Obstacles to Jury Diversity—Common Misconceptions about *Batson* Challenges

Mark R. Phillips, Ph.D.

Trial Partners, Inc.

8383 Wilshire Blvd. Ste. 810
Beverly Hills, CA 90211
(323) 653-3330
(323) 653-3331 [fax]
mark@trial-partners.com

Dr. Mark R. Phillips is the vice president of Trial Partners, Inc. and a Senior Trial Consultant. His expertise includes jury decision making and persuasion, jury selection, eyewitness identification, and witness preparation. He regularly conducts mock trial jury simulation research, focus groups, post-trial juror interviews, and community attitude surveys. Dr. Phillips consults in civil and criminal matters in state and federal jurisdictions throughout the country, and he has published research on jurors' perceptions of minority attorneys, eyewitness identification, and jury decision making. He has also conducted research on jurors' perceptions of ethnic minority attorneys and female attorneys, and he recently published an article on this topic in the ABA Minority Trial Lawyer entitled, "Jurors' Perceptions of Ethnic Minority Attorneys: Are We in a Post-Racial Era?" He would like to thank Dr. Christina Marinakis for conducting the legal research presented in this article, as well as Dr. Julian A. Gilbert, Dr. Stephen W. Joy, and Ms. Eunice Choi for their assistance with this research and article.

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I. Introduction

A. Importance of Diverse Juries

"In the name of God, do your duty." The need for Atticus Finch to make this unsuccessful plea to the jury in *To Kill a Mockingbird* demonstrates the danger of monochromatic juries, particularly in cases involving issues related to race or ethnicity. But even in trials that do not include a Black man on trial for the rape of a White woman, defendants benefit from having a diverse jury. Indeed, all parties interested in a fair trial benefit from a diverse jury that truly represents the community.

A diverse jury includes diverse viewpoints, which increases the likelihood that the jury will represent the community. Diverse jurors promote thorough group deliberations, and perhaps most importantly, they enhance public acceptance of jury verdicts as legitimate. Albert W. Alschuler & Randall L. Kennedy, *Equal Justice: Would Color-conscious Jury Selection Help?* 81 A.B.A. J. 36 (1995).

Justice Thurgood Marshall eloquently articulated this explanation in the U.S. Supreme Court ruling *Peters v. Kiff*, 407 U.S. 493, 503 (1972): "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Indeed, Justice Marshall's observations are supported by social science research. Through their extensive studies in jury decision processes spanning over two decades, professors Hans and Vidmar observed that juries that are representative of the community (and therefore diverse) were more likely to "get it right" than non-diverse juries. They noted that diverse juries promote vigorous debate and that heterogeneous juries have an edge in fact finding, especially when matters at issue incorporate social norms and judgments, as jury trials often do. Valerie Hans & Neil Vidmar, *The Verdict on Juries*, 91 Judicature 226, 230 (2008).

A 2006 study by Samuel R. Sommers provides additional evidence of differences in the deliberations of diverse vs. homogeneous juries. According to Sommers, "Racially diverse juries deliberated longer, discussed more trial evidence, and made fewer factually inaccurate statements in discussing the evidence than did all-White juries." Samuel R. Sommers, *On Racial Diversity and Group Decision-making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality and Soc. Psychol., 597 (2006). He further explained that, "These effects cannot be explained solely in terms of the performance of [ethnic minority] jurors within the group, as White jurors were also more thorough and accurate during deliberations" when they were part of a diverse jury compared to when they were on an all-White jury. *Id.* According to Sommers, "A potential implication of these findings is that one process through which a diverse jury composition exerts its effects is by leading [all jurors—including non-minorities] to process evidence more thoroughly [than they otherwise would]." *Id.* The reasons for this effect deserve more attention in the scientific literature, but one could postulate that a diverse jury encourages jurors to examine support for their own beliefs in preparation to defend their positions and convince others of differing viewpoints.

Another explanation is that diverse juries reduce the likelihood of groupthink errors. Groupthink is a psychological phenomenon in which members of a group excessively seek concurrence and unanimity for the sake of promoting harmony and reducing conflict within the group—so much so that they end up making poor or irrational decisions. *See* Irving L. Janis, *Groupthink*, 6 Psychol. Today, 43 (1972). Groupthink is especially likely to occur in a homogenous group that is insulated from outside influences and that lacks clear or well-established

procedural or methodological norms—in other words, conditions that are common during non-diverse jury deliberations. Groupthink leads to a lack of critical evaluation of alternative viewpoints because members of the group actively suppress dissenting or minority viewpoints. *Id.* Perhaps most importantly, one of the effective antidotes to groupthink is diversity within the group. Though additional research is needed on the role of groupthink in jury deliberations, established psychological theory and empirical evidence from other contexts clearly suggest that jury representativeness is as an important element of high jury performance.

With regard to defendants in civil trials, the significance of thorough deliberations warrants further examination. In a large-scale mock jury study involving premises liability cases, juries that found the defendant liable and assessed punitive damages were less likely to discuss or come to a conclusion on each element of the claim than pro-defense juries. Reid Hastie, David A. Schkade, & John W. Payne, *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 Law & Hum. Behav. 287, 303 (1998). The findings were dramatic, with 100% of the juries that found in favor of the plaintiffs giving only cursory discussion to the legal elements and a large majority of the juries who thoroughly discussed the claims siding with the defense. *Id.* The researchers concluded that when jurors thoroughly review the elements of the claim, there is an increased probability that the jury will determine that some of the elements are not supported by a preponderance of the evidence. Thus, jury deliberation is more thorough than individual reasoning, and the more thorough the decision process, the likelier the jury is to find in favor of the defendant. *Id* at 305.

B. Constitutional Issues

Beyond the practical benefits of a diverse jury, The U.S. Supreme Court has determined that the issue of jury racial composition is a constitutional matter. Although Congress enacted laws prohibiting racial discrimination in the context of jury service in 1875, states continued to exclude racial minorities from their jury pools. Section 4 of the Civil Rights Act of 1875 stated that, "no citizen possessing all other qualification which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude." It was not until 1879 that the High Court enforced the law in the first Supreme Court case involving the issue of racially diverse juries, *Strauder v. West Virginia*, 100 U.S. 303 (1880). In *Strauder*, the Court declared unconstitutional West Virginia's law limiting jury service to "all-White male persons" over the age of 21. The Court held that a jury drawn from a pool excluding members of the defendant's own race violated the Equal Protection Clause. *Id.*

After *Strauder*, the law protected racial minorities against jury discrimination in theory, but it often failed to do so in practice because states could exclude jurors on the basis of vague qualifications (*e.g.*, excluding jurors who were not "generally reputed to be honest and intelligent") or summon jurors for service as they chose. Indeed, a 1910 study on the racial makeup of juries at the time found that Blacks "rarely served on juries in Florida, Mississippi, Missouri, South Carolina, and Virginia, and *never* served in Alabama and Georgia." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 894-95 (1994) (emphasis in original).

It wasn't until the Federal government moved to randomized selection in 1968 that representative numbers of minorities were even called to participate in the jury selection process. *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970). Even then, through the use of peremptory challenges, counsel could surreptitiously exclude minorities from service by exercising challenges on minority members of the venire.

II. *Batson* Challenges

More than a century after the *Strauder* decision, the 1986 ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986) held race-based execution of peremptory challenges unconstitutional under the Equal Protection

Clause. The *Batson* decision arose from a state case in which an all-White jury convicted a Black man for burglary and receipt of stolen goods. Invoking the *Strauder* decision, the Court explained that racial discrimination in jury selection harms the accused, the excluded juror, and the community at large by undermining confidence in the jury system. *Id.* at 87.

A. Extension to Civil Cases

Although *Batson* limited the use of peremptory challenges by prosecutors in criminal cases to remove jurors of the same race as the defendant, the Supreme Court subsequently extended this prohibition to civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). The Court explained, "whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994).

B. "Cognizable" Groups

Shortly after *Batson*, courts across the country started expanding the rule prohibiting attorneys from making race-based peremptory strikes to other "cognizable groups." Although the *Batson* Court never specifically identified so-called "reverse-*Batson* challenges," it alluded to them when it noted that "the potential for racial bias, further, inheres in the [racial minority] defendant as well." *Batson*, 476 U.S. at 104. Though initially, reverse-*Batson* issues arose in cases in which a prosecutor challenged a criminal defendant's exercise of peremptory strikes, regardless of race [*see, e.g., Georgia v. McCollum*, 505 U.S. 42 (1999)], it has evolved to become a term describing exercise of strikes against White jurors, or jurors of the majority group. By endorsing this protection, courts essentially extended *Batson* to jurors of any race, because each race constitutes its own cognizable group.

The U.S. Supreme Court defines a cognizable group as, "a recognizable, distinct class, singled out for different treatment under the laws." *Castaneda v. Partida*, 430 U.S. 482, 494 (1972). The California courts attempted to explain what constitutes a recognizable and distinct class in *People v. Wheeler*, 22 Cal 3d 256, 276-77 (1978) by discussing the difference between a group bias and a specific bias. Unlike specific biases, which are valid grounds for executing a strike, an unconstitutional strike based on a group bias exists "when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." *Id.* at 276. This differs from specific biases, which may be inferred from a juror's responses to questions or presumed from their experiences, as opposed to mere membership in a group. The California courts clarified that in order to have *Wheeler* protection, the cognizable group "must share a common perspective, but not a common personality." *People v. Garcia*, 77 Cal. App. 4th 1269, 1277 (2000). More specifically, the common perspective shared by the group can be described as being "exposed to, or fearful of, persecution and discrimination." *Id.* at 1276. Examples of groups that California has permitted to be excluded from *Wheeler* protection include: battered women, people older than 70, ex-felons, people who have been a resident of the state for less than one year, and Jehovah's witness (because of a religious belief against judging other people.) Kathryn Ann Berry, *Striking Back against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 Berkeley Women's L. J. 157, 160 (2001).

In 2000, a California appellate court became the first court in the U.S. to prohibit the use of peremptory challenges based on prospective jurors' sexual orientation. *Garcia*, 77 Cal. App. 4th 1269. The California legislature soon passed a law formalizing and expanding this decision, which the governor signed into law just six months after *Garcia*. However, the court based its decision almost exclusively on California law, largely ignoring the U.S. Constitution, so other states may have difficulty relying on the reasoning in *Garcia* to extend

the practice. The decision and corresponding state law also did not provide any guidance as to what a judge should do when a lawyer's strike is based on his or her *perception* of a potential jurors' sexual orientation. Berry, *supra* at 161.

As the prevalence of interracial couples steadily increases, perception of race has also become a potential issue that the courts have yet to address. For example, when a litigant strikes a mixed-race juror, can opposing counsel make a challenge requiring the litigant to provide a race-neutral reason? What if an attorney mistakenly believes that a juror is "African-American," when in fact the juror identifies himself as Hispanic because he was born in the Dominican Republic? Although courts have yet to address these issues, it seems likely that any one of these groups – whether it be national origin, ethnicity, race, or simply skin color – could constitute a protected cognizable group.

C. Procedure For Making A *Batson* Challenge

Courts provide wide latitude when it comes to the timing for making a *Batson* challenge. Making a challenge need not wait until the jury is impaneled. For example, when lead prosecutor Linda Drane Burdick used one of the state's ten peremptory challenges to remove a Black woman in *Florida v. Casey Anthony*, defense attorney Jose Baez objected immediately, citing *Batson* and noting that the jury pool underrepresented minorities. Judge Belvin Perry sustained the challenge, presumably after evaluating the circumstances, stating that the State had not made clear that its use of the challenge was "race-neutral." Anthony Ventra, *Anthony Trial: Prosecution Peremptory Challenge of Black Woman not 'Race Neutral,'* Yahoo News (May 18, 2011), http://news.yahoo.com/anthony-trial-prosecution-peremptory-challenge-Black-woman-not-184400974.html. Likewise, the empanelment of a jury does not necessarily foreclose the possibility of making a successful *Batson* challenge. Courts have declared a mistrial as a result of a *Batson* violation when the challenge is made on a post-verdict motion. *Minneiefield v. State*, 539 N.E.2d 464, 466 (Ind. 1989).

Once a party makes the challenge, courts must follow a three-step procedure outlined by the *Batson* Court for evaluating its legitimacy. The first step requires the complaining party to make a *prima facie* case of purposeful discrimination, which, until 1991, required the party to demonstrate that the defendant is a member of a recognized racial group, and that the prosecutor used peremptory challenges to remove members of the defendant's own race from the jury venire. *Batson*, 476 U.S. at 96. Then, the defendant has to establish that these two facts, along with any other relevant circumstances, create an inference that the prosecutor has used peremptory challenges to strike potential jurors on the basis of their race. *Id*. Presently, a challenge to the use of a peremptory strike does not require membership in the same class as the stricken juror. *Powers v. Ohio*, 499 U.S. 400, 415-16 (1991).

Given that the court must consider any relevant circumstances, the party making the challenge should, when stating the challenge, refer to any aspect of the *voir dire* that supports the inference of a discriminatory intent. This includes, for example, that the opposing counsel targeted a certain racial group in asking questions pertaining to cause and hardship. It could also include *not* asking questions of jurors in the non-targeted racial group.

Once a party establishes a *prima facie* case of purposeful discrimination, the second *Batson* step requires the defending party (the party that made the peremptory challenge at issue) to provide a race-neutral explanation for the use of the challenged peremptory strike. *Batson*, 476 U.S. at 97. At this stage, the defending party should be prepared to reference the stricken juror's attitudes and experiences that he or she has shared in a written juror questionnaire, if any, or during the oral *voir dire* process, and explain how those attitudes and experiences makes that person unfavorable to be sitting in judgment of the client. In the absence of sufficient race-neutral reasoning for striking the juror, or in addition to that argument, the defending party also

may justify the strike by relying on a race-neutral strategic decision, such as striking the challenged juror in order to seat a more favorable juror, according to that juror's attitudes and experiences.

The third *Batson* step is for the trial court to determine whether the challenging party has carried the burden of proving purposeful discrimination. Although the defending party has a burden to provide a race-neutral explanation, the burden to prove discrimination "rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam.). The Court explained that the first two *Batson* steps describe the process for producing the evidence that allows the trial court to determine the persuasiveness of the objecting party's constitutional claim. *Johnson v. California*, 545 U.S. 162, 171 (2005). Nevertheless, the critical question at this step is the judge's determination of the persuasiveness of the defending party's justification of its peremptory strike. Accordingly, the trial court must decide whether the party's race-neutral explanation is credible. *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003).

D. Standard of Review

In determining whether a party has established a *prima facie* case of purposeful discrimination, *Batson* instructs the trial court to "consider all relevant circumstances," including the pattern of strikes and counsel's questions and statements during *voir dire*. *Batson*, 476 U.S. at 97. While the court is to consider the pattern of strikes, a strict rule requiring counsel to have used every strike on a member of the protected class in order to sustain a challenge is not warranted. For one, it could create complications when the party has more strikes available to use than there are class members in the venire. Second, the fact that counsel passed on a member of the protected class would mean very little in a situation where there are more members of the class in the "strike zone" than there are available strikes. Both of these situations could be very likely in jurisdictions lacking in diversity. Third, as previously mentioned, a party need not wait until its opponent has exercised all of its strikes before making the challenge. Thus, *Batson* encourages the trial judge to consider the defending party's pattern of strikes because it may strongly support the inference of a discriminatory intent, but by no means is the pattern definitive, nor is it necessary for counsel to use each and every strike on a member of the protected class in order for the judge to sustain a challenge for a particular juror. Consequently, attorneys may make a *Batson* challenge even if the opposing party has previously passed on a member of the protected class or struck a member of the non-targeted class.

Once the judge determines that the objecting party has established an inference that the challenge was race-based, the judge must evaluate the defending party's race-neutral explanation for the strike. The standard discussed in *Batson* appears to be low, making it clear that "[u]nless a discriminatory intent is inherent in the [defending party]'s explanation, the reason offered will be deemed race-neutral." *Purkett*, 514 U.S. at 768. The Court goes on to emphasize that the defending party need not provide "an explanation that is persuasive, or even plausible," only one with "facial validity." *Id.* at 778. However, the trial court is still charged with determining the credibility of the race-neutral justification. Credibility, according to the Court, "can be measured by, among other factors, the [defending party]'s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, 537 U.S. at 339.

The trial court's determination of discriminatory intent is a factual finding that will only be overturned on appeal if clearly erroneous. *Id.* at 340 (*citing Hernandez v. New York*, 500 U.S. 352, 364 (1991)). However, if an appellate court finds that the trial court erroneously denied a *Batson* challenge, every circuit that has considered the issue thus far has determined that it is a structural error that is not subject to harmless-error review, but rather requires automatic reversal. *See, e.g., United States v. McFerron*, 163 F.3d 952, 955-56 (6th Cir. 1998).

E. Remedies

The Court in *Batson* briefly described two possible remedies when the judge sustains a challenge: discharging the entire venire and starting over by selecting a new panel, or reseating the improperly stricken jurors. However, the Court did not indicate whether these are the only permissible remedies, instead stating that the Court "make[s] no attempt to instruct these courts how best to implement our holding." *Batson*, 476 U.S. at 99 n.24. Subsequent Supreme Court decisions have not clarified this issue further, though as of 2012, there was no known case in which the Court had ever overturned a remedy imposed by a trial judge. Jason Mazzone, *Batson Remedies,* 97 Iowa L. Rev. 1613, 1614 (2012).

State courts have varied significantly in their approaches to *Batson* remedies, with some states interpreting the published *Batson* decision as outlining the only available remedies, while others have interpreted the decision as merely suggesting possible remedies. *Id.* In the latter states, alternative remedies have included ordering the forfeiture of peremptory challenges, giving the side prejudiced by the violation additional peremptory challenges, granting a mistrial, and imposing sanctions upon the attorney making the improper strike. *See, e.g., People v. Perez*, 829 N.Y.S.2d 61 (App. Div. 2007); *Commonwealth v. Hill*, 727 A.2d 578 (Pa. 1999). Even in states giving discretion to trial judges to use remedies not specifically indicated in *Batson*, remedies may be restricted by appellate courts, legislatures, and interpretations of state constitutions prohibiting discriminatory uses of peremptory challenges. Mazzone, *supra* at 1614. More creative remedies, for example, have been curtailed, as in one Missouri trial where the trial court attempted to remedy the improper strike of a Black juror by allowing the objecting party to strike a White juror, essentially restoring the "racial balance" of the jury. The state's Supreme Court found such a remedy improper. *State v. Hampton*, 163 S.W.3d 902, 904 (Mo. 2005).

During the *Casey Anthony* jury selection, Judge Perry sustained the *Batson* challenge before the juror in question was excused, so the remedy was simply to not excuse the juror – essentially reseating the improperly stricken juror. Ventra, *supra*.

Most state appellate courts have interpreted *Batson* as providing trial judges with discretion to choose between the two remedies described in the published decision. A minority of states, however, permit judges to devise an appropriate remedy, but they also have limited the remedies that trial courts may actually impose, or in some instances, they have indicated a preference for certain circumstances. Mazzone, *supra* at 1618-19. Florida, for example, noted a preference for reseating the juror in order to protect the juror's right not to be excluded on the basis of race. *Jefferson v. State*, 595 So. 2d 38, 41 (Fla. 1992). Reseating a juror, however, is appropriate only when doing so will not prejudice the parties, as in the case where the juror is unaware that he or she has been stricken by a particular party. Likewise, reseating a juror who was privy to which party dismissed him or her would not be appropriate. *Holmes v. State*, 543 S.E.2d 688, 691 (Ga. 2001)

Other, more practical circumstances sometimes dictate the choice of remedy for a *Batson* violation. For example, if a trial judge has already excused jurors who are subsequently found to be part of a pattern of discriminatory strikes, the only remedy may be to discharge the entire venire and start the process anew. *People v. Knight*, 701 N.W.2d 715, 729 (Mich. 2005).

Some state appellate courts have required that *Batson* violations be remedied by reseating the stricken juror. *See, e.g.*, *Ellerbee v. State*, 450 S.E.2d 443 (Ga. Ct. App. 1994), *overruled on other grounds by Felix v. State*, 523 S.E.2d (Ga. 1999); *Conerly v. State*, 544 So. 2d 1370 (Miss. 1989); *State v. Grim*, 853 S.W.2d 403 (Mo. 1993); *Curry v. Bowman*, 885 S.W.2d 421 (Tex. Crim. App. 1993) (en banc). In addition to judicial economy, these states emphasize that individual jurors have the right not to be excluded from a jury because of their race, and reseating the juror is the only remedy that protects the juror from being a victim of improper discrimination. Further, some courts have determined that it would be improper to discharge the entire venire

because it could reward the party that made the improper challenge in the first place. *See, e.g.*, *Williams v. State*, 125 P.3d 627. 636 (Nev. 2005). However, even where the state has required that jurors be reseated, some appellate courts have not required the trial judge to reseat all of the improperly stricken jurors. *See, e.g., Koo v. State*, 640 N.E.2d 95, 100 (Ind. Ct. App. 1994) (holding that the trial court did not abuse its discretion by reseating two out of the six jurors challenged under *Batson*.) When courts have reseated a juror, they usually find that any party that has violated *Batson* has forfeited the corresponding peremptory challenge, though some states note that forfeiture may not be an appropriate remedy "when the finding of discrimination is close" and there are few remaining strikes. *People v. Luciano*, 890 N.E.2d 214, 216-19 (N.Y. 2008).

Other state appellate courts require that the trial judge discharge the entire venire and select a jury from a new venire. *See, e.g., State v. Gilmore*, 511 A.2d 1150 (N.J. 1986; *State v. Franklin*, 456 S.E.2d 357 (S.C. 1995)). However, courts that have proposed striking the venire have sometimes expressed concerns that a reseated juror may harbor ill feelings towards the party that struck the juror, thereby undermining the fairness of the trial. *See, e.g.*, *State v. McCollum*, 433 S.E.2d 144, 159 (N.C. 1993).

Courts like Minnesota do not give judges total discretion to apply remedial measures, but statutorily dictate that the trial court *either* reinstate the improperly stricken juror *or* discharge the entire panel and start anew. Minn. R. Crim. P. 26.02(7)(4). Still other courts provide a compromise. Although the California Supreme Court held that discharging the venire is required to remedy discriminatory jury practices, it further held that the trial judge may impose other remedial measures—but only with the assent of the complaining party. *People v. Willis*, 43 P.3d 130 (Cal. 2002). The court determined that doing so without such assent constitutes an abuse of discretion. *People v. Morris*, 131 Cal. Rptr. 2d 872, 877-78 (Ct. App. 2003). The California Court has also endorsed the imposition of sanctions on attorneys. *Willis*, 43 P.3d at 137.

Because the remedy for a sustained *Batson* challenge varies by state and jurisdiction, it is prudent for attorneys to become familiar with each state's statutes, case law, and practices on the issue prior to the start of jury selection when appearing in that state or jurisdiction.

III. Examining the Underlying Assumption For Race-Based Peremptory Challenges – Does Race Correlate With Verdict Outcome?

A. Literature Review

The use of race-based peremptory challenges to strike potential jurors during *voir dire* is not only constitutionally impermissible, but is also a practice rooted in folk wisdom, mere superstition, or a stereotype that Black or Hispanic jurors, by virtue of their race alone, are automatically plaintiff-oriented and will therefore award greater damages than their White counterparts. Extant research examining the role that race plays on verdict has largely focused on criminal contexts, particularly with respect to defendant race in relation to juror race or the racial characteristics of the jury, (*see, e.g.,* Samuel R. Sommers, *On Racial Diversity and Group Decision-making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality and Soc. Psychol., 597 (2006)) while comparatively little attention has been paid to the civil side of litigation. Although a complex relationship between juror race and trial outcome exists in the criminal arena, one where the relationship varies according the race of the defendant and the salience of racial issues in the case, research conducted thus far shows an unreliable association between race or ethnicity and liability judgments or damage awards in civil lawsuits. Margaret Bull Kovera & Brian Cutler, *Jury Selection: Empirical Foundations and Limits* 60, 61 (2013). Moreover, one must consider that individual differences—in terms of personal

experiences, attitudes toward litigation, and other attitudes—that underlie any such generalized differences by juror race are also relatively poorly understood. Nevertheless, in spite of the overwhelming acknowledgment that additional research is needed, the consensus among experts on jury decision making is that an individual juror's race generally has little to no direct relationship with any predisposition to render a verdict in favor of the plaintiff or defense. *See* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* (1983); Saul M. Kassin & Lawrence S. Wrightsman, *The American Jury on Trial: Psychological Perspectives* (1988).

In spite of these limitations, research on race and legal decision making has provided some evidence that race is slightly correlated with trial outcomes in some civil cases. In a post hoc review of actual verdict data from 1979 to 2000, researchers found no relationship between the ethnic composition of the trial venue and overall plaintiff win rates or award levels in cases in federal trial courts. However, for specific types of cases, including toxic torts, products liability, and employment discrimination, they observed a significant correlation between larger Black populations and plaintiff verdicts. Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is there a Bronx Effect?* 80 Texas L. Rev. 1889 (2002). The precise mechanisms that account for this influence remain in need of additional empirical investigation, as do a variety of questions regarding the generalizability of these findings across different types of trials and racial groups. Despite these findings, the researchers were unable to identify a consistent effect of demographic characteristics on the outcome of trials. In state cases from 1992 to 1996, they found no robust evidence that race, income, or urbanization relate to award levels. It is also important to keep in mind that this review never assessed racial composition of the actual juries, instead relying on census data, and thus assumes that jury composition reflects the general population demographics. From experience, we know this is often not the case because certain demographics are more likely to be disqualified from jury service or excused due to hardship than others.

In studies of cases in which researchers asked mock jurors to assign liability and determine punitive damages in product liability and premises liability cases, non-White mock jurors were more likely to assign liability than White mock jurors, but race only accounted for approximately 10% of the variance, a finding that was supported by the fact that pre-deliberation verdicts were also reliably correlated with ethnicity to a small but statistically significant degree. Hastie, *et al.* (1998), *supra*. In other studies of mock jurors, race did not appear to reliably predict verdict or damage awards. *See* Roselle L. Wissler, Allen J. Hart & Michael J. Sax, *Decision-making about General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 Mich. L. Rev. 751 (1999); James R. MacCoun, *Differential Treatment of Corporate Defendants by Juries: Examination of Deep Pocket Hypothesis*, 30 Law and Soc'y Review 132 (1996). Brian L. Cutler, *Special Issue: The Status of Scientific Jury Selection in Psychology and Law*, 3 Forensic Reports (1990); Shari S. Diamond, *Scientific Jury Selection: What Social Scientists know and do not know*, 73 Judicature, 178 (1990).

B. Trial Partners Data

Based on an analysis of a subset of our trial consulting firm's database including over 5,000 mock jurors across various case types, we found relatively low, but statistically significant differences among verdict leanings according to juror race. Further analyses revealed that White mock jurors tended to lean more toward the defense and less toward the plaintiff than Black and Hispanic mock jurors. Both Black mock jurors and Hispanic mock jurors were more likely to lean in favor of the plaintiff and less toward the defense than Asian mock jurors. There were no statistically significant differences between other racial groups. However, like in the published peer-reviewed literature, the influence of race was minimal, accounting for just 2% of the variance in verdict leanings.

We also found statistically significant differences between racial groups on the mock jurors' self-reports of their desire to compensate the plaintiff or punish the defendant. In particular, White mock jurors said they had less desire to compensate the plaintiffs and less desire to punish defendants than Black or Hispanic mock jurors. Black and Hispanic mock jurors also said they had a stronger desire to compensate plaintiffs and punish defendants than Asian mock jurors. Again, however, race accounted for just 2% of the variance among all jurors' desires to compensate and punish. There were no significant differences among racial groups on subjective measures of sympathy for the plaintiffs or anger toward the defendants.

IV. Conclusions

In conclusion, demographic characteristics have proven to be no more than minimally useful in predicting trial outcomes, and their usefulness frequently depends on the case type and the issues involved. The published research, in conjunction with Trial Partners' data, consistently indicate that jurors' attitudes are much stronger, more reliable predictors of verdict preferences in both criminal and civil cases than demographic characteristics like race. Indeed, our own data confirms what we see in almost all peer-reviewed, published empirical research – namely, a relatively weak or muddled relationship between demographic characteristics and verdict outcome and a comparatively strong, consistent, and stable correlation between jurors' attitudes and their verdict and damages decisions. For example, in civil cases, attitudes toward tort reform, corporations, protecting one's community, the justice system, and the extent to which people are responsible for what happens to them are consistently highly correlated with verdict and damages preferences. These findings occur both in published, peer-reviewed empirical research and in our analysis of our juror database.

Although gender, age, race, income, and education do sometimes emerge in the literature and in our research as significant predictors of verdicts or damage awards, their predictive power is not robust and the directions of any correlations are inconsistent (*See* Kovera & Cutler, *supra*; Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol., Pub. Pol'y, and Law, 622 (2001); M. Juliet Bonazzoli, 18 *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, Quinnipac L. Rev., 247 (1998); Hastie *et al.* (1998), *supra*; Michael J. Saks, *What do Jury Experiments Tell Us about How Juries (Should) Make Decisions?* 6 S. Cal. Interdisc. L.J. 1 (1997); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 93 Mich. L. Rev. (1993); Wissler, *et al.*, *supra*). Furthermore, these relationships do not generalize to all types of cases, and they appear to depend on the particular methods and procedures used by researchers.

Even when a demographic characteristic such as race does correlate with verdict outcome in a particular case, it is improper to conclude that race had a causal effect on verdicts or damages (the old adage that "correlation does not equal causation"). It is very likely that attitudinal and/or experiential factors would explain the small race differences researchers and practitioners occasionally observe in their studies or anecdotally in the real-world. Additional analysis is needed to determine whether a particular or consistent third variable, or multiple other variables, are the driving forces behind the weak relationships between race and verdict outcome.

Before relying on demographic variables, such as race, age, or education, as an aid for exercising peremptory strikes, we (and other jury experts) recommend conducting case-specific mock trial jury research or community attitude surveys to assess whether these factors relate at all to verdict inclinations for a particular case, either directly or through an interaction with other variables such as specific attitudes. *See* Kovera & Cutler, *supra*.

Even if conducting pre-trial research is unrealistic, we typically suggest asking the judge for extended time to conduct attorney *voir dire*, and/or to use a juror questionnaire. Both of these represent opportunities to make inquiries to the venire regarding important experiential and attitudinal characteristics that might remain unearthed without a questionnaire or extensive questioning. A juror questionnaire in particular is helpful if the case or questions will concern a delicate or sensitive topic. Judges may be convinced to allow juror questionnaires and more extensive *voir dire* if they understand that, by comparison, limited *voir dire* is less likely to uncover bias and more likely to result in unlawful discrimination on the basis of race, gender, or other cognizable groups.