3. Juror-Victim Interactions

With regard to victim characteristics and jury decision-making, the most robust research comes from the death-sentencing arena, wherein a relatively strong and consistent devaluation of minority victims has been observed in the United States context.[174] Studies that use regression analytic techniques to examine actual sentence outcomes in death penalty jurisdictions across the nation have found that White victims are significantly more likely to prompt death sentences than Black victims after controlling for legally relevant factors.[175] Findings from the capital context also indicate an interaction effect, in which mock jurors will most likely sentence Black defendants convicted of killing White victims to death.[176] Finally, recent work re-examining these studies[177] to consider both race and gender of victims, has found that cases involving Black male victims were the least likely to result in a death sentence.[178]

In the non-capital homicide context, studies that use actual case outcome data from varied U.S. jurisdictions suggest that juries are

[174] *See, e.g.*, DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) [hereinafter BALDUS ET AL., EQUAL JUSTICE]; David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1997) [hereinafter Baldus et al., *Racial Discrimination*]; John J. Donohue, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637, 696 (2014); Radha Iyengar, *Who's the Fairest in the Land? Analysis of Judge and Jury Death Penalty Decisions*, 54 J.L. & ECON. 693 (2011); Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 IOWA L. REV. 1925 (2011). Contradicting the longstanding, robust findings of these differences is Wesley G. Jennings et al., *A Critical Examination of the "White Victim Effect" and Death Penalty Decision-Making from a Propensity Score Matching Approach: The North Carolina Experience*, 42 J. CRIM. JUST. 384 (2014).

[175] *See supra* note 174 and accompanying text. Note especially BALDUS ET AL., EQUAL JUSTICE, *supra* note 174, and Baldus et al., *Racial Discrimination supra* note 174. *See also* U.S. GOV'T ACCT. OFF., GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Feb. 1990), http://www.gao.gov/assets/220/212180.pdf; Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital Cases*, 46 CRIMINOLOGY 971 (2008).

[176] *See supra* note 174 and accompanying text; *see also* Lynch & Haney, *Discrimination*, *supra* note 165.

[177] Marian R. Williams, Stephen Demuth & Jefferson E. Holcomb, *Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-Related Victimization, and Jury Decision Making*, 45 CRIMINOLOGY 865, 868 (2007).

[178] *Id.* at 865.

more lenient toward defendants who have killed non-Whites,[179] men,[180] and those whose victims "physically provoked" the defendant.[181] Other research using experimental methodology has found that Black and Latino child sexual assault victims are viewed by mock jurors as more responsible for their own abuse than White victims; however, that did not translate into less culpability for the defendant.[182] Conversely, mock juror research using "hate crime" case facts indicates that Black victims prompt stronger assessments of guilt and more severe punishment recommendations relative to cases involving White victims.[183] This finding lends support to Sommers and Ellsworth's thesis that race "salience" counteracts derogation of minorities in the criminal justice system.[184]

In regard to victim-juror interactions, as noted above, prior mock jury research indicates that women are more conviction-prone in sexual violence cases involving female and child victims.[185] In experimental research using an acquaintance rape case scenario, researchers found that men and women differ in their assessments of the case, with women expressing more support for victims.[186] Both male and female mock jurors, however, devalue Black female victims relative to White female victims.[187] Australian researchers have examined the interactions of juror gender with the male defendant's and female victim's race, respectively, among a White Australian participant group who rendered verdict preferences and sentence recommendations after reading about a non-capital murder case.[188] Findings indicated that, "female mock jurors were particularly severe toward the Black defendant in comparison to the White defendant and were more punitive toward the Black defendant than their male

[179] Eric P. Baumer, Steven F. Messner & Richard B. Felson, *The Role of Victim Characteristics in the Disposition of Murder Cases*, 17 JUST. Q. 281, 299 (2000); Theodore R. Curry, *The Conditional Effects of Victim and Offender Ethnicity and Victim Gender on Sentences for Non-capital Cases*, 12 PUNISHMENT & SOC'Y 438, 449–52 (2010).

[180] Curry, *supra* note 179.

[181] *Id.*; Baumer, et al., *supra* note 179, at 290.

[182] Bottoms, Davis & Epstein, *supra* note 156, at 21–22.

[183] Marcus-Newhall et al., *supra* note 173, at 130.

[184] Sommers & Ellsworth, *Race Salience*, *supra* note 172, at 606.

[185] Bottoms, *Review*, *supra* note 156; *see also* Schutt & Hosch, *supra* note 157.

[186] Linda A. Foley et al., *Date Rape: Effects of Race of Assailant and Victim and Gender of Subjects on Perceptions*, 21 J. BLACK PSYCHOL. 6, 12 (1995).

[187] *See id.* at 6; *see also* Roxanne A. Donovan, *To Blame or Not to Blame Influences of Target Race and Observer Sex on Rape Blame Attribution*, 22 J. INTERPERSONAL VIOLENCE 722 (2007) (demonstrating more victim blame of Black rape victims by White male study participants, but not White female study participants).

[188] Robert Forster Lee et al., *The Effects of Defendant Race, Victim Race, and Juror Gender on Evidence Processing in a Murder Trial*, 24 BEHAV. SCI. & L. 179 (2006).

counterparts."[189] Across both male and female participants, the "defendant was given a more punitive sentence for the Black victim as compared to the White victim,"[190] which directly contrasts the American studies discussed *supra*.[191]

4. Self-defense Cases and Juror Judgment

Finally, in regard to case facts relevant to the Zimmerman trial, some empirical research exists discussing how laypersons consider claims of self-defense; however, most of the research is specific to Battered Woman's Syndrome and the effect of expert testimony on judgments of guilt.[192] Dan Kahan and Donald Braman, however, conducted a study that examined lay judgments in two very divergent cases of self-defense: a battered woman scenario involving a woman who shot and killed her abusive husband while he slept; and a scenario involving a White forty-two-year-old male commuter who fatally shot a Black seventeen-year-old young man who had asked the defendant for money on a subway platform, which the defendant interpreted as threatening based on his previous victimizing experiences.[193] In this study, the researchers focused on how political beliefs, cultural worldviews, and other such cognitions shaped assessments of the cases.[194] Kahan and Braman's findings also speak to demographic differences in how these two different uses of the self-defense justification are interpreted.[195]

A nationally representative sample of 1600 American adults participated online in Kahan and Braman's study and were assigned to one of the two self-defense conditions.[196] In both scenarios, the "danger" posed by the victim was made ambiguous, as were the defendants' ability to flee or retreat without using violence.[197] The findings reveal significant differences in predictors of acquittal as a function of case type. Overall, findings of guilt were much lower (33% versus 47%) for the White commuter scenario compared to the

[189] *Id.* at 192–93.

[190] *Id.* at 189.

[191] Baumer et al., *supra* note 179; Curry, *supra* note 179.

[192] *See* DEVINE, JURY DECISION MAKING, *supra* note 135, at 134–36 for a discussion of this work.

[193] Dan M. Kahan & Donald Braman, *The Self-defensive Cognition of Self-defense*, 45 AM. CRIM. L. REV. 1, 64–65 (2008).

[194] *Id.*

[195] *Id.*

[196] *Id.* at 27.

[197] *Id.* at 28–34.

battered woman scenario.[198] Whites and political conservatives were significantly more likely to acquit in the White commuter case, with only 29% of Whites finding the defendant guilty compared to 56% of Black participants finding him guilty.[199] The researchers modeled the decision-making process and found that being White, female, politically conservative, less educated, and ascribing to hierarchical and individualist worldviews all predicted pro-defendant interpretation of the evidence in the White commuter scenario case which then led to a preference for acquittal.[200] Notably, political conservatism and hierarchical worldviews had the opposite effect in the battered woman scenario.[201] Thus, beliefs (likely often shaped by demographics) become an interpretive tool for making sense of ambiguous facts in such cases.

This study is the most relevant systematic empirical examination of laypersons' interpretation of case facts with some resonance to the Zimmerman case. Indeed, above and beyond political and worldview perspectives, White female jurors were especially prone to acquittal in the White commuter scenario.[202] Given that five of the six Zimmerman jurors were White women,[203] this suggests that a finding of guilt with this particular group would be harder to achieve than with a more diverse group. This study also clearly shows that the particulars of the kind of self-defense case significantly interact with juror characteristics.[204] The acquitting juror in the White commuter scenario looks more like a convicting juror in other criminal matters, both demographically and attitudinally.

C. *From Jurors to Juries*

The vast majority of experimental trial simulation research has focused on individual responses to criminal cases rather than group decision-making processes, which limits the findings' applicability to the "real world" conditions in which juries deliberate to a verdict.[205]

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[198] *Id.*

[199] Kahan & Braman, *supra* note 193, at 42. Political conservatives were also less likely to find him guilty (23%) than were liberals (43%). *Id.*

[200] *Id.* at 45–46.

[201] *Id.* at 52–53.

[202] *Id.*

[203] Buckley, *supra* note 40. The sixth juror was an Hispanic woman who, post-verdict, revealed that she supported conviction on second degree murder, but was bullied into going along with acquittal.

[204] Kahan & Braman, *supra* note 193, at 54.

[205] This "external validity" critique is just one of several, including the pervasive use of college students as participants and the unrealistic stimulus materials (often written

While a relatively large and consistent body of research indicates that majority pre-deliberation preferences do predict final verdicts,[206] a number of features of the group process (both in terms of composition and deliberative process) are important to the resolution of cases.[207] In short, the group outcome is not always the sum of its individuals' preferences. In this section, this Article will first review the research on jury composition effects, including the demographic make-up of the group and the specific issue of the jury size, and then will discuss research relevant to the jury deliberation and decision-making process.

1. The Construction of Juries and Challenges to Diversity

Many scholars have revealed that systematic demographic bias is built into our system of identifying potential jurors for service and then selecting them to serve.[208] Hiroshi Fukurai and Richard Krooth suggest that "each and every stage of jury selection excludes a disproportionate number of racial and ethnic minorities from effectively serving as jurors."[209] This is partially driven by factors such as residential stability (which correlates with economic stability, ethnicity, and age) since a primary mode of identifying eligible jurors is through the voting rolls.[210] The blanket exclusions that many districts impose, based on citizenship status,[211] language skills,[212] and felony record,[213] also serve to homogenize jury pools. Once called to service, the jury selection process further biases the composition of seated juries, particularly in capital cases.[214]

summaries or abbreviated transcripts) used to simulate the trial. See Shari Seidman Diamond, *Illuminations and Shadows from Jury Simulations*, 21 LAW & HUM. BEHAV. 561 (1997) for an early critique and DEVINE, JURY DECISION MAKING, *supra* note 135, at 23 for a more recent one.

[206] KALVEN & ZEISEL, *supra* note 121; HASTIE ET AL., *supra* note 132.

[207] Diamond, *supra* note 205, at 564–66. See Lynch & Haney, *supra* note 136, at 95, for a discussion of this in a capital penalty context.

[208] *See, e.g.*, HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY (1993); HIROSHI FUKURAI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION (2003); Ronald Randall, James A. Woods & Robert G. Martin, *Racial Representativeness Of Juries: An Analysis of Source List and Administrative Effects on The Jury Pool*, 29 JUST. SYS. J. 71 (2008); Mary R. Rose, *Access to Juries: Some Puzzles Regarding Race and Jury Participation*, 12 SOC. CRIME L. & DEVIANCE 119 (2009).

[209] FUKURAI & KROOTH, *supra* note 208, at 2; *see also* Randall, *supra* note, at 81.

[210] Rose, *supra* note 208, at 124.

[211] *Id.* at 126.

[212] *Id.*

[213] 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 (2014); Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J. 335 (2011).

[214] In general, the process by which potential jurors are excused in criminal cases

The use of peremptory challenges contributes to the selection bias during voir dire, particularly when used by prosecutors.[215] Samuel Sommers and Michael Norton conducted experiments to test whether peremptory use was race-based and to document how the apparent race-based use was justified in race-neutral terms. The researchers found that across three different samples of participants, individuals who role-played as prosecutors in a Black defendant criminal case were significantly more likely to exclude potential Black jurors compared to otherwise identical potential White jurors.[216] Participants in each study derived wholly race-neutral justifications for their exclusions in 92–94% of the cases.[217] While such biased exclusion is especially likely, and especially problematic, in cases involving non-White defendants, it pervades as a practice no matter the race of the defendant given the presumption that Black jurors are acquittal-prone.[218]

In the death penalty context, prosecutors appeared to view Black venire members as less likely to sentence to death and, as a result, prosecutors disproportionately struck these members during voir

disproportionately removes people of color, young people, and women. See Shamena Anwar, Patrick J. Bayer & Randi Hjalmarsson, *The Role of Age in Jury Selection and Trial Outcomes* (Economic Research Initiatives at Duke (ERID), Working Paper No. 146, 2013), on the issue of age biasing. In capital cases the requisite death qualification procedure exacerbates this bias. *See* Haney, Hurtado & Vega, *supra* note 145, at 629–30; Alicia Summers, R. David Hayward & Monica K. Miller, *Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics*, 40 J. APPLIED SOC. PSYCHOL. 3218, 3228–29 (2010).

[215] In non-capital and capital cases alike, peremptory challenges can and are used to remove non-Whites, usually by prosecutors. *See* Samuel R. Sommers, & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527 (2008) [hereinafter Sommers & Norton, *Race and Jury Selection*]. For gender-based exclusions, see Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAV. DECISION MAKING 467 (2007). For an examination in the capital context, see David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) [hereinafter Baldus et al., *The Use of Peremptory Challenges*]; Catherin M. Grosso, Barbara O'Brien & George G. Woodworth, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57 (2009).

[216] The participant groups were, respectively, college students, law students, and lawyers. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007).

[217] *See id.* at 267 ("Despite the fact that race clearly played a role in peremptory judgments, only 7% of college students, 6% of law students, and 8% of attorneys cited race as influential.").

[218] Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61 (1986).

dire.[219] For instance, David Baldus and his colleagues documented the peremptory strike practices in 317 Philadelphia capital cases over a sixteen-year-period, finding that prosecutors were *especially* likely to excuse young Black men from serving, and they primary excluded Black potential jurors of all ages and both genders.[220]

In cases like Zimmerman's, Black venire members would likely be viewed as liabilities to the defense rather than to the prosecution; indeed, the defense used two of their three exercised strikes against Black potential jurors, while six of the seven strikes that the prosecution attempted to exercise were of White women.[221] The defense also challenged the prosecution's sequential strike of four White women on *Batson* grounds; the judge overturned two of those strikes.[222]

2. Biasing Effects of Jury Homogeneity

Given what we know about the similarity-leniency bias and the operation of subtle forms of White racism against minorities in judgment settings,[223] the demographic skewing of criminal juries can lead to disparities in verdict outcomes above and beyond the individual juror-level effects described previously. Indeed, a growing body of research indicates that jury group diversity improves the quality of deliberation and decision-making through the very process of bringing together persons with different backgrounds, life experiences, and perspectives.[224]

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[219] Baldus et al., *The Use of Peremptory Challenges*, *supra* note 215, at 124; Grosso et al., *supra* note 215, at 1548.

[220] Baldus et al., *The Use of Peremptory Challenges*, *supra* note 215, at 121–22.

[221] Michael Smerconish, *Did Gender, Not Race, Decide Zimmerman Verdict?*, SUN SENTINEL (Aug. 3, 2013), http://articles.sun-sentinel.com/2013-08-03/news/fl-mscol-zimmerman-oped0803-20130803_1_not-guilty-verdict-george-zimmerman-jury-consultant.

[222] In *Batson v. Kentucky*, 476 U.S. 79 (1986), the U. S. Supreme Court ruled that the defendant's equal protection rights were violated when the prosecutor used peremptory challenges to remove prospective jurors on the basis of race. *Jury Selected in George Zimmerman Murder Trial*, CLICK ORLANDO (June 20, 2013), http://www.clickorlando.com/news/jury-seated-in-george-zimmerman-murder-trial/20648712.

[223] For review of similarity-leniency, see Devine et al., *45 Years*, *supra* note 135. For White racism in judgment settings, see Sommers & Ellsworth, *White Juror Bias*, *supra* note 172.

[224] Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171 (2007). For capital context, see Lynch and Haney, *supra* note 136.

Sommers experimentally examined the decision-making processes of twenty-nine six-person mock juries that considered a criminal case involving a Black defendant.[225] Half of the mock jury groups were "diverse," comprised of two Blacks and four Whites, and the other half were all-White.[226] Sommers found that the diverse groups deliberated longer, discussed more of the case facts, and were less likely to assert inaccurate facts or information in comparison to the all-White groups.[227] These findings indicated that jurors in diverse groups engaged in more systematic information processing and more careful consideration of relevant case facts, leading Sommers to conclude that in "every deliberation measure examined in the present research, heterogeneous groups outperformed homogeneous groups."[228]

Research has portrayed White-dominated juries as more conviction-prone and punitive against non-White defendants than more diverse juries.[229] For instance, Marian Williams and Melissa Burek examined felony trial outcomes from four large jurisdictions in the United States and found that "juries with a higher percentage of whites serving on them were more likely to convict black defendants,"[230] after controlling for legally relevant case factors.

Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson examined the impact of jury racial composition on 731 non-capital criminal trial outcomes in Sarasota County and Lake County, Florida between 2000 and 2010, uncovering a significant impact of jury pool diversity on case outcomes.[231] Specifically, "in cases with no blacks in the jury pool, black defendants are convicted at an 81% rate and white defendants at a 66% rate. When the jury pool includes at least one black potential juror, conviction rates are almost identical: 71% for black defendants and

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[225] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 602–03 (2006).

[226] *Id.* at 601.

[227] *Id.* at 604–06.

[228] *Id.* at 608.

[229] Williams & Burek, *supra* note 127. For out-group punitiveness against Latino defendants by White-dominated juries, see Delores A. Perez et al., *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. APPLIED SOC. PSYCHOL. 1249 (1993). But see, Howard C. Daudistel et al., *Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases*, 29 J. APPLIED SOC. PSYCHOL. 317 (1999) for a finding of significant out-group bias against White defendants among Latino-dominated juries in Texas.

[230] Daudistel et al., *supra* note 229; Williams & Burek, *supra* note 127, at 164.

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

73% for white defendants."[232] The finding holds for jury composition itself, in that juries with at least one Black juror seated led to almost identical conviction rates, regardless of defendant race.[233]

In the death penalty context, William Bowers and his colleagues have demonstrated a "white male dominance" effect, whereby capital juries with five or more White men are dramatically more likely to sentence to death Black defendants who kill White victims in comparison to similar cases without such a concentration of White men as jurors.[234] Conversely, Bowers and his colleagues also identified a "black male presence'' effect, whereby having at least one Black man on the jury significantly reduced the likelihood of a death sentence in Black defendant-White victim cases.[235]

Experimental research also observed the "white male dominance" effect on capital sentencing where small group juries comprised of 33% or more White men favored death in 86% of the Black defendant cases, but only in 63% of the otherwise identical White defendant cases.[236] In contrast, the groups not dominated by White men did not differentiate their sentence determination by race of defendant.[237] Very little research exists on how juries as groups differentially deliberate, in either capital or non-capital settings, as a function of their own composition in concert with victim characteristics. Outside of the Bowers et al. research on capital juries described above, research on victim effects has generally not examined interactions between victim demographics and jury composition factors.

3. Group Decision-Making Processes

As noted earlier, the Chicago Jury Project findings indicated a "net jury leniency"[238] in criminal verdicts when compared to judges' assessments of cases. This finding stimulated two bodies of research, the first of which examined how jurors and juries rely upon "extra-legal" factors, including sentiment or prejudice, in their judgments

[232] *Id.* at 1019.

[233] *Id.*

[234] 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, 192–94 (2001); William J. Bowers, Marla Sandys & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1501 (2004).

[235] Bowers, Sandys & Brewer, *supra* note 234, at 1501.

[236] Lynch & Haney, *supra* note 136, at 78, 84–85.

[237] *See id.* at 84–85.

[238] Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21, 21 (1988).

when liberated from the evidence due to its ambiguous or equivocal nature, as detailed above.[239] The finding that juries will more likely acquit than judges in weaker evidence cases has since been replicated, with recent researchers hypothesizing that "judges have a lower conviction threshold than juries."[240] The second body of research asked whether the group deliberation process itself produces a leniency bias.[241] The original Chicago Jury Project analyses did not support this hypothesis, finding instead that individual jurors' pre-deliberation assessments would generally predict verdict outcomes in a relatively straightforward manner, which suggested that the group decision-making process had little real effect on final verdicts.[242]

Subsequent research has challenged that supposition, demonstrating that an asymmetric majority-preference tipping point seems to operate in criminal case scenarios.[243] Thus, a meta-analysis of both experimental and field research jury studies indicates that if two-thirds of the jury members have a preference for an acquittal pre-deliberation, that will be the end verdict about 94% of the time, whereas the same majority favoring conviction pre-deliberation leads to just two-thirds, about 67%, of those final verdicts being convictions.[244] Moreover, in cases with even splits in pre-deliberation verdict preferences, jury units are about four times as likely to acquit as they are to convict.[245] The "leniency asymmetry effect" is not a general tendency towards acquittal; rather it is such that "a given faction favoring acquittal will tend to have a greater chance of prevailing than would an equivalently sized faction favoring conviction."[246] Robert Kerr and Norbert MacCoun suggest that this

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[239] *Id.*

[240] Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 172 (2005).

[241] MacCoun & Kerr, *supra* note 238, at 21.

[242] KALVEN & ZEISEL, *supra* note 121, at 288 (reporting further that in cases where there was an even split on the first ballot, half of the final verdicts were acquittals and half were convictions); Broeder, *supra* note 118, at 747 (reporting that analysis of the interviews with 1500 jurors from 213 cases indicated that juries almost universally took a first ballot "immediately" once retiring to deliberate, and "the majority on the first ballot almost always won. The majority won in approximately ninety percent of such cases").

[243] *See, e.g.*, MacCoun & Kerr, *supra* note 238, at 22.

[244] *Id.* at 30 (reporting on a meta-analysis of eleven studies that indicated a robust leniency "asymmetry effect").

[245] *Id.*

[246] Norbert L. Kerr & Robert J. MacCoun, *Is the Leniency Asymmetry Really Dead? Misinterpreting Asymmetry Effects in Criminal Jury Deliberation*, 15 GROUP PROCESSES & INTERGROUP REL. 585, 586 (2012). In this article, the authors reanalyze data reported

bias likely derives from the specific burden of proof in criminal cases, the "reasonable doubt" standard, since the effect disappears under a "preponderance of evidence" standard.[247] The bias will also most likely be present when the evidence is equivocal as to guilt, in that uncertainty pushes the group decision toward acquittal.[248]

Research suggests that deliberation styles can influence outcomes. Scholars have delineated two primary types of deliberations: verdict-driven, where the jury polls its members frequently and frames discussion around determining the appropriate verdict outcome;[249] and evidence-driven, whereby juries work to narratively construct an understanding of what happened without voicing verdict preferences, then select the verdict that best fits the constructed narrative.[250] Recent work by Nicole Waters and Valerie Hans indicates that deliberation styles impact whether and how individual jurors conform to, or dissent from, the majority.[251] Using a data set of interviews with nearly 3500 previous jurors from criminal trials in four different urban locations, Waters and Hans first found that about 10% of the sample disagreed with the majority preference at the end of deliberations although over three-quarters of those "dissenters" went along with the majority preference to achieve a unanimous verdict (characterized as "conformers").[252] The remaining 23% were "holdouts" who caused the jury to hang.[253] Collectively, "[o]ver half the juries (54 percent) included at least one juror whose one-person jury verdict diverged from the final vote of the jury."[254] The likelihood of having either kind of dissenter was strongly associated with deliberation style, in that those juries that had early votes and secret ballots especially seemed to

since the publication of the 1988 "Asymmetric Influence" that called into question the leniency asymmetry for actual juries, and found that while the effect was stronger for "mock juries" it was also present for actual juries.

[247] MacCoun & Kerr, *supra* note 238, at 27–30; s*ee also* Lynch & Haney, *Capital Jury*, *supra* note 165 (demonstrating in the California capital penalty-phase context, which has a preponderance standard, there appears to be a punitive asymmetry effect).

[248] Kerr & MacCoun, *supra* note 246, at 598–99.

[249] *See* Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 CHI.-KENT L. REV. 579, 585 (2007).

[250] *See generally* HASTIE ET AL., *supra* note 132. As Devine points out, deliberations are often a combination of the two styles. DEVINE, JURY DECISION MAKING, *supra* note 135, at 157.

[251] Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. EMPIRICAL LEGAL STUDS. 513 (2009).

[252] *Id.* at 525 (converting into percentages from last line of Table 2).

[253] *Id.* at 527 (converting into percentages portion of total "dissenters," N=351 that were "holdouts," N=82).

[254] *Id.* at 523.

generate dissenters.[255]

Additionally, those jurors especially likely to be conforming dissenters—going along with the verdict without agreeing with it—were those who favored convictions. Only 12.5% of conviction-favoring dissenters held out, whereas 35% of acquittal-favoring dissenters held out.[256] Dissenters in general felt less likely to influence during the deliberations and saw their peers as less open-minded.[257]

Finally, experimental research has found that some jurors are more likely to be given authority than others within deliberations. Whites, males, and more highly educated jurors are disproportionately likely to become forepersons.[258] Forepersons, in turn, are highly influential in shaping deliberations[259] and outcomes.[260] Even among the rest of the jurors, research suggests that demographic characteristics predict a member's influence on others' opinions. Men and those of higher socio-economic status are both perceived to be more influential to others and actually do participate more in deliberations.[261] Recent evidence shows that some jurors may be negative influences, driving others away from their positions.[262] Jessica Salerno, for instance, manipulated the gender of an angry holdout in a simulated deliberation and found that when female holdouts expressed anger in deliberations, they produced a boomerang effect, causing study participants (both male and female) to become even more confident in their own divergent viewpoints.[263] Conversely, angry male holdouts eroded participants' confidence in their own verdict preferences and pulled them toward the holdout.[264]

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[255] *Id.* at 526.

[256] *Id.* at 525.

[257] Waters & Hans, *supra* note 251, at 528.

[258] DEVINE, JURY DECISION MAKING, *supra* note 135, at 154–55.

[259] Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 226 LAW & SOC'Y REV. 513 (1992); Erin York & Benjamin Cornwell, *Status on Trial: Social Characteristics and Influence in the Jury Room*, 85 SOC. FORCES 455 (2006).

[260] Dennis J. Devine et al., *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. EMPIRICAL LEGAL STUDS. 273 (2007).

[261] DEVINE, JURY DECISION MAKING, *supra* note 135, at 166–67 (reviewing several studies that report such findings).

[262] Jessica M. Salerno, One Angry Woman: Emotion Expression and Minority Influence in a Jury Deliberation Context (2012) (unpublished Ph.D. dissertation, University of Illinois at Chicago) (on file with the University of Illinois at Chicago, available at https://indigo.uic.edu/bitstream/handle/10027/9602/Salerno_Jessica.pdf?sequence=1).

[263] *Id.*

[264] *Id.* at 52–54.

4. Six- vs. Twelve-Person Juries

Jury size remains the final relevant consideration of the jury research. In 1970, the U.S. Supreme Court upheld as constitutional Florida's practice of using six-person juries in felony criminal trials in the case of *Williams v. Florida*.[265] The Court referred to the difference between six-person and twelve-person juries as likely "negligible" in terms of its composition and function,[266] a view vehemently rejected by the leading jury scholars at the time.[267] In the wake of this decision, for instance, Hans Zeisel portended a significant negative effect on the jury as a legal institution.[268] Zeisel focused on two concerns: the impact on diversity of the jury as a body, and the impact on stability in outcomes across groups.[269] On the first concern, he estimated that for any minority group that comprises 10% of the population, approximately 72% of twelve-person juries would include at least one member of that group.[270] That estimate drops to 47% of all six-person juries, thereby excluding that minority group completely from more than half of all juries.[271] On the second concern, using probability estimates, Zeisel suggested that the decrease in jury size would increase the unpredictability of jury verdicts by approximately 41%, based on the increased variability in diversity between juries.[272] Since Zeisel made these predictions, empirical research has largely borne him out.[273]

In 1997, Michael Saks and Mollie Marti conducted a meta-analysis of eighteen studies that looked at the effect of group size on a number of variables, including diversity of representation, length and quality of deliberations, and variability in outcomes.[274] The researchers found that smaller juries were less diverse, deliberated for shorter periods of time, and, in several of the studies, jurors discussed fewer relevant case

[265] 399 U.S. 78 (1970).

[266] *Id.* at 102.

[267] DEVINE, JURY DECISION MAKING, *supra* note 135, at 42.

[268] Hans Zeisel, Six Man Juries, Majority Verdicts: What Difference Do They Make? 3 (1973) (unpublished manuscript) (on file with the University of Chicago Law School Occasional Papers, available at http://chicagounbound.uchicago.edu/cgi/view content.cgi?article=1023&context=occasional_papers).

[269] *Id.* at 4.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] See, for example, Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451 (1997), for a meta-analysis of studies that looked at jury size as an independent variable.

[274] *Id.*

facts and had poorer recall for case details.[275] No systematic differences in outcomes existed when juries reached a verdict, but there was a slightly higher likelihood of a hung jury with twelve-person juries.[276] This may well be the product of increased diversity of thought, as well as the higher likelihood that more than one dissenter will be present on twelve-person juries compared to six-person juries. Social psychological research on social influence and conformity has long shown that a single dissenter in a group judgment is more susceptible to pressure to conform than are pairs or other minority factions, at a frequency much greater than dissenting proportion would predict.[277] In other words, although a 2–10 split is proportionately equivalent to a 1–5 split, the latter dissenter will much more likely succumb to the majority group influence.

Because variety in perspectives among jury members may be partly driven by diverse life experiences, demographic characteristics, and social positions, the threat to jury heterogeneity posed by the six-person jury remains a major concern for jury researchers.[278] Shari Diamond, Destiny Peery, Francis Dolan, and Emily Dolan compared racial and ethnic heterogeneity of six-person versus twelve-person civil juries in Cook County, Illinois where the default jury size was six, unless a party demanded a twelve-person jury and paid the additional fees to empanel one.[279] The data were collected between 2001 and 2007, yielding 89 six-person juries and 188 twelve-person juries that had been selected from a venire pool that was 25% Black, 8% Latino, 63% White, and 4% other race/ethnicity or unknown.[280]

Findings indicated that nearly three out of every ten six-person juries contained no Black members and another three out of ten had only one Black member.[281] Only 2% of the twelve-person juries had no

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[275] *Id.* at 457.

[276] *Id.* at 459–61 (indicating that the actual effect size under real world conditions due to the common experimental design feature of presenting "ambiguous" cases, rather than cases with strong evidence toward conviction or acquittal).

[277] Psychologist Solomon Asch was the pioneer in-group conformity research. *See* Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority Of One Against A Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1 (1956). For a recent meta-analysis of group conformity studies, see Rod Bond, *Group Size and Conformity*, 8 GROUP PROCESSES & INTERGROUP REL. 331 (2005).

[278] *See, e.g.*, Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441 (2008).

[279] Shari Seidman Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 435 (2009).

[280] *Id.*

[281] *Id.* at 442.

Black members and another 16% had just one Black member.[282] Two-thirds of the six-person juries included no Hispanic members; that percentage was much lower (40%) with twelve-person juries.[283] Thus, while the selection process in this context did not further erode the representativeness of the seated juries, these findings directly demonstrate the increased risk of demographic homogeneity that attends six-person juries.[284]

Perhaps most on point is the work by economists Anwar, Bayer, and Hjalmarsson in Florida, described *supra*.[285] The data in this study indicated that 36% of the jury pools[286] for the criminal trials included no Black potential jurors, and 72% of the seated six-person juries did not include a single Black juror.[287] The disparity problem in convictions that the researchers demonstrated was therefore exacerbated by the widespread exclusion of Black jury members that comes with the six-person jury.[288] Thus, forty years after Zeisel issued his warnings about the impact of *Williams* on the jury's functionality and representativeness, Anwar and her colleagues directly linked Zeisel's two concerns explicitly to the problem of racial disparities in case outcomes, arguing that:

> [A] potentially desirable feature of a justice system is that jury verdicts are not arbitrary given the evidence. In this context, increasing the number of jurors on the seated jury would substantially reduce the variability of the trial outcomes, increase black representation in the jury pool and on seated juries, and make trial outcomes more equal for white and black defendants.[289]

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[282] *Id.*

[283] *Id.* at 444.

[284] *Id.* at 449 (concluding that the most straightforward solution to homogeneous juries is "a return to the 12-member jury").

[285] Anwar et al., *supra* note 231.

[286] *Id.* at 1019 (the mean pool size per felony trial in the sample was twenty-seven persons).

[287] *Id.* at 1029 (summary statistics table).

[288] *Id.* at 1035 (reporting a 16% gap in the rate of convictions between Blacks and Whites when no Blacks were on the jury; the gap disappeared when there was at least one Black juror).

[289] *Id.* at 1049.

IV. THE CONSTITUTIONAL IMPERATIVE OF DIVERSE JURIES & CHALLENGES TO THEIR REALIZATION

A. *Jury Representativeness and the Right to Exclude*

The Supreme Court has long maintained that the selection of a jury that adequately represents the broader community is important to both fundamental rights and democracy.[290] In *Taylor v. Louisiana*, Justice White noted that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[291] A representative jury, recognized by the Court for more than 100 years as part of a defendant's Sixth Amendment's right to an impartial jury, does not exclude any significant group in society.[292]

Over 100 years ago, a jury of one's peers included people of different races. One of the first cases to address the issue of a defendant's rights to a racially diverse jury was the 1879 case of *Strauder v. West Virginia*.[293] The defendant, a freed slave, sought to move his criminal trial from state court to federal court.[294] At the time, West Virginia law excluded Blacks from serving on grand and petit juries.[295] The defendant argued that the absence of Blacks from the jury prevented him from receiving a fair trial.[296] The Supreme Court agreed and upheld his claim.[297]

The entitlement to a jury that represents a fair cross-section of society has two key components. First, persons of the defendant's own race cannot be excluded. Second, and more broadly, even in cases in which the defendant is, for example, a White male, minorities and women should not be excluded from the jury pool as a matter of fairness to the defendant.[298] This has far broader implications for the jury as an institution than does a defendant's claim for inclusion of jurors who look like him or her. For instance, in *Taylor v. Louisiana*, the Court entertained a challenge posed by a male defendant who argued that the Louisiana law excluding women from jury service unless they previously filed written declaration, violated his Sixth

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[290] *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

[291] 419 U.S. 522, 528 (1975).

[292] J.E.B. v. Alabama ex rel. T.B., 551 U.S. 127, 142 (1994).

[293] 100 U.S. 303 (1879), *abrogated on different grounds by Taylor*, 419 U.S. at 522.

[294] *Strauder*, 100 U.S. at 311.

[295] *Id.* at 308.

[296] *Id.* at 304.

[297] *Id.* at 308.

[298] Powers v. Ohio, 499 U.S. 400, 422–23 (1991).

Amendment right to impartial jury.[299] The Court agreed, highlighting the central importance of a jury's representativeness as a general principle.[300] A representative jury is one that attorneys select from a pool that contains a fair cross-section of the community.[301] Justice White identified the fair-cross-section requirement as "fundamental to the jury trial guaranteed by the Sixth Amendment"[302] that was violated by the systematic exclusion of women from the jury.[303]

In *Taylor v. Louisiana*, the Supreme Court has acknowledged that the notion of representativeness is grounded in the essential function of juries as a democratic civic institution as we conceive of them in the United States. In this passage from *Taylor*, the Court highlights the rights of members of various community groups to participate in juries[304]:

> Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.[305]

As the Court makes clear in the passages cited above, representativeness of juries is critical, not just for sake of the parties in a given case, but also to democracy itself. In the Court's view, restricting service to some groups and excluding others undermines impartiality and prevents those excluded from fully participating in the body politic.

B. *The Effect of the Exclusion on Communities*

Though the holdings in all of the Sixth Amendment cases have necessarily been limited to the effect of exclusion on defendants,[306] as noted above, the Supreme Court has articulated other constitutional values inherent in the representativeness requirement in several other

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[299] Taylor v. Louisiana, 419 U.S. 522, 525 (1975).
[300] *Id.* at 528.
[301] *Id.* at 529.
[302] *Id.* at 530–31.
[303] *Id.* at 531.
[304] *See generally Taylor*, 419 at 530–31.
[305] *Taylor*, 419 U.S at 530–31 (internal citations omitted) (alterations in original).
[306] *See id.* at 522; Berghuis v. Smith, 559 U.S. 314, 314 (2010).

cases.[307] One value, distinct from that of the defendant's rights, concerns the rights of potential jurors to participate in this important civic activity.[308] The Court clearly stated that nearly all members of society are eligible by right to serve on juries.[309] In other words, excluding women and minorities from participating as jurors violates their participatory rights, regardless of defendants' interests.[310] The Court recognized these participatory rights as early as *Strauder v. West Virginia*.[311] In *Strauder*, the Court noted that excluding Blacks from juries damaged not just Black defendants but also Blacks who might participate as jurors.[312] The exclusion of Blacks, according to the Court, denies the class of potential jurors the "privilege of participating equally . . . in the administration of justice."[313] Exclusion from jury service also stigmatizes and is "practically a brand upon [individuals], affixed by the law, an assertion of their inferiority."[314]

The Court has ruled that the deliberate exclusion of members of a protected class (for instance, based on race or gender) from juries constitutes unconstitutional discrimination in violation of the Fourteenth Amendment's Equal Protection Clause.[315] In *J.E.B. v. Alabama*, the Court struck down gender-based peremptory challenges, noting not just the harm imposed by gender-based discrimination on the defendant and the individual juror, but also its negative impact on the community:

> Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process . . . . The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned

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[307] *Taylor*, 419 U.S. at 530.

[308] *Id.* at 530–31 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter J., dissenting)).

[309] The exceptions include blanket exclusion of felons in jurisdictions that choose to do so, exclusions on language ability, and those of citizen status. On the legal logic used to justify felon exclusion, see James M. Binnall, *Sixteen Million Angry Men: Reviving a Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service*, 17 VA. J. SOC. POL'Y & L. 1 (2009); Brian C. Kalt, *Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

[310] *Taylor*, 419 U.S. at 530.

[311] 100 U.S. 303, 308 (1879), *abrogated on different grounds by Taylor*, 419 U.S. at 522.

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] *See* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994); Batson v. Kentucky, 476 U.S. 79, 84–85 (1986).

discrimination in the courtroom engenders.[316]

In her concurrence, Justice O'Connor articulated the importance of gender-based inclusion, like race-based inclusion, to the deliberative process, intuiting what social science research has demonstrated: "[L]ike race, gender matters . . . . [O]ne need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. 'Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them.'"[317]

C. *Jury Blaming: A Tale of Two Female Dominated Juries*

As previously demonstrated, the selection of juries that adequately represent the diverse life experiences and perspectives of the full array of community members is a longstanding legal value. The Court has valorized the fair cross-section requirement for its value to individual defendants, potential jurors, and society, writ large. In contrast, however, the public sphere has not always been so laudatory, particularly in racially charged, controversial cases. A notable example of such criticism existed with the jury of the O.J. Simpson case.[318] Simpson, a Black actor and former professional football player, was charged with the 1994 murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman.[319] The jury that heard and decided the Simpson case included eight women and four men.[320] Eight of those jurors were Black, two were Hispanic, and one was half White and half American Indian.[321] One juror was White.[322]

After the jury acquitted Simpson of the murders, many commentators accused the jury of being racially biased in favor of the

[316] J.E.B. v. Alabama, 511 U.S. at 140 (1994). The notion of community-based harms posed by discrimination had also been recognized by the Court in an earlier case, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627 (1991), where the Court noted the effects of how discrimination in jury selection might be received. Discrimination in the courtroom, the Court added, "raises serious questions as to the fairness of the proceedings conducted there." *Id.* at 628.

[317] *J.E.B.*, 511 U.S. at 148–49 (O'Connor, J., concurring) (quoting Beck v. Alabama, 447 U.S. 625, 642 (1980)).

[318] *See, e.g.*, Gerald Uelman, *Jury Bashing and the O.J. Simpson Verdict*, 20 HARV. J. L. & PUB. POL'Y 475, 475–76 (1997).

[319] People v. O.J. Simpson, No. BA 097211 (Cal. Super. CL, LA. County) (Oct. 3, 1995); Kenneth B. Noble, *A Jury is Chosen to Hear the Simpson Case*, N. Y. TIMES (Nov. 4, 1994), http://www.nytimes.com/1994/11/04/us/a-jury-is-chosen-to-hear-the-simpson-murder-case.html.

[320] Noble, *supra* note 319.

[321] *Id.*

[322] *Id.*

defendant.[323] The day after the verdict's announcement, the Wall Street Journal broadcast the jury's verdict with the headline, "Color Blinded," implying that the jury's decision had more to do with the jury's racial composition than the burden of proof.[324] The newspaper article assumed that the jury refused to convict Simpson because of his race, and not because of the prosecution's failure to provide evidence of guilt beyond a reasonable doubt.[325] Similar allegations of racial bias were expressed toward the predominantly White jury that acquitted the four police officers in 1992 for the 1991 beating of Rodney King.[326] A bystander taped the beating, prompting one law professor to comment: "Apparently, it was easy to convince a jury of [W]hite suburbanites to disconnect their eyeballs from their brains, and not be 'satisfied with seeing.'"[327]

Even though female-dominated juries heard both the Simpson and Zimmerman cases, the jury in the Zimmerman case fared far better in the public sphere than did the jury in the O.J. Simpson case. In the Zimmerman case, despite a majority of the jurors being White women, there was a rush to explain the jury's verdict from an evidentiary, rather than either a raced or a gendered perspective.[328] After this decision, the Wall Street Journal assigned no blame for the failure to convict Zimmerman to the jury's demographics, editorializing that "the state could not prove its case to the satisfaction of the six jurors, all women, for whom the easiest decision in terms of

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[323] *See, e.g.*, William F. Buckley, *The O.J. Verdict Deserves Protest: Outcome Says Nothing About Justice, Speaks Volumes on Race Relations*, ARIZ. REPUBLIC, Oct. 10, 1995, at B5 ("It is simply undeniable that the black majority believed him innocent because he was black."); Mona Charen, *A Triumph for Black Racism*, BALTIMORE SUN, Oct. 10, 1995, at 11A ("Only a nation of fools would lull itself into believing that this was not a racially motivated and a racist verdict."); Martin Gottlieb, *Race, Sex, Sports: Divisions Normal*, DAYTON DAILY NEWS, Oct. 11, 1995, at 10A ("Whites in general do not seem to be driven by race. Absent race, people in general would probably see Simpson as guilty, given all the circumstantial evidence that surfaced early and given the enjoyment that people get out of hating a rich guy's lawyers."); Charles Krauthammer, *America's Show Trial*, WASH. POST, Oct. 6, 1995, at A25 ("We have lived now for a generation under a theory that declares that for officially designated victim classes the ordinary rules do not apply."). *See also* Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 MICH. J. RACE & L. 69, 81 (1996).

[324] Benjamin A. Holden, Laurie P. Cohen & Eleena D. Liser, *Color Blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1.

[325] *Id.*

[326] *See,* Sam V. Meddis, *Many Blacks Think Justice Not Part of System: King Case Reaffirms Sentiment*, USA TODAY, May 13, 1992, at 8A; Gerald Uelmen, *Need for Civilian Police Review Revisited*, L.A. DAILY J., May 15, 1992, at A4.

[327] Uelmen, *supra* note 326.

[328] Holly McCammon, *What Zimmerman's All-Female Jury Says*, CNN (June 24, 2013), http://www.cnn.com/2013/06/24/opinion/mccammon-female-jury/.

public approval would have been to convict."[329] While the jury in this highly publicized and closely watched case consisted entirely of women, there was no notable criticism of the controversial verdict framed in terms of the jury's gender composition. What might that tell us about how gender and race stereotypes differentially function in the public sphere?

A variety of possible explanations exist for the media's failure to engage in the sort of jury blaming in the Zimmerman case that it had done in the Simpson case. Of course, the media could possibly have learned from past criticism and decided to accept the jury's decision as properly based on legal standards.[330] Another rationale may be that race is privileged over gender as a frame for explaining contested verdicts. In other words, in both cases, media and commentators were less concerned with the fact that women dominated the respective juries; rather, the juries' racial composition was at issue. The Simpson jury was criticized not because Black women dominated it, but rather because the majority of jurors were *Black*. In that vein, the Zimmerman jury was not criticized, despite being dominated by women, because most of the women were *White*.

Though the public did not criticize the Zimmerman verdict in gendered terms, reports of the deliberations indicate that the jurors' racial and gender identities may indeed have shaped how the jurors understood the evidence in the case and gave it meaning.[331] Principles of intersectionality[332] are best able to capture the manner in which race and gender interact to impact juror decision-making. Intersectionality maintains that rather than thinking that one characteristic of an individual creates a singular, predictable experience of subordination, characteristics like race and gender may "interact with each other . . . and with a host of other characteristics, like age, income, occupation, education, political affiliation, and religion, to make any one characteristic an unreliable indicator of bias."[333] Different

[329] *Review and Outlook: The Zimmerman Verdict*, WALL ST. J. (July 15, 2013), http://www.wsj.com/articles/SB10001424127887324348504578605731733310240.

[330] Andrew Guthrie Ferguson, *Why the George Zimmerman Trial's All-Female Jury is News,* THE ATLANTIC (June 21, 2013), http://www.theatlantic.com/national/archive/2013/06/why-the-george-zimmerman-trials-all-female-jury-is-news/277103/.

[331] Jaren Nichole Wieland, *A Jury of One's Peers: What It Is; How It Is Changing; and Why It Is Important*, 57 ADVOCATE 24, 28 (2014); Cara Buckley, *6 Female Jurors Are Selected for Zimmerman Trial*, N.Y. TIMES (June 20, 2013), http://www.nytimes.com/2013/06/21/us/6-female-jurors-are-selected-for-zimmerman-trial.html.

[332] *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241 (1991).

[333] Jean Montoya, *"What's So Magic(al) About Black Women?" Peremptory Challenges at the Intersection of Race and Gender*, 3 MICH. J. GENDER & L. 369, 380 (1996).

characteristics may lead to either privilege or subordination.

An intersectional approach would interrogate the jurors' experiences not just as women, but also their experiences as either White or non-White women, and how that then shapes their perceptions of the case. Take for instance the gendered experience of mothering. In this context, if gender alone was the only component in the jury's assessment of the Zimmerman case facts, mothering would have perhaps predicted a different interpretation. All but one of the jurors were mothers.[334] Trayvon Martin, a slight, baby-faced, teenager, was killed after engaging in typical teenaged behavior—going to a convenience store to purchase snacks. Looking solely to the issue of gender, one might have expected that the mothers on the jury might have seen Martin as a child, and therefore might have been relatively unsympathetic to his killer. This was not the case, however.

No window into the jury room existed to allow for a direct observation of the deliberations. Nevertheless, we do have commentary offered by jurors soon after the case ended. That commentary indicates that both race and gender informed the jury's reading of the case. Take for instance the remarks of Juror B37 who self-identified as a White woman in her sixties and as a mother of two grown children. The first juror to speak to the press, Juror B37, noted that at the beginning of jury deliberations, three of the jurors favored acquittal, two favored a manslaughter conviction, and one favored a second degree murder conviction.[335] Juror B37 believed that Zimmerman's "heart was in the right place" and thought that Martin likely became violent first.[336] This juror also used to have a gun permit and supported Zimmerman's right to have a gun with him the night of the shooting.[337]

Intersectionality reminds us that individuals have multiple components to their identity, which may interact to affect their decision-making. In this case, it appears that the jurors with children approached their decision making as mothers, and that mother identity was racially charged as well. Thus, four out of the five mothers viewed the case through the lens of White mothers, not mothers of color. Martin's race, therefore, created social distance and may have

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[334] *The 6 Women Who Will Determine Zimmerman's Fate*, HLN (June 24, 2013), http://www.hlntv.com/slideshow/2013/06/20/george-zimmerman-murder-trial-juror-bios.

[335] Mark Mooney, *George Zimmerman Juror Says His 'Heart Was in the Right Place,'* ABC NEWS (July 15, 2013), http://abcnews.go.com/blogs/headlines/2013/07/george-zimmerman-juror-says-his-heart-was-in-the-right-place/.

[336] *Id.*

[337] *Id.*

inhibited jurors from analogizing his experience to their own children. To the White female jurors, Martin was perhaps less likely to be seen as childlike and more likely to be viewed as a menacing threat, a symbolic assailant.[338] In her interview with CNN's Anderson Cooper, Juror B37 transformed Martin from victim into the threatening assailant, justifying her "belief" in Zimmerman's account by inventing Martin's motives and actions as a violent aggressor:

> **Cooper:** So you think, based on the testimony you heard, you believe that Trayvon Martin was the aggressor?
> **Juror B37:** I think the roles changed. I think, I think George got in a little bit too deep, which he shouldn't have been there. But Trayvon decided he wasn't going to let him scare him and get the one-over, up on him, or something. And I think Trayvon got mad and attacked him.[339]

Her assessment that the unarmed Martin, a teenager returning from a snack run, was an angry aggressor suggests that she did not primarily construct Martin through the lens of a mother. Rather, racial distance between Juror B37 and Martin likely shaped her justification of his homicide, "because George had a right to protect himself."[340]

Intersectionality theory posits that race matters in a gendered way, as illustrated by another juror's, Juror B29's, very different rendering of the case facts and decision-making process. At the time of the trial, Juror B29 was a thirty-six-year-old mother of eight children. Juror B29 was a Latina and the only juror of color.[341] She told the media that she felt that Zimmerman "got away with murder."[342] Juror B29 said that "in our hearts we felt he was guilty," but that the law and evidence did not allow a guilty verdict.[343]

Her comments also highlight how she assessed this case as a mother. Because of her status as a non-White mother, Juror B29 seemed to be able to see similarities between Martin and her own children and similarities between herself and Martin's mother. Juror B29 stated:

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[338] *See id.* See also Skolnick who devised the concept of the "symbolic assailant" in the context of policing. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 45 (1967).

[339] *Anderson Cooper 360 Degrees*: *Exclusive Interview With Juror B-37; Defense Team Reacts to Juror Interview* (CNN television broadcast July 15, 2013) (transcript available at http://www.cnn.com/TRANSCRIPTS/1307/15/acd.01.html).

[340] *Id.*

[341] Alyssa Newcomb, *George Zimmerman Juror Says 'In Our Hearts, We Felt He Was Guilty,'* ABC NEWS (July 25, 2013), http://abcnews.go.com/US/george-zimmerman-juror-murder/story?id=19770659.

[342] *Id.*

[343] *Id.*

> It's hard for me to sleep, it's hard for me to eat because I feel I was forcefully included in Trayvon Martin's death. And as I carry him on my back, I'm hurting as much [as] Trayvon's Martin's mother because there's no way that any mother should feel that pain.[344]

Though it is impossible to know how much the juror's perspective might have affected the decision in the case had other jurors shared this view,[345] Juror B29 compellingly contrasts Juror B37. Where Juror B37 approached the killing of the unarmed Martin as justified because of her belief that Martin likely became violent first, Juror B29 thought that if not legally guilty, Zimmerman was morally culpable and would have to reconcile that with God.[346] Though Juror B29 believes ultimately that the law is to blame for the jury's acquittal of Zimmerman, she also expressed an empathic sense of responsibility, noting her difficulty eating and sleeping after her role as a juror in the case that did not find Zimmerman guilty.

Though the media did not criticize the jury's verdict in the Zimmerman case in the same way it did the verdict in the Simpson case, the Zimmerman verdict was not universally accepted.[347] After the verdict, protests erupted around the country. Many protesters viewed the decision in the case as less legitimate, at least in part, because of the absence of Black jurors. Thus, these protests were an assault on the legitimacy of the jury as an institution, a value recognized by the courts and validated by social science research.[348] "Perceptions of fairness and legitimacy based on the racial composition of the jury can

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[344] *Id.*

[345] Juror B29 initially voted for second degree murder and advocated for that position throughout the deliberations. *See* Greg Allen, *Zimmerman Juror Says He "Got Away With Murder,"* NPR (July 26, 2013), http://www.npr.org/templates/story/story.php?storyId=205695296. As juror B29 told an ABC newscaster: "I was the juror that was going to give them the hung jury. Oh, I was. I fought to the end." Nonetheless, this juror ultimately conformed to the others' position and acquitted Zimmerman on all charges. *Id.*

[346] *Id.*

[347] *See, e.g.*, Geraldine L. Palmer, *Dissecting the Killing of Trayvon Martin: The Power Factor*, 5 J. FOR SOC. ACTION IN COUNSELING & PSYCH. 126 (2013); Anthony Hall, Comment, *A Stand for Justice—Examining Why Stand Your Ground Laws Negatively Impact African Americans*, 7 SO. REGION BLACK L. STUDENTS ASS'N L. J. 95 (2013); Lizette Alvarez, *A Florida Law Gets Scrutiny After a Teenager's Killing*; N.Y. TIMES, Mar. 20 2012, at A1.

[348] Leslie Ellis, & Shari Siedman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy,* 78 CHI.-KENT L. REV. 1033, 1050 (2003). Ellis and Diamond found that potential jurors viewed a criminal trial outcome involving a Black defendant as fair, whether found guilty or not guilty, when the verdict was rendered by a racially diverse jury, whereas the trial was deemed less fair when the defendant was convicted by an all-White jury.

have a measurable effect on public perceptions of the fairness of the criminal justice system."[349]

CONCLUSION

Concerns about the role that race and gender play in decision-making are increasingly a part of the dialogue in controversial cases. In the two years following the Zimmerman trial, the decisions of grand jurors charged with deciding whether charges should be filed against officers in the police killings of Michael Brown in Ferguson, Missouri and Eric Garner in Staten Island, New York were announced. In both cases, the respective grand juries declined to indict the officers. Both cases highlight the challenge to the legitimacy of our criminal justice system when White authorities kill Black civilians and are not held criminally responsible. The law keeps the identity of grand jurors a secret, but the racial breakdown of the jurors charged with hearing the case against Officer Darren Wilson—three Black members and nine White members—was quickly revealed.[350] While this body did look like the countywide pool from which it was drawn, it did not look like Ferguson, the site of inquiry, where 67.4% of the 21,000 residents are Black and only 29.3% are White.[351] Staten Island, where the grand jury declined to indict the police officer who used the chokehold that led to the death of Eric Garner, did not release the racial and gender composition of the grand jury.[352] These cases did not even survive the first, lower threshold of probable cause to be able to move forward to a public adjudication process; even if they had, the past suggests that prospects for holding the defendants criminally responsible would be poor.[353]

These kinds of cases represent the flip-side of the problem identified in *Batson v. Kentucky*: Black defendants have a right to diverse

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[349] *Id.*

[350] Greg Botelho & Ed Lavandera, *3 African-Americans on 12-Person Grand Jury Weighing Ferguson Shooting Case*, CNN (August 26, 2014), http://www.cnn.com/2014/08/22/us/missouri-teen-shooting//.

[351] *2010 Census Interactive Population Search (Ferguson, MO)*, U.S. CENSUS BUREAU, (last visited Sept. 26, 2015), http://www.census.gov/2010census/popmap/ipmtext.php?fl=29:2923986.

[352] A Garner family lawyer estimated the jury to be approximately half White, one quarter Black, and one quarter Hispanic. Rick Hampson, *Chokehold cases focuses attention of New York's "forgotten borough,"* USA TODAY (Dec. 8, 2014), http://www.usatoday.com/story/news/nation/2014/12/06/chokehold-garner-staten-island-wu-tang-clan/19942489/.

[353] Steve Visser, *Police Using Deadly Force Are Rarely Convicted*, ATLANTA J-CONST., (Aug. 25, 2014), http://www.ajc.com/news/news/crime-law/police-using-deadly-force-are-rarely-convicted/ng8Nf//.

juries that do not exclude members on the basis of race.[354] In *Batson*, the remedy is directed at prosecutors who use their peremptory challenges to exclude venire members on the basis of their race. Specifically, under *Batson*, the defendant must first make a prima facie case that the prosecutor is striking jurors on the basis of racial identity.[355] Second, the burden shifts to the prosecutor to "come forward with a neutral explanation for challenging Black jurors."[356] Finally, "the trial court then will have the duty to determine if the defendant has established purposeful discrimination."[357]

Cases like Zimmerman's pit the values and mandates of the fair cross-section doctrine for the broader community directly against the individual defendant's Sixth Amendment rights. In *Georgia v. McCollum,* the Court affirmed the broader community value of diverse juries by ruling that the Constitution prohibits race-based exclusions, even if exercised by the defendant in furtherance of his rights.[358] The Court specifically authorized prosecutors to make *Batson* challenges when they perceive the defense is striking jurors because of their race or gender.[359]

On both sides of this problem, the remedy has been woefully inadequate and highlights the large gap between the principles of *Batson* and the social psychological realities in which *Batson* challenges operate.[360] If we maintain an expanded view of the fair cross-section requirement—that it is necessary for the broader community and for democratic ideals—we might reconstitute the mechanisms for achieving appropriately diverse juries from the individual challenge to policy mandates. The language from *Strauder* and other cases suggests a constitutional avenue exists to broaden how we conceive of the value of a fair cross-section in the context of juries by a more expansive consideration of how this democratic institution functions to reinforce legal legitimacy.[361] Communities have a clear stake in having a fair

[354] Batson v. Kentucky, 476 U.S. 79, 84 (1986).

[355] *Id.* at 96–97.

[356] *Id.* at 97.

[357] *Id.* at 98.

[358] Georgia v. McCollum, 505 U.S. 42, 57 (1992). See Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 1 (1994) for a full discussion of this ethical bind for defense attorneys and law students in clinical settings.

[359] *McCollum*, 505 U.S. at 56.

[360] Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision-Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 587 (2011).

[361] *Batson*, 476 U.S. at 84–85, *abrogated on different grounds by* Taylor v. Louisiana, 419 U.S. 522 (1975); *Taylor*, 419 U.S. at 530–31; Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

cross-section of the community participate in jury decisions to help ensure that the broader community accepts those decisions as legitimate.

How might this be operationalized? First, in recognition of the distinct obligations of prosecutors in criminal cases to serve the interests of justice and represent the communities in which they work, prosecutors might be required to affirmatively seat a jury that adequately represents the community from which it is drawn. Thus, rather than treating jury selection as a purely adversarial process, whereby each side must mount challenges if a suspicious pattern of exclusion arises, the prosecutor may be called upon to demonstrate how each decision furthers the fair cross-section imperative. This might be included in Rule 3.8 of the American Bar Association's Model Rules of Professional Conduct, which outlines the "Special Responsibilities of a Prosecutor,"[362] and serves as a model for professional responsibility adopted by most states. It might also be incorporated in the ABA standards for the prosecutorial function in jury selection, under Standard 3-5.3.[363]

Second, taking the lessons from the social science scholarship on the causes and consequences of non-diverse juries, a reconsideration of the policy value, if not the constitutionality, of the six-person jury is critical.[364] Evidence strongly suggests that six-person juries are significantly more likely to result in homogeneous composition than twelve-person juries.[365] Anwar et al.'s analysis of criminal trials in Florida provides dramatic evidence of the cost to fairness for defendants of color under a six-person jury system. As Diamond, Peery, Dolan and Dolan conclude: "If increasing diversity in order to better represent the population is a goal worth pursuing for the U.S. jury, the straightforward solution—the key—is a return to the 12-member jury."[366]

Third, as a matter of policy, jurisdictions should implement "affirmative jury selection" practices whereby minority communities are oversampled in the issuance of jury summons and then re-configure the selection process to focus on the creation of a diverse

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[362] MODEL RULES OF PROF'L CONDUCT R. 3.8 (2015).

[363] *Criminal Justice Section Standards for the Prosecution Function*, ABA, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html (last visited Sept. 26, 2015).

[364] *See* Anwar, Bayer & Hjalmarsson, *supra* note 214; Diamond, Peery, Dolan & Dolan, *supra* note 279.

[365] Diamond, Peery, Dolan & Dolan, *supra* note 279.

[366] *Id.*

and inclusive seated jury.[367] Thus, this would be coupled at the selection stage with the ethical mandate to prosecutors to serve the community by furthering the representative cross-section ideals.

If the approach to jury selection followed these principles, what would the Zimmerman jury have looked like? The Zimmerman jury was comprised of five White women and one Hispanic woman.[368] Though the overall pool may have reflected the diversity of the community, the six-person jury seated in the case did not. Zimmerman lived in the Retreat at Twin Lakes,[369] which was not an all-White community. In fact, the Retreat at Twin Lakes was fairly diverse. The zip code in which the neighborhood was located contained a mix of residents: 20% Black, 20% Hispanic, 50% White.[370] The overall community from which the jury pool was drawn was a diverse one as well.[371] Sanford is in Seminole County, which is composed of 52% women, 64% White, 19% Hispanic, 12% Black.[372] Given the county demographics, a twelve-person jury should have included six men, at least one Black member, two Hispanic members, and no more than eight White members. Had it more accurately reflected a fair cross-section of the community, the outcome may well have been different.

[367] Sommers & Norton, *Race and Jury Selection, supra* note 215, at 536. *See also* Lynch & Haney, *supra* note 360, at 599–604.

[368] Buckley, *supra* note 40.

[369] Chris Francescani, *George Zimmerman: Prelude to a Shooting*, REUTERS (Apr. 25, 2012), http://www.reuters.com/article/2012/04/25/us-usa-florida-shooting-zimmerman-idUSBRE83O18H20120425.

[370] *Reporting Trayvon*, COLUM. JOURNALISM REV. (Apr. 2, 2012), http://www.cjr.org/behind_the_news/reporting_trayvon.php?page=all.

[371] *State & County QuickFacts: Seminole County, Florida*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/12/12117.html (last visited Aug. 31, 2015).

[372] *Id.*