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Title:

The Propriety of Peremptory Challenges for Perceived Personality Traits

Authors:

Erik J. Girvan, Robert J. Cramer, Caroline Titcomb, Tess M.S. Neal, & Stanley L. Brodsky

Author bios and attribution note:

Erik Girvan, Assistant Professor, University of Oregon School of Law, J.D., Harvard Law School, Ph.D., University of Minnesota; Robert Cramer, Assistant Professor, Sam Houston State University, Ph.D., University of Alabama; Caroline Titcomb, M.A., Doctoral Candidate, University of Alabama; Tess Neal, Forensic Psychology Postdoctoral Fellow, University of Massachusetts Medical School, Ph.D. University of Alabama; Stanley Brodsky, Professor, University of Alabama, Ph.D., University of Florida, Gainesville. We would like to thank Peter Bartlett, Connor Duggan, Brian Bornstein, Ernestine Gordijn, Marti Hope Gonzales, and other reviewers solicited for their comments on earlier drafts of this paper. Any errors or omissions are ours.

Abstract:

There is substantial controversy over the extent to which social science should be used in jury selection. Underlying the debate are two competing interests in the make-up of a jury: a privilege to strike prospective jurors on subjective grounds, which supports scientific jury selection, and an collective interest of citizens to be free from exclusion from jury service, which does not. While the incommensurability of the interests precludes resolution of the controversy in the abstract, specific solutions are possible. Using the example of selection of jurors based upon their respective levels of extraversion, we describe how the competing interests frequently do not apply to concrete cases. In the subsequent analysis, we show that, rhetoric notwithstanding, a normative preference for adhering to tradition and institutional inertia are the primary instrumental considerations for determining whether peremptory challenges based upon personality traits like extraversion ought to be allowed. Consistent with this analysis, we conclude that the practice of striking jurors based upon estimates of such personality traits is appropriate.

Introduction

While attending a Continuing Legal Education seminar, the first author overheard an exchange in which one lawyer (no doubt primed by the particularities of the author's facial hair) advised another: "Always challenge jurors with goatees; they are too smart for their own good." As the focus of voir dire is not on what is good for jurors, perhaps more accurate advisements would have been either "too smart for your *client's* good" or "perceptive enough to recognize and react negatively to a weak evidence or argument." Likely dating back to the inception of the jury system, trial lawyers have cataloged physical and behavioral cues in litigation folklore as markers for particular personality traits, attitudes, or other psychological characteristics thought to be undesirable in jurors.¹ Since the 1970s, those with the resources to do so have hired jury consultants to employ empirical methods to find out which of these hunches are correct and to suggest new possibilities.²

"Scientific jury selection"³ is cited as both the source of and solution to many potential ethical issues in jury selection.⁴ As such, it is the subject of a substantial

¹ For discussions of some examples and their veracity, see generally Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, If Anything, to Do About It*, 1999 WIS. L. REV. 441 (1999); Solomon M. Fulero & Stephen D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore And Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229 (1990); Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178 (1989); and Jim Goodwin, Note, *Articulating the Inarticulate: Relying On Nonverbal Behavioral Cues To Deception To Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739 (1996).

² A famous example is that of the O.J. Simpson Trial. In the case, both prosecution and defense teams hired jury consultants to study which jurors would be most receptive to their respective arguments; see Michiko Kakutani, *Figuring Out the O.J. Simpson Trial*, N.Y. TIMES, Sept. 10, 1996, at C14. The prosecution, however, elected to ignore its experts when they advised that their research indicated that, domestic violence notwithstanding, African-American women would be sympathetic to the defense. Although it is impossible to say with certainty how much this affected the final outcome, it is true that the final twelve-person jury that acquitted Mr. Simpson consisted of seven African-American women. *Id.*

³ This phrase refers to the selection of juries based on physical and behavioral characteristics. See, e.g., Strier & Shestowsky, *supra* note 1; Fulero & Penrod, *supra* note 1.

⁴ See Strier & Shestowsky, *supra* note 1, at 471.

debate.⁵ Underlying and perpetuating the controversy over the use of psychological science in jury selection is a fundamental contradiction between two competing interests in jury composition: the recently recognized right of citizens not to be excluded from jury service and litigants' ancient common law privilege to remove a prospective juror without any stated justification.

According to the Supreme Court, jury service represents a fundamentally important experience for citizens in a democracy:

Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law. Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.⁶

Indeed, in *Powers v. Ohio*, the Court recognized a right of jurors not to be excluded from service based on their race in no small part because a jury system open to all citizens prevents abuse, promotes equality, is instrumental in civic education, and instills individuals with a sense of duty.⁷

⁵ See generally, III. *Jury Selection and Composition*, 110 HARV. L. REV. 1443 (1997); Collin P. Wedel, Note, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges*, 7 STAN. J. C.R. & C.L. 293 (2011); Rachel Hartje, Comment, *A Jury Of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection Of Juries*, 41 CAL. W. L. REV. 479 (2005); Stephanie Leonard Yarbrough, *The Jury Consultant—Friend or Foe of Justice*, 54 SMU L. REV. 1885 (2001); Maureen E. Lane, Note, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying The American Legal System?*, 32 SUFFOLK U. L. REV. 463 (1999); Debra Sahler, Comment, *Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule*, 6 ALB. L.J. SCI. & TECH. 383 (1996); Dennis P. Stolle et. al., *The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation*, 20 LAW & PSYCHOL. REV. 139 (1996); Jeremy W. Barber, Note, *The Jury Is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225 (1994); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741 (1988).

⁶ *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (internal quotations and citations omitted).

⁷ *Id.* at 406-07.

Given the breadth of rhetoric supporting the public-policy rationale for a legal interest in jury service, one might expect that courts diligently protect prospective jurors from exclusion. If so, one would be sorely disappointed. It is legally permissible for trial lawyers to act on the vast majority of their stereotypic associations, however arbitrary, between many aspects of physical appearance, observable behaviors, psychological traits, and jury verdicts when using challenges to excuse prospective jurors from the jury pool.⁸ In fact, the actual limitations on the use of peremptory challenges are extremely narrow.⁹

Since 1965, the U.S. Supreme Court has held that jurors cannot be challenged based upon their race,¹⁰ gender,¹¹ ethnicity,¹² and, at least in theory, other stereotyped groups that were the targets of historical prejudice,¹³ including religious affiliation.¹⁴ Commentators argue that this classification should be extended to members of a range of social categories, including those defined by sexual orientation,¹⁵ obesity,¹⁶ disability,¹⁷ and criminal record.¹⁸ However, there is no systematically-recognized right for members of these groups to protect them from a peremptory challenge. Moreover, there appear to be few if any serious arguments on behalf of those whose behaviors identify them—

⁸ See Goodwin, *supra* note 1.

⁹ See *id.*

¹⁰ See *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹¹ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

¹² See *Hernandez v. New York*, 500 U.S. 352 (1991); see also Elaine A. Carlson, *Batson, J.E.B., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 1005 (1994).

¹³ See Carlson, *supra* note 12, at 962-63 (citing *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992)).

¹⁴ See, e.g., A.C. Johnstone, *Peremptory Pragmatism: Religion and the Administration of the Batson Rule*, 1998 U. CHI. LEGAL F. 441 (1998).

¹⁵ See, e.g., V.H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1 (2001).

¹⁶ See, e.g., M.E. O'Grady, *A Jury of Your Skinny Peers: Weight-Based Peremptory Challenges and the Culture of Fat Bias*, 7 STAN. J. C.R. & C.L. 47 (2011).

¹⁷ Mary A. Lynch, *The Application Of Equal Protection To Prospective Jurors with Disabilities: Will Batson Cover Disability-Based Strikes?*, 57 ALB. L. REV. 289 (1993).

¹⁸ Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003); 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).

accurately or inaccurately—as members of more loosely-defined social groups, such as the facial-haired *intelligentsia*.

What explains the inconsistency between the Supreme Court’s expansive rhetoric concerning the benefits of jury service and the limited scope of protections for such service in practice? While the former may justify restrictions on the ability to exclude prospective jurors based upon assessments of their psychological traits, the latter permits such exclusions. Rejecting an abstracted approach to this question, we analyze a specific, novel example of the issues created by the recognition of competing interests in jury service.

In Part I, which focuses on criminal defendants, we provide an overview of the history and policy rationale supporting peremptory challenges and the Constitutional limitations imposed on them. In Part II, we present an empirical case for why criminal defendants may wish to strike jurors due to estimates of their respective levels of the personality trait extraversion. We report an original set of studies indicating that the trait extraversion can affect receptivity to expert testimony in the context of a capital case, biasing jurors’ perceptions of the appropriate verdict. Further, we review psychological literature showing that lawyers could, as a practical matter, reliably identify jurors’ levels of extraversion from their observed behavior.

In Part III, we expose the limitations of the public-policy rationale articulated by the courts regarding jury service generally, as well as its application to determine the propriety of peremptory challenges based on jurors’ psychological characteristics. We then suggest two alternative policy criteria and discuss the implications and shortcomings of each. Finally, based on the analysis, we argue that judicial decisions regarding the

appropriate scope of the peremptory challenge are best understood through the criteria of legal traditionalism and institutional inertia, rather than any expressed rhetoric about the value of jury service. Given these criteria, except in the narrow case of historically disadvantaged “discrete and insular minorities,”¹⁹ the privilege of a party to strike prospective jurors based upon estimates of their psychological characteristics — such as personality — trumps the interests of a particular citizen in jury service.²⁰

I. Exclusion and Inclusion: A History of Interests in Jury Service

Courts and scholars have recognized numerous distinct bases for interests related to the use of peremptory challenges.²¹ For simplicity, these bases can be placed into two categories. The first is the privilege of the litigants, particularly criminal defendants, to strike jurors whom they perceive to be partial. The second is the collective interest of citizens in jury service. This section provides an overview of each.

A. A Common Law Privilege to Exclude

The privilege of a criminal defendant to make peremptory challenges is ancient, with roots in Roman practice, and is related to the common law right to an unbiased jury.²² At the inception of the institution of the jury trial, juries more resembled a collection of witnesses, each of whom was expected to have some firsthand knowledge of the facts of the case, rather than the abstracted deliberative body with which we are

¹⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

²⁰ *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986).

²¹ *See generally* Audrey M. Fried, *Fulfilling the Promise of Batson: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311 (1997); Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568 (2007); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?* 92 COLUM. L. REV. 725 (1992); *III. Jury Selection and Composition*, *supra* note 5; Kalt, *supra* note 18.

²² A comprehensive discussion of the history of the jury is beyond the scope of this article and is covered extensively elsewhere. *See, e.g.,* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994); *see also* JOHN PETTINGAL, *AN ENQUIRY INTO THE USE AND PRACTICE OF JURIES AMONG THE GREEKS AND ROMANS* 135 (1769).

familiar today.²³ Even then, however, jurors were to be independent of the parties to the case, e.g., not relatives or associates.²⁴ To enforce the right to an unbiased jury, counsel were ultimately able to challenge either the entire venire, as having been delivered by a biased official, or jurors individually on one of four grounds: that the juror was royalty, had been convicted of a crime that indicated he was not credible, was deficient in terms of legal status (e.g., a slave, a woman, not a citizen, or not a landholder), or was suspected of bias either with or without proof.²⁵

The latter challenge, as embodied in 18th century English common law, was imported to colonial America as the peremptory challenge.²⁶ Here, as in England, it was considered an essential procedural mechanism, but not necessarily one designed to *make* juries unbiased. Rather, the purpose of the peremptory challenge was to help ensure the legal system did not seem to be biased, as “to perform its high function in the best way ‘justice must satisfy the appearance of justice.’”²⁷ For this reason, the peremptory challenge was considered so fundamental that its “denial or impairment . . . [was] reversible error without a showing of prejudice.”²⁸

For example, in an early U.S. Supreme Court opinion deciding criminal defendants charged with the same capital offense lacked a right to be tried separately, Justice Story reviewed the common law rationale for the peremptory challenge.²⁹ Citing

²³ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 86-89 (3d ed. 1990).

²⁴ *Id.*

²⁵ Carlson, *supra* note 12, at 988-90 (1994) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES, *349, *350).

²⁶ *Id.* at 951-53.

²⁷ Swain v. Alabama, 380 U.S. 202, 219 (1965) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). Social scientific research supports the notion that litigants who perceive the justice system as procedurally fair are more willing to support it, even when they lose a case. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 64 (1988).

²⁸ *See Swain*, 380 U.S. at 219 (citing Lewis v. United States, 146 U.S. 370, 376 (1982)).

²⁹ United States v. Marchant & Colson, 25 U.S. 480, 482 (1827).

Blackstone, he observed that the ability to make challenges to jurors was one of exclusion, not selection.³⁰ It existed—within the limits of the total number of challenges allowed, the computation of which became an issue when two or more defendants were tried together—to give defendants a way to avoid being tried by a jury composed of individuals they perceived to be biased against them.³¹ The subjectivity of the defendants’ perception of who might be biased was not considered a weakness of the procedure, but essential to it:

As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.³²

Thus the core historical justification for the right to a peremptory challenge had less to do with actual bias (i.e., that which was grounded in fact or could in theory be proven) as with addressing a defendant’s concern, however unfounded, that the deck was effectively stacked against him.

B. Limits on the Peremptory Challenge³³

The common law articulated by Blackstone is not the only source of peremptory challenge jurisprudence. Indeed, in 1790 the same Congress that proposed the Bill of Rights passed an act recognizing the use of the procedure in capital cases.³⁴ It was not until the 20th century, however, that U.S. Supreme Court began to explore in earnest

³⁰ *Id.*

³¹ *Id.*

³² *Lewis*, 146 U.S. at 376 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *353). A similar, albeit less central, justification was offered for peremptory challenges for prosecutors, as well as the purpose of offsetting any advantage in this regard to the defendant as “the scales [of justice] are to be evenly held.” *Swain*, 380 U.S. at 220 (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)).

³³ *See, e.g., III. Jury Selection and Composition*, *supra* note 5; *Underwood*, *supra* note 21.

³⁴ *See Holland v. Illinois*, 493 U.S. 474, 481 (1990).

Constitutional justifications for rights and duties related to the peremptory challenge. However, the exploration was not directed towards bolstering or guaranteeing the peremptory challenge, but rather the opposite. In 1919, the U.S. Supreme Court expressly rejected the argument that the Sixth Amendment right to an impartial jury guarantees peremptory challenges.³⁵ Instead, the Court ultimately used the Constitution as the source of the first recognized limits on the peremptory challenge as a privilege to exclude potential jurors for arbitrary or capricious reasons.

Consistent with the peremptory challenge's roots as a way to avoid the perception of a biased jury, the first substantive limits on the use of peremptory challenges related to systematic use of the procedure by prosecutors to ensure all-white juries. In *Swain*, the Supreme Court recognized that such use to carry out a discriminatory policy could violate equal protection under the Fourteenth Amendment.³⁶ In the case, an African-American defendant appealed a rape verdict in part on the grounds that Alabama prosecutors had used their peremptory challenges to strike African-American jurors not only in his case, but in every case, with the result that there had never been an African-American juror empanelled in the county where the trial was held.³⁷

After reviewing the history of the peremptory challenge, the Court first opined that the challenge's fundamental property was the ability of parties to strike jurors for any reason without judicial oversight.³⁸ Acceptable justifications for strikes included: the party's "sudden impressions and unaccountable prejudices" thoughts as to "whether [a juror] from a different group is less likely to be" partial, "a juror's 'habits and

³⁵ *Stilson v. United States*, 250 U.S. 583, 586 (1919); *see also Holland*, 493 U.S. 474.

³⁶ *Cf. Swain*, 380 U.S. at 204.

³⁷ *Id.* at 223.

³⁸ *Id.* at 213-14.

associations” or his or her “race, religion, nationality, occupation or affiliations.”³⁹ The Court then drew a distinction between intra- and inter-case considerations.⁴⁰ In particular, the Court held that the exercise of a peremptory challenge for any reason specific to a *particular* defendant, crime, or case was entirely privileged.⁴¹ However, a pattern of race-targeted peremptory challenges by the “prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be” raised an issue of equal protection.⁴² Thus, for the first time defendants had not only a privilege to strike jurors arbitrarily, but also a potential right to a trial before a jury composed of at least a limited class of individuals who the prosecutor would have stricken with complete discretion.

As a practical matter, however, the right existed for defendants only in theory. The burden necessary to invoke judicial inquiry into the basis for a prosecutor’s peremptory challenge was heavy, requiring the production of evidence of the prosecutor’s systematic use of the challenges across other cases. In *Batson v. Kentucky*, the Supreme Court removed the intra-/inter-case distinction,⁴³ effectively lowering the burden by allowing defendants to make out a *prima facie* case of racial discrimination using evidence from only the peremptory challenges in the case at issue.⁴⁴ Although historically unprecedented, the recognition of a constitutional limitation on prosecutors’ peremptory-

³⁹ *Id.* at 220-21 (citations and internal quotations omitted).

⁴⁰ *Id.* at 222-23.

⁴¹ *Id.*

⁴² *Id.* at 223 (citations and internal quotations omitted).

⁴³ The distinction survives in some tests for what bases of peremptory challenges are permissible. *See, e.g.,* *People v. Tapia*, 30 Cal. Rptr. 2d 851, 866 (Cal. Ct. App. 1994) (peremptory challenges may not be used to remove prospective jurors solely on the basis of presumed group bias). We defined group bias as a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. Peremptory challenges are permissible only if they are based on specific bias, defined as “a bias relating to the particular case on trial or the parties or witnesses thereto.” *Id.* (quoting *People v. Wheeler*, 583 P.2d 748, 761 (Cal. 1978)).

⁴⁴ *Batson v. Kentucky*, 476 U.S. 79, 80 (1986).

challenge privilege was far less significant than the next development in the evolving dialogue between peremptory challenges and the U.S. Constitution.

In *Powers v. Ohio*, the U.S. Supreme Court recognized a new, competing interest related to the use of peremptory challenges: the right of citizens selected for jury service not to be excluded based upon their race.⁴⁵ In *Powers*, the defendant, a Caucasian man, objected to the prosecutor's use of seven of ten peremptory challenges to remove African-American jurors from the venire.⁴⁶ After his conviction for murder, the defendant appealed the verdict under *Batson*, citing his Fourteenth Amendment right to equal protection.⁴⁷ The Court reversed and remanded on the grounds that the prosecutor's use of race-based peremptory challenges violated the rights of individual jurors "not to be excluded from [a petit jury] on account of race."⁴⁸

As a foundation for the new right, the Court reviewed dissents in judicial opinions, as well as political scholarship going back to Alexis de Tocqueville asserting the importance of an inclusionary jury system.⁴⁹ On this basis, it opined jury service was central to citizenship, provided a civic education and an opportunity to participate in the administration of justice, and supplied the "democratic element of the law," which "guards the rights of the parties and ensures continued acceptance of the laws by all of

⁴⁵ 499 U.S. 400, 416 (1991).

⁴⁶ *Id.* at 400.

⁴⁷ *Id.* at 403. The defendant also raised a Sixth Amendment claim, but, while the case was pending, the Supreme Court "held the Sixth Amendment did not restrict the exclusion of a racial group at the peremptory challenge stage." *Id.* at 404 (citing *Holland v. Illinois*, 493 U.S. 474, 488 (1990) (Kennedy, J., concurring)).

⁴⁸ *Powers*, 499 U.S. at 400.

⁴⁹ *See id.* at 406-10.

the people.”⁵⁰ *Powers*, in turn, opened the door for allowing *prosecutors* to object to, and to force judicial inquiry into, the basis for *defendants’* peremptory challenges.⁵¹

Thus, coming full circle, the Supreme Court justified the most substantive limitation on a defendant’s privilege to peremptorily challenge jurors on very similar public policy grounds as the peremptory challenge itself. Parties to a criminal case have traditionally been given the unfettered privilege to remove prospective jurors thought to be biased as a safeguard against the accusation that the jury trial itself was a sham and the scales already firmly tilted in favor of a particular verdict. The right of prospective jurors not to be excluded from service serves the same goal: avoiding “the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.”⁵²

II. The Example of Extraverted Jurors

Should psychological science be used to identify and systematically exclude jurors with particular identifiable psychological and/or interpersonal characteristics? Where does the ability to exclude end and right to be free from exclusion begin? Given courts have derived two mutually-exclusive interests related to jury composition from the same public-policy goal, answering these questions definitively in the abstract is likely impossible. We argue that one need not do so. Rather, the tension between the common law peremptory challenge and Constitutional freedom from exclusion is best resolved with reference to specifics: specific practices, specific traits, and specific interests.

⁵⁰ See *Powers*, 499 U.S. at 407 (1991) (citing *Green v. United States*, 356 U.S. 165, 215 (1958)) (Black, J., dissenting)).

⁵¹ See *Georgia v. McCollum*, 505 U.S. 42 (1992); see also Carlson, *supra* note 12, at 962.

⁵² *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994).

To set the stage for such an analysis, in this section, we present original research suggesting that a juror's level of extraversion could bias the extent to which they are persuaded by expert testimony, ultimately affecting whether the juror supports a sentence of guilty versus one of not guilty in a capital case. In addition, we review psychological research indicating that juror extraversion is a trait that is readily and reliably observable and, thus, as a practical matter, is one that could be used to analyze a venire and determine which jurors to strike.

A. Effects of Juror Extraversion on the Impact of Expert Testimony

Use of expert testimony is a common, often central, and sometimes required feature of litigation.⁵³ Jurors' perceptions of the credibility of an expert witness are critical to the effectiveness of the witness.⁵⁴ Itself a source of information, credibility can act as evidence for an argument, affect the amount of thought exerted by jurors, and bias their ongoing perceptions and thought processes in favor of or against a desired outcome.⁵⁵ In fact, a witness's status as an expert may provide a simple cue to the jurors that they can be less critical of the arguments presented due to the heuristic assumption that experts are usually correct.⁵⁶

⁵³ See *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (recognizing criminal defendants' right to expert testimony when their psychological condition is at issue); *Briggs v. Wash. Metro. Transit Auth.*, 481 F.3d 839, 845 (D.C. Cir. 2007) (collecting a variety of cases in which expert testimony was required by the D.C. Circuit); *Urdang v. Mahrer*, 158 N.E.2d 902 (Ohio Ct. App. 1959) ("The overwhelming weight of authority supports the view that ordinarily expert evidence is essential to support an action for malpractice against a physician or surgeon."). *But see* Colin Miller, *No Expertise Required: How Washington D.C. Has Erred in Expanding Its Expert Testimony Requirement*, 39 RUTGERS L. REC. 55 (2012) (arguing that expert testimony should not be required in many types of cases).

⁵⁴ See Stanley L. Brodsky et al., *The Witness Credibility Scale: An Outcome Measure for Expert Witness Research*, 28 BEHAV. SCI. & L. 892 (2010) [hereinafter Brodsky et al., *The Witness Credibility Scale*].

⁵⁵ See Richard E. Petty & Pablo Brinol, *Persuasion: From Single to Multiple Metacognitive Processes*, 3 PERSP. ON PSYCHOL. SCI. 137 (2008); Richard E. Petty et al., *Source and Message Factors in Persuasion: A Reply to Stiff's Critique of the Elaboration Likelihood Model*, 54 COMM. MONOGRAPHS 233 (1987).

⁵⁶ See, e.g., Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOL. 752 (1980); Richard E. Petty, John T. Cacioppo & Rachel Goldman, *Personal Involvement as a Determinant of Argument-Based*

Research into both the jury decision-making and social-cognitive literature supports the assertion that jurors use peripheral cues such as expertise when processing testimony and other forms of evidence.⁵⁷ Although traditionally viewed as automatic and often undetectable processes,⁵⁸ efforts are being made to clarify the role of peripheral processes in decision-making.⁵⁹ Greene and Ellis, for example, underscored that heuristic processes include conscious decisions and interpersonal inferences.⁶⁰ Similarly, other scholars eschew the automatic and controlled process distinction and argue for a single route to persuasion.⁶¹ There is ample evidence that jurors are influenced, consciously or not, by simple cues such as witness attractiveness, age, gender, ethnicity, speech style, eye contact, and body language; all these factors can affect how jurors evaluate an expert witness' credibility and the extent to which they are persuaded by that expert.⁶²

Persuasion, 41 J. PERSONALITY & SOC. PSYCHOL. 847 (1981); Richard E. Petty & Duane T. Wegener, *Attitude Change: Multiple Roles for Persuasion Variables*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY, 323 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).

⁵⁷ See, e.g., ELLIOT ARONSON, THE SOCIAL ANIMAL (11th ed. 2011); Edie Greene & Leslie Ellis, *Decision Making in Criminal Justice*, in APPLYING PSYCHOLOGY TO CRIMINAL JUSTICE 183 (David Carson et al. eds., 2007); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision-Making*, in THE JURY TRIAL IN CRIMINAL JUSTICE 192 (Douglas D. Koski ed., 2003); Steven J. Sherman, Charles M. Judd & Bernadette Park, *Social Cognition*, 40 ANN. REV. PSYCHOL. 281 (1989).

⁵⁸ Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 27 SCI. 1124 (1974).

⁵⁹ See Felix Acker, *New Findings on Unconscious Versus Conscious Thought in Decision Making: Additional Empirical Data and Meta-Analysis*, 3 JUDGMENT & DECISION MAKING 292 (2008).

⁶⁰ See Greene & Ellis, *supra* note 57.

⁶¹ E.g., Arie W. Kruglanski & Erik P. Thompson, *Persuasion by a Single Route: A View from the Unimodel*, 2 PSYCHOL. INQUIRY 83, 83 (1999).

⁶² See, e.g., Stanley L. Brodsky et al., *Credibility in the Courtroom: How Likeable Should an Expert Witness Be?*, 37 J. AM. ACAD. PSYCHIATRY & L. 525 (2009) [hereinafter Brodsky et al., *Credibility in the Courtroom*]; Robert J. Cramer et al., *Expert Witness Confidence and Juror Personality: Their Impact on Credibility and Persuasion in the Courtroom*, 37 J. AM. ACAD. PSYCHIATRY & L. 63 (2009); Kenneth G. DeBono & Richard J. Harnish, *Source Expertise, Source Attractiveness, and the Processing of Persuasive Information: A Functional Approach*, 55 J. PERSONALITY & SOC. PSYCHOL. 541, 541 (1988); Kim Giffin, *The Contribution of Studies of Source Credibility to a Theory of Interpersonal Trust in the Communication Process*, 68 PSYCHOL. BULL. 104 (1967); James E. Maddux & Ronald W. Rogers, *Effects of Source Expertness, Physical Attractiveness, and Supporting Arguments on Persuasion: A Case of Brains over Beauty*, 39 J. PERSONALITY & SOC. PSYCHOL. 235, 235 (1980); Gerald R. Miller & Judee K. Burgoon, *Factors Affecting Assessments of Witness Credibility*, in THE PSYCHOLOGY OF THE COURTROOM (Norbert L. Kerr & Robert M. Bray eds., 1982); Tess M. S. Neal & Stanley L. Brodsky, *Expert Witness Credibility as a Function of Eye Contact Behavior and Gender*, 35 CRIM. JUST. & BEHAV. 1515 (2008).

But credibility is not a one-dimensional construct. Brodsky and colleagues provide a model of witness credibility in which four empirically supported characteristics of expert testimony — witness confidence, likeability, trustworthiness, and knowledge — act in concert to determine credibility.⁶³ By exposing the characteristics underlying expert witness credibility, the model provides a practical tool for assessing the strengths and shortcomings of an expert witness.

Behaviors related to confidence (i.e., “the degree of demonstrable self-assurance expert witnesses have in their general ability on the stand”),⁶⁴ which is one of the four credibility domains, have been shown to influence testimonial outcomes.⁶⁵ Operationally, the behaviors include verbal confidence cues such as variations in expert and lay witness’ tone and style of speech (e.g., use of verbal hedges, intensifiers, hesitations), and nonverbal behaviors such as varied levels of eye contact, posture,

⁶³ See Brodsky et al., *The Witness Credibility Scale*, *supra* note 54, at 64; see also STANLEY L. BRODSKY, *COPING WITH CROSS-EXAMINATION AND OTHER PATHWAYS TO EFFECTIVE TESTIMONY* (2004).

⁶⁴ Cramer et al., *supra* note 62, at 64 (2009).

⁶⁵ More broadly, jurors’ perceptions of witness confidence have been well documented as positively correlated with credibility, accuracy, and believability ratings of witness testimony. See, e.g., R. C. L. Lindsay et al., *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 L. & HUM. BEHAV. 333 (1989); Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability in Memory*, 12 LEARNING & MEMORY 361 (2005); C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPLIED PSYCHOL. 714 (1994); Veronica S. Tetterton & Amye R. Warren, *Using Witness Confidence Can Impair the Ability to Detect Deception*, 32 CRIM. JUST. & BEHAV. 433 (2005); Bernard E. Whitley Jr. & Martin S. Greenberg, *The Role of Eyewitness Confidence in Juror Perceptions of Credibility*, 16 J. APPLIED SOC. PSYCHOL. 387 (1989). Additional evidence for the relation between confidence, persuasion, and subsequent decision-making comes from fields related to computer information technology, advertising and consumer behavior, market economics, and sales consulting. E.g., Gerald D. Bell, *Self-Confidence and Persuasion in Car Buying*, 4 J. MARKETING RES. 46 (1967); Fergus Bolger, Briony D. Pulford, & Andrew M. Colman, *Market Entry Decisions: Effects of Absolute and Relative Confidence*, 55 EXPERIMENTAL PSYCHOL. 113 (2008); John M. Briggs, *The Psychology of Successful Persuasion*, 22 J. AM. SOC’Y C.L.U. 51 (1968); Donald F. Cox & Raymond A. Bauer, *Self-Confidence and Persuasibility in Women*, 28 PUB. OPINION Q. 453 (1964); J. J. Jiang, G. Klein, & R. G. Vedder, *Persuasive Expert Systems: The Influence of Confidence and Discrepancy*, 16 COMPUTERS HUM. BEHAV. 99 (2000); Rosann L. Spiro & Barton A. Weitz, *Adaptive Selling: Conceptualization, Measurement, and Nomological Validity*, 27 J. MARKETING RES. 61 (1990); J. Frank Yates, Paul C. Price, Ju-Whei Lee, & James Ramirez, *Good Probabilistic Forecasters: The ‘Consumer’s’ Perspective*, 12 INT’L J. FORECAST 41 (1996).

gestures, and anxious movements.⁶⁶ Others have studied lay witness confidence in a more naturalistic context, or have manipulated ratings of the communicators' and eyewitness' self-confidence by varying the presence of corroborating evidence and narrative statements, respectively.⁶⁷

From a psychological-process standpoint, the confidence heuristic model provides a sensible foundation for understanding how perceptions of confidence derived from confidence-related behaviors may operate in the courtroom.⁶⁸ The model equates higher levels of witness confidence with message receivers assuming greater competence, knowledge, and persuasive power.⁶⁹ As with other elements of source credibility, contemporary research conceptualizes confidence as an influential factor that is consistent with theories regarding peripheral cues and their impact on persuasion.⁷⁰

However, not all jurors will perceive, or respond to, confidence-related cues in the same way. Social-psychological theories of message learning⁷¹ and reception yielding⁷²

⁶⁶ See Brodsky et al., *Credibility in the Courtroom*, *supra* note 62, at 525; Michael Leippe, Andrew P. Manion, & Ann Romanczyk, *Eyewitness Persuasion: How and How Well do Fact Finders Judge the Accuracy of Adults' and Children's Memory Reports?*, 63 J. PERSONALITY & SOC. PSYCHOL. 181 (1997); Catha Maslow, Kathryn Yoselson, & Harvey London, *Persuasiveness of Confidence Expressed via Language and Body Language*, 10 BRIT. J. SOC. & CLINICAL PSYCHOL. 234 (1971); Neal & Brodsky, *supra* note 62; WILLIAM M. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* (1982); Gary L. Wells & R. C. L. Lindsay, *How do People Infer Accuracy of Eyewitness Memory? Studies of Performance and a Metamemory Analysis*, in *EVALUATING WITNESS EVIDENCE: RECENT PSYCHOLOGICAL RESEARCH AND NEW PERSPECTIVES* 41 (Sally M.A. Lloyd-Bostock & Brian R. Clifford eds., 1983).

⁶⁷ Kimberley McClure & Jill J. Myers, Presentation at the Annual Meeting of the American Psychology-Law Society, Vancouver, B.C.: The Two-Pronged Test Attenuates the Effects of Witness Confidence on Detectives' Perceptions of Eyewitness Credibility (March 18, 2010); Harvey London et al., *The Jury Method: How the Persuader Persuades*, 34 PUB. OPINION Q. 171 (1970); Harvey London, Philip J. Meldman, & A. Van C. Lanckton, *The Jury Method: Some Correlates of Persuading*, 23 HUM. REL. 115 (1970); HARVEY LONDON, PHILIP J. MELDMAN, & A. VAN C. LANCKTON, *THE JURY METHOD* (1970); Luus & Wells, *supra* note 65.

⁶⁸ See Paul C. Price & Eric R. Stone, *Intuitive Evaluation of Likelihood Judgment Producers: Evidence for a Confidence Heuristic*, 17 J. BEHAV. DECISION MAKING 39 (2004).

⁶⁹ See generally J. FRANK YATES, *JUDGMENT AND DECISION MAKING* (1990).

⁷⁰ See Petty, Cacioppo & Goldman, *supra* note 56, at 847.

⁷¹ See generally CARL IVAR HOVLAND ET AL., *COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE* (1953).

state that messages result in attitude change through specific mediating processes related to information perception (i.e., message reception) and acceptance (i.e., yielding to the message).⁷³ Where a characteristic of the individual, the message, or both in interaction disrupt the process, no attitude change occurs. Thus, using the reception-yielding formulation, Chaiken and Eagly showed that changing the communication medium moderates receptivity of more subtle, non-verbal cues such as the communicator's likeability conveyed in the message.⁷⁴ Overall, the findings suggest that the factors which affect whether an argument or item of evidence is perceived, such as non-verbal cues, can alter how that message is received.

The intersection of low juror extraversion and the subtlety of confidence-related behaviors likely represent an example of a combination of psychological and message characteristics that disrupt the processes of reception and yielding and thus prevent attitude change. Numerous lines of research provide converging evidence that extraversion is one of the primary dimensions of personality.⁷⁵ Moreover, of the personality characteristics, several studies show that an individual's level of extraversion can be reliably assessed by raters (e.g., jury consultants) through observation.⁷⁶ Furthermore, from a forensic standpoint, extraversion has been shown to be an important

⁷² William J. McGuire, *Personality and Attitude Change: An Information-Processing Theory*, in PSYCHOLOGICAL FOUNDATIONS OF ATTITUDES 171, 181-82 (Anthony G. Greenwald et al. eds., 1968).

⁷³ Petty, Cacioppo & Goldman, *supra* note 56, at 847; *See generally* ALICE H. EAGLY & SHELLY CHAIKEN, THE PSYCHOLOGY OF ATTITUDES (1993).

⁷⁴ *See* EAGLY & CHAIKEN, *supra* note 73.

⁷⁵ *See* John M. Digman, *Personality Structure: Emergence of the Five-Factor Model*, 41 ANN. REV. PSYCHOL. 417 (1990).

⁷⁶ Andrew Beer & David Watson, *Personality Judgment at Zero Acquaintance: Agreement, Assumed Similarity, and Implicit Simplicity*, 90 J. PERSONALITY ASSESSMENT 250, 251 (2008); Peter Borkenau & Anette Liebler, *Trait Inferences: Sources of Validity at Zero Acquaintance*, 62 J. PERSONALITY & SOC. PSYCHOL. 645, 654 (1992).

variable in jury selection related to pro-defense verdicts and being elected as jury foreperson.⁷⁷

The “Big Five” personality classification of extraversion is perhaps the most widely recognized and researched conceptualization.⁷⁸ From this perspective, extraverts are gregarious.⁷⁹ They tend to be highly talkative, seek positive emotions from their environment, engage in high degrees of social and other activity, display assertiveness, and present interpersonal warmth.⁸⁰ By contrast, introverts display the opposite tendencies.⁸¹

Experiments provide evidence for extraversion’s positive relation with the ability to interpret nonverbal messages when decoding such messages is a peripheral task or one of many concurrent tasks.⁸² For example, Akert and Panter found that extraverts’ higher tolerance for stimulation yielded an advantage in decoding—or accurately recognizing—nonverbal messages, especially when the messages were highly complex.⁸³ Further, Lieberman and Rosenthal hypothesized that the documented decoding advantage of the

⁷⁷ John Clark et al., *Five-Factor Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 644 (2007).

⁷⁸ See, e.g., PAUL T. COSTA & ROBERT R. MCCRAE, *THE NEO-PIR PROFESSIONAL MANUAL* (1992) [hereinafter COSTA & MCCRAE, *NEO-PIR PROFESSIONAL MANUAL*]; Paul T. Costa & Robert R. McCrae, *Normal Personality Assessment in Clinical Practice: The NEO Personality Inventory*, 4 PSYCHOL. ASSESSMENT 5 (1992) [hereinafter Costa & McCrae, *Normal Personality Assessment in Clinical Practice*]; Robert J. Cramer et al., *A Five-Factor Analysis of Spirituality in Young Adults: Preliminary Evidence*, 43 RES. SOC. SCI. STUD. RELIGION 43 (2008); Lewis R. Goldberg, *A Broad-Bandwidth, Public Domain, Personality Inventory Measuring the Lower-Level Facets of Several Five-Factor Models*, in PERSONALITY PSYCHOLOGY IN EUROPE 7 (Ivan Mervielde et al. eds., 1999); ROBERT R. MCCRAE & PAUL T. COSTA, *PERSONALITY IN ADULTHOOD: A FIVE-FACTOR THEORY PERSPECTIVE* (2003).

⁷⁹ See Costa & McCrae, *Normal Personality Assessment in Clinical Practice*, *supra* note 78, at 7.

⁸⁰ See *id.*; COSTA & MCCRAE, *NEO-PIR PROFESSIONAL MANUAL*, *supra* note 78.

⁸¹ Costa & McCrae, *Normal Personality Assessment in Clinical Practice*, *supra* note 78, at 7.

⁸² Robin M. Akert & Abigail T. Panter, *Extraversion and the Ability to Decode Nonverbal Communication*, 9 PERSONALITY & INDIVIDUAL DIFFERENCES 965 (1988); Hillary Anger Elfenbein et al., *Emotional Intelligence and the Recognition of Emotion from Facial Expressions*, in THE WISDOM IN FEELINGS: PSYCHOLOGICAL PROCESSES IN EMOTIONAL INTELLIGENCE 37 (Lisa Feldman Barrett & Peter Salovey eds., 2002); Matthew D. Lieberman & Robert Rosenthal, *Why Introverts Can’t Always Tell Who Likes Them: Multitasking and Nonverbal Decoding*, 80 J. PERSONALITY & SOC. PSYCHOL. 294 (2001).

⁸³ See Akert & Panter, *supra* note 82, at 970.

extravert would occur primarily in naturalistic settings, because such settings inherently involve multitasking.⁸⁴ A meta-analysis of their experiments provides support for their assertion; extraverts are significantly more accurate at decoding nonverbal messages when participants are multitasking, but not when participants' attention is focused on decoding nonverbal communications. Thus, based upon existing psychological theory, there is ample reason to believe that shy jurors and gregarious jurors will respond differently to a witness's level of confidence in his or her testimony.

B. Two Original Studies

To our knowledge, no study had tested this hypothesis. Accordingly, in two studies we examined whether jurors' level of extraversion moderates the persuasive impact of expert witness confidence relative to the combined effects of the remaining elements of the credibility model (i.e., likeability, trustworthiness, and knowledge).⁸⁵ In the first, we assessed the relation between juror extraversion and witness testimonial confidence, baseline credibility, and overall credibility in a correlational design. Study II replicated and extended Study I by examining the relation between these variables when witness testimonial confidence was behaviorally manipulated.

1. Hypotheses.

Hypothesis one (H1). Overall credibility will be a significant positive predictor of death penalty assignment. A positive relationship is hypothesized because the expert in our study testifies that the defendant is dangerous and will continue to present a danger to

⁸⁴ See Lieberman & Rosenthal, *supra* note 82, at 294-95.

⁸⁵ For ease of reference, in the remainder of the paper we refer to the combination of all four elements in the credibility model as "overall credibility," the confidence element alone as "testimonial confidence," and the combination of likeability, trustworthiness, and knowledge as "baseline credibility."

society. Thus, the more credible jurors find the expert, the more we would expect them to agree with the expert.

Hypothesis two (H2). Extraversion will moderate the overall persuasive effects of testimonial confidence and baseline credibility on death penalty assignment. Specifically, both an expert witness' testimonial confidence and baseline credibility will play a role in the likelihood that the participant assigns the death penalty for extraverted participants. However, for participants who are low in extraversion (i.e., introverted), the likelihood of assigning the death penalty will be affected primarily by baseline credibility, not testimonial confidence. In short, we predicted a significant three-way interaction between testimonial confidence, juror extraversion, and baseline credibility.

2. *Study I: Exploratory Analysis of Expert Testimony and Juror Extraversion*

Method

Participants

A total of 209 mock jurors were drawn from introductory psychology courses at a large, public university. Their mean age was 19.08 years ($SD = 2.15$). The sample was predominantly female (85%) and primarily Caucasian ($n = 177$), followed by African-American ($n = 26$), Asian-American ($n = 3$), and 'Other' ($n = 3$).

Measures

The dataset from Stanley Brodsky and his colleagues' 2009 experiment⁸⁶ was analyzed for Study I in the present investigation. The measures described below were those used to gather data for the original study.

⁸⁶ See Brodsky et al., *Credibility in the Courtroom*, *supra* note 62.

Demographics. Demographic information was collected for participant age, gender, ethnicity, juror service experience, and testifying experience.

Witness confidence and credibility. Witness confidence was assessed using the Witness Credibility Scale.⁸⁷ The scale is composed of twenty paired adjectives, each rated on a 10-point bipolar scale.⁸⁸ Based on expert witness research, factor analyses yielded four subscales: Confidence, Trustworthiness, Likability, and Knowledge.⁸⁹ These four factors can be aggregated for a total witness credibility score to measure overall credibility.⁹⁰ In four separate studies, subscale internal consistencies for the factors have been found to be high: Confidence ($\alpha = .89$ to $.94$), Trustworthiness ($\alpha = .92$ to $.98$), Likability ($\alpha = .86$ to $.94$), and Knowledge ($\alpha = .86$ to $.96$). The overall credibility alpha values range from $.91$ to $.97$. Of these four factors, the present investigation focuses primarily on a comparison between the effects of Confidence (i.e., testimonial confidence) and a summed total score of the other three credibility subscales (i.e., baseline credibility).

Extraversion. Mock juror extraversion was measured with Goldberg's Five-Factor Items.⁹¹ This instrument includes fifty statements, each rated on a five-point Likert scale.⁹² Five overarching traits are assessed: emotional stability ($\alpha = .86$), extraversion ($\alpha = .87$), openness to experience ($\alpha = .84$), agreeableness ($\alpha = .82$), and conscientiousness ($\alpha = .79$). The extraversion scale was the scale of interest in our study.

⁸⁷ See generally Brodsky et al., *The Witness Credibility Scale*, *supra* note 54.

⁸⁸ *Id.* at 899.

⁸⁹ *Id.* at 898-99.

⁹⁰ *Id.* at 899-900.

⁹¹ See Goldberg, *supra* note 78. For a discussion of personality measurements generally, see International Personality Item Pool (IPIP), *A Scientific Collaboratory for the Development of Advanced Measures of Personality Traits and Other Individual Differences* (2001), <http://ipip.ori.org/> (last visited December 18, 2012).

⁹² See Brodsky et al., *The Witness Credibility Scale*, *supra* note 54, at 902.

Sentencing decision. Expert testimony featured a witness conveying an opinion consistent with assignment of the death penalty, as opposed to life in prison without parole. Sentencing recommendation was defined as mock juror ratings of their likelihood of assigning the death penalty. Likelihood of assigning the death penalty was assessed using a 10-point Likert scale with endpoints labeled 1 = “Very Unlikely” and 10 = “Extremely Likely.”

Procedure

Participants received brief jury instructions, noting that they were to rate an observed expert witness and make sentencing decisions based on the witness’s recommendations. Participants then watched a videotape of a mock expert witness testifying concerning results of a psychological evaluation on the violence risk of a defendant convicted of capital murder. They then completed the demographic, personality, and credibility measures. All participants were notified of their rights as a research participant and debriefed.

Results

Linear regression with the criterion variable of participants’ sentencing decision was implemented to test H1. The main predictor was overall witness credibility, controlling for age, gender, support for the death penalty, and extraversion. The overall model was significant, $F(5, 203) = 27.55, p < .001, R^2 = .40$. As predicted, perception of overall credibility was significant ($\beta = .41, p < .001$), and the positive beta weight indicated a positive association between credibility and assigning the death penalty, consistent with our prediction.

To test H2, a regression model with participants' sentencing decision as the criterion measure was used. Predictors included ratings of expert witness testimonial confidence, ratings of expert witness baseline credibility, participants' level of extraversion, as well as the two- and three-way interactions between these variables. The model also included controls for age, gender, and support for the death penalty. The overall model was significant, $F(10, 198) = 16.06, p < .001, R^2 = .45$. Baseline credibility was a significant positive predictor ($\beta = .52, p < .001$), qualified by a marginal trend higher order interaction with participants' level of extraversion ($\beta = -.14, p = .08$). Similarly, the interaction between witness testimonial confidence and juror extraversion yielded a marginal trend ($\beta = .24, p = .06$). Finally, these results were qualified by a marginal trend in the predicted three-way interaction ($\beta = -.41, p = .09$).

Given that the predicted three-way interaction only approached significance, a formal analysis of the simple slopes could be misleading.⁹³ Nevertheless, because the interaction was predicted and because for this study we relied on individual differences in perception, we compared the relative effects of testimonial confidence and baseline credibility on death penalty recommendations for introverts and extraverts for exploratory purposes. The decision patterns were consistent with those described in H2 (see Figure 1).

⁹³ Jeremy F. Dawson & Andreas W. Richter, *Probing Three-Way Interactions in Moderated Multiple Regression: Development and Application of a Slope Difference Test*, 91 J. APPLIED PSYCHOL. 917, 918 (2006).

Figure 1: Mean likelihood of assigning the death penalty by level of extraversion and ratings of expert witness' base-line credibility and testimonial confidence

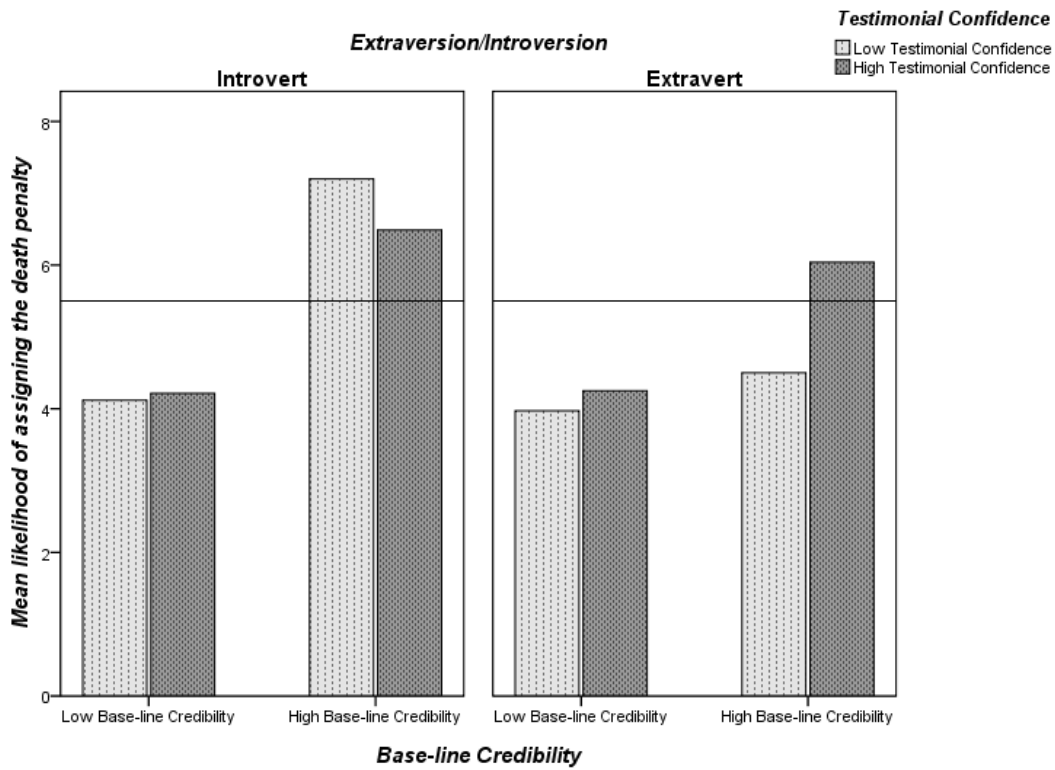


Figure 1 displays that expert witnesses perceived as low in testimonial confidence had a differential impact on the sentencing recommendations of introverts and extraverts. When participants were introverted, their perceptions of an expert's testimonial confidence appeared to have no impact on how the expert's testimony influenced his or her sentencing recommendations. In comparison, the likelihood of assigning the death penalty for participants who were extraverted did not cross the mid-point of the scale, except when the expert witness was thought to be high in both baseline credibility and testimonial confidence.

Discussion

Study I offers some preliminary evidence for the integration of the confidence heuristic model, source credibility, and perceiver (mock juror) extraversion in that they

interact to affect juror decision-making. These findings extend current knowledge in the confidence heuristic literature by showing that extraversion moderates use of peripheral-type cues from an expert witness. From the perspective of message learning and reception yielding, moderation analyses suggest that extraverts tend to receive and be persuaded by confidence in a different manner when compared to introverts. Extraverts rated witnesses who were low in testimonial confidence as also low in credibility, possibly due to attention to peripheral cues of testimony behavior. To the contrary, introverts remained influenced by low confident witnesses.

The obvious limitation of Study I is the correlational design. We did not manipulate the witness's testimonial confidence, and thus causal inferences cannot be drawn. To improve this limitation and to extend our findings, an experimental design was subsequently employed in Study II.

3. *Study II: Experimental Investigation of Witness Testimony and Juror Extraversion*

Method

Participants

This sample was comprised of 314 mock jurors drawn from introductory psychology courses at a large public university. The mean age of the sample was 18.94 years ($SD = 2.59$). The sample included 100 males and 214 females (68% female).

Participants reported their ethnicity as Caucasian ($n = 261$), African-American ($n = 38$), Latin-American ($n = 10$), Asian-American ($n = 2$), and other ($n = 3$).

Measures

The demographic questionnaire, measure of extraversion, and sentencing scale used in Study I were identical to those used in Study II.

Testimonial confidence manipulation. The witness's testimonial confidence was divided into three distinct categories (i.e., low, medium, and high). Each level of testimonial confidence was defined by a group of naturalistic behavioral cues associated with that level of confidence, originally developed by Cramer, Brodsky, and DeCoster.⁹⁴ Examples of cues associated with low testimonial confidence include an unstable tone of voice and fixated eye contact.⁹⁵ Medium testimonial confidence cues include stability in voice tone, narrative responses to questions, flexible eye contact, and good posture.⁹⁶ High testimonial confidence cues are behaviors such as rapid rate of speech, leaning forward, and expressing certainty in all conclusions.⁹⁷

Procedure

The procedure was similar to that of Study I. The only significant departure was that participants observed one of three randomly assigned videotaped conditions of mock expert witness testimony in which the expert conformed to one of the three levels of testimonial confidence discussed above (i.e., low, medium, or high confidence).

Results

Linear regression was used to test H1, with participants' sentencing decision as the criterion variable. The main predictor was expert witness overall credibility, controlling for age, gender, support for the death penalty, and juror extraversion. The model was significant, $F(5, 308) = 71.65, p < .001; R^2 = .54$. As predicted, overall credibility was positively associated with likelihood of assigning the death penalty ($\beta = .62, p < .001$).

⁹⁴ See Cramer et al., *supra* note 62, at 64-65.

⁹⁵ *Id.* at 64.

⁹⁶ *Id.*

⁹⁷ *Id.* at 64-65.

To test H2, participants' sentencing decisions were regressed on participants' level of juror extraversion, two indicator-coded variables for the testimonial confidence conditions (medium testimonial confidence was coded as the reference category), and ratings of expert witness credibility, as well as the two- and three-way interactions between these variables. As with Study I, the model also included controls for age, gender, and support for the death penalty. In the full model ($F(14, 299) = 27.45, p < .001; R^2 = .56$), both baseline credibility and the low-testimonial confidence conditions were significant predictors ($\beta = .42, p < .001; \beta = -.25, p < .001$, respectively). However, as hypothesized, these effects were qualified by a significant three-way interaction between level of juror extraversion, expert witness baseline credibility, and the low-testimonial confidence condition ($\beta = .12, p = .006$). Neither the high-confidence condition, nor any of its interaction terms were significant.

Next, following the recommendation of Dawson and Richter,⁹⁸ we assessed whether the variables in the significant three-way interaction conformed to the specific pattern postulated in H2. The test involves calculating the significance of the differences between the simple slopes of the four lines defined by predicted values on the dependent measure at each of the combinations of extraversion (plus or minus one *SD*) and baseline confidence (plus or minus one *SD*) with endpoints in the low testimonial confidence and medium/high testimonial confidence conditions.⁹⁹ The results were consistent with H2 and the pattern observed in Study I. In particular, differences in testimonial confidence

⁹⁸ See Dawson & Richter, *supra* note 93, at 917 (2006).

⁹⁹ In light of the high testimonial confidence condition not being significantly different from the medium testimonial confidence condition, we omitted the indicator codes and interactions from the model used to compute coefficients, variances, and covariances for the simple slopes analysis, effectively combining the medium- and high-testimonial confidence conditions into one group. As expected, the results from this model were not substantively different from those reported above.

had a significantly greater effect on extraverts' likelihood of assigning the death penalty than introverts when baseline credibility was high ($t = -2.49, p = .01$). Moreover, the results suggest that for high extraverts, level of testimonial confidence and level of baseline credibility have almost a multiplicative effect on the likelihood of awarding the death penalty ($t = -1.78, p = .08$). In contrast, this is not the case for participants who are low in extraversion ($t = 1.40, p = .16$).

To present the follow-up analysis in a more intuitive format, we divided the sample at the median level of extraversion and, for each sub-sample, re-ran the regression model described above omitting juror extraversion and its interaction terms, as well as omitting the indicator code for the high-confidence condition and its interaction terms. Consistent with the analysis reported above, the results suggest that both baseline credibility and testimonial confidence influence the decisions of extraverts, while only baseline confidence influences introverts. In the extravert subsample, baseline credibility and the low confidence condition were significant predictors ($\beta = .53, p < .001$; $\beta = -.33, p < .001$), as was the two-way interaction between them ($\beta = -.17, p = .04$). In contrast, in the introvert subsample, only baseline credibility emerged as a significant predictor ($\beta = .35, p < .001$).

Figure 2: Mean likelihood of assigning the death penalty by level of extraversion, ratings of expert witness' base-line credibility, and testimonial confidence condition

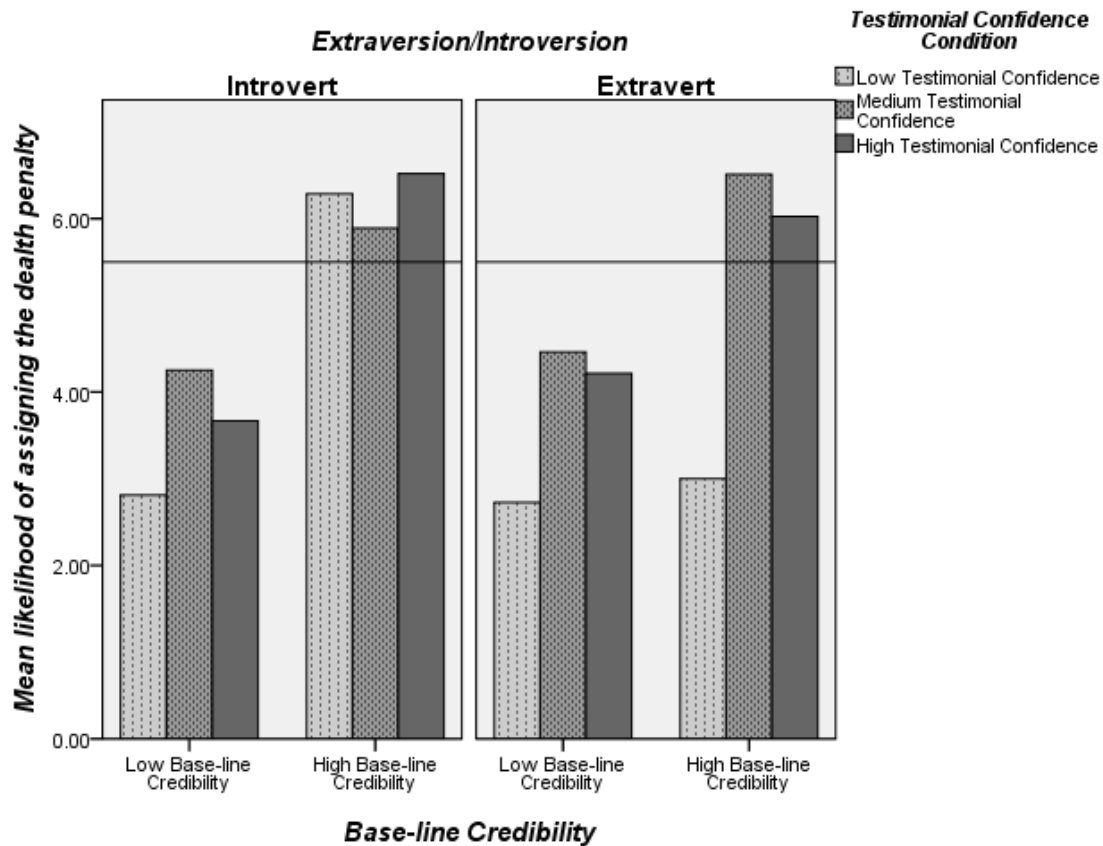


Figure 2 illustrates the pattern of results supporting H2. As was the case with Study I, the mean likelihood of assigning the death penalty for introverted participants was related to perceptions of an expert witness's baseline credibility, such that increased baseline credibility was associated with a greater reported likelihood of awarding the death penalty. Different levels of the witness's testimonial confidence did not lead to different sentencing decisions for introverts. However, for extraverted participants, the witness's testimonial confidence moderated baseline credibility and sentencing decisions. Extravert exposure to the low-testimonial confidence condition affected likelihood of awarding the death penalty in that this likelihood was significantly lower than in the

medium- and high-confidence conditions. Thus, when the expert witness was rated high on baseline credibility, the low-testimonial confidence condition reduced the mean reported likelihood of assigning the death penalty only for those participants who scored relatively high on extraversion.

Discussion

The fact that expert witness overall credibility influenced perceiver decisions in this context is not entirely surprising given previous findings on the potency of source credibility.¹⁰⁰ Moreover, the four components of Brodsky and colleagues' witness credibility model¹⁰¹ have received empirical support in previous studies that are consistent with results from the present investigation.¹⁰² For the first time, however, this study shows how testimonial confidence, one of the four components of the model, functions in relation to perceiver extraversion. In particular, the more gregarious, or extraverted, the perceiver (i.e., the mock juror), the more affected he or she is by the testimonial confidence of the messenger (i.e., the expert witness). Extraverted mock jurors, who, by definition, engage their social world to a high degree and seek positive emotions from these experiences, appear to read and rely upon witnesses' confidence-related behaviors. If they see the witness as lacking in testimonial confidence, such mock jurors rate the witness as lower in overall credibility and subsequently, are less likely to agree with the content of their testimony.

By comparison, introverted, or shy, mock jurors have a different reaction to non-confident experts: at each level of baseline credibility, they treat non-confident witnesses as just as credible as confident witnesses, and are as likely to agree with non-confident

¹⁰⁰ See, e.g., Miller & Burgoon, *supra* note 62; Neal & Brodsky, *supra* note 62, at 1515.

¹⁰¹ Brodsky et al., *The Witness Credibility Scale*, *supra* note 62, at 892; cf. BRODSKY, *supra* note 63.

¹⁰² See, e.g., Neal & Brodsky, *supra* note 62, at 1515.

witnesses as they are with confident witnesses. From a message learning theory standpoint, introverts are probably less influenced by confidence cues.¹⁰³ Rather, they pay more attention to the substance of testimony. This would explain why introverts still perceived low confident witnesses as relatively credible and believable when the baseline credibility of the witness was high. Extraverts, on the other hand, are likely to attend more to nonverbal behavioral cues associated with confidence, as is suggested by prior research in this area, and to be persuaded by those cues.¹⁰⁴

III. Analysis of Criterion for Balancing Interests in Jury Service

As discussed in Part I, recent Supreme Court jurisprudence sets the traditional common law privilege to strike jurors believed to be biased, irrespective of the basis for or veracity of that belief, against an equal-protection right of prospective jurors not to be struck from juries on certain grounds.¹⁰⁵ The conflicting interests in who serves or does not serve on a jury inform and fuel the ongoing debate over the propriety of so-called scientific jury selection. Drawing on our empirical research, we analyze the underlying elements of the competing interests in this section. We analyzed the specific example of striking prospective jurors from the venire based upon evidence of their respective level of the personality trait extraversion. In doing so, we argue that while jury selection based upon personality characteristics certainly falls within the traditional scope of practice for the peremptory challenge, the traditional justification does not necessarily apply. Rather, the alternate criteria of tradition and institutional inertia best describes how judges treat peremptory challenges and scientific jury selection. Moreover, strikes on the basis of

¹⁰³ HOVLAND ET AL., *supra* note 71.

¹⁰⁴ *See, e.g., Akert & Panter, supra* note 82, at 965.

¹⁰⁵ *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986).

traits like extraversion present few if any of the threats to equal protection that motivated the Supreme Court to limit the peremptory challenge.¹⁰⁶ Applying these criteria, we argue that striking jurors on the basis of personality characteristics like extraversion is appropriate.

A. A Hypothetical Case Study

To ground our analysis and lend some flesh to the theoretical bones of the research results, we begin with a hypothetical felony murder case: The defendant is charged with killing a man during an attempted robbery, a capital offense in Texas, the state where the alleged crime took place.¹⁰⁷ Although the defendant has pled not guilty, his counsel believes he will likely be found guilty, because of an informal confession by defendant while incarcerated for another crime along with the corroborating evidence. In light of the particular facts of the case and the absence of any additional record of violence by the defendant, counsel also believes the defendant can avoid the death penalty by convincing the jury in the penalty phase that he is not a further danger to the community. To do so, the defendant must rebut the State's expert witness, a clinical psychologist, who will testify on the question of future dangerousness.

Despite the weak evidence on this question, defendant's counsel believes that the expert will appear to be particularly confident in his opinion on this question. After consulting with a jury selection expert, defendant's counsel learns that jurors who are high in extraversion are particularly sensitive to an expert witness's level of confidence when deciding how much weight to give that testimony. Those low in extraversion (i.e.,

¹⁰⁶ *Cf. id.* at 85 (although the Court has stated that “the state denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded,” it has never taken a similar position with regard to jurors who share a defendant's personality characteristics).

¹⁰⁷ *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West 2008).

introverted jurors) tend to disregard the witnesses' confidence. On the recommendation of the consultant, prior to and during voir dire, defendant's counsel has an assistant observe the prospective jurors, note which ones seem to be keeping to themselves and which tend to engage with those around them, and rank them on this basis. Later, defendant's counsel uses three of defendant's peremptory challenges to strike prospective jurors who were rated as particularly talkative and engaged. This leaves a panel of jurors thought to be average to low in extraversion.¹⁰⁸ If the theory works as expected, defendant may still be found guilty, but can hope to avoid the death penalty.

B. Propriety of the Peremptory Strikes for Extraversion

The hypothetical case provides an example of how the results of research into psychological traits that moderate receptivity to persuasive messages, such as the studies reported above, might affect a criminal proceeding. Three jurors who would not otherwise have been targeted for peremptory challenge were struck based on the research and informal estimates of one of their psychological traits. While the result was consistent with what the research would suggest, it is impossible to tell whether striking those jurors was a determinative factor in this particular case, because so much psychological research operates at an aggregate level.¹⁰⁹

¹⁰⁸ The critical issues for attorneys in this assessment is whether a witness's confidence in his or her testimony is likely to accurately reflect the strength of the underlying evidence and, if not, which favors their side of the case. If the two coincide, then the juror's level of extraversion would not matter. To the extent an expert witness is expected to appear confident (or lacking in confidence) irrespective of the strength of the underlying evidence, extraverted jurors will, on the whole, tend to be more (or less) persuaded by them than jurors who are introverted. This is the situation in the hypothetical. Those of us who are trial consultants would not generally recommend relying upon weak evidence and a confident expert, as the prosecutor in the hypothetical is doing. However, if an attorney has elected to do so, the research suggests extraverted jurors would be preferable.

¹⁰⁹ See, e.g., David L. Faigman & John Monahan, *Psychological Evidence at the Dawn of the Law's Scientific Age*, 56 ANN. REV. PSYCHOL. 631, 633 (2005) (Analyzing "the already raging debate among psychologists regarding what methods are adequate to study human behavior."); DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §§ 1.17-1.40 (1997); David

More importantly for the argument in this article, the hypothetical also illustrates how, in practice, cases involving scientific jury selection may not align with the primary public policy considerations marshaled in support of or in opposition to interests in jury service. In fact, the historical public policy rationale for an unfettered peremptory challenge does not apply to this situation. Without the benefit of the jury consultant's advice, the defendant would not have perceived the relatively extraverted venire members as biased against him. Indeed, it is highly questionable whether a tendency to place high persuasive weight on behavioral cues suggesting witnesses lack confidence in their testimony even constitutes a "bias" in the sense traditionally envisioned by Blackstone, the courts, and other commentators. Thus, absent the information that introverts are less affected by puffery, there is little if any danger that the defendant would have less faith in the judicial process because of an inability to strike the three introverted jurors.

The same is true for the broad public-policy rationale supporting a juror's right not to be excluded from service. The three prospective jurors in the hypothetical may otherwise have served on the jury. Following the Supreme Court's rationale, they would have had the opportunity to participate and benefit from the trial and sentencing process as an educational experience. But had the defendant's counsel not struck the three introverted jurors, the three jurors who replaced them may have missed the same opportunity for participation.

In terms of the venire, the incidence of the benefits (and burdens) of jury service is a zero-sum game in which participation by some precludes participation by others. In the aggregate, however, the demand for jurors is typically far lower than the supply,

L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1015-17 (1989).

which operates as an upward constraint on the potential benefits of an inclusive jury system for a democratic society. So long as jury service is not systematically distributed among select sub-groups of citizens, the same total benefits ought to accrue to all of society irrespective of the particular individual jurors who ultimately participate. Thus, the central public-policy rationale does not depend upon the selection outcome of prospective jurors as individuals, but to them as representatives of the broader citizenry. To the extent psychological characteristics involved in the peremptory challenge determination are functionally randomly distributed among citizens, selection for juror exclusion based upon those characteristics is unrelated to that rationale.

Moreover, with respect to public perceptions of justice, because level of extraversion is not a traditional basis for systematic disenfranchisement, it is unlikely that the members of a democratic society will lose confidence in the legal system based upon knowledge of its use to identify and strike prospective jurors in a small number of criminal trials. Consistent with this conclusion and belying its reliance on the high rhetoric and political theory favoring a broadly inclusive jury pool,¹¹⁰ the Supreme Court later indicated that the civic protection from peremptory challenge extends only to a party's use of "group stereotypes rooted in, and reflective of, historical prejudice."¹¹¹ Typically, this includes only those suspect social categories that merit strict scrutiny (e.g., race, ethnicity, and national origin) and intermediate scrutiny (e.g., gender and perhaps

¹¹⁰ *Powers v. Ohio*, 499 U.S. 400, 403 (1991).

¹¹¹ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994) (recognizing a juror's right not to be stricken based upon gender).

illegitimacy),¹¹² not specific psychological traits that research shows may affect receptivity to persuasive messages.¹¹³

Where the basic justifications for exclusion and inclusion in jury service do not apply (as in the case of peremptory challenges based upon psychological traits like the level of extraversion), how ought the appropriate balance between competing interests be struck? We identify two alternative criteria. The first concerns the familiar notion in the U.S. criminal justice system that criminal proceedings ought to be weighed substantially in favor of criminal defendants, i.e., “it is far worse to convict an innocent man than to let a guilty man go free.”¹¹⁴ Defendants, for example, are said to be innocent until proven guilty, a presumption that has been lauded as “undoubted law, axiomatic and elementary,”¹¹⁵ “part of the foundation of our system of criminal justice,”¹¹⁶ and a normative mandate “that society *ought to speak* of accused men as innocent, and *treat* them as innocent, until they have been properly convicted after all they have to offer in their defense has been carefully weighed.”¹¹⁷ Adding effect to this verbiage is a set of procedural protections for criminal defendants, the most significant of which are that, in most cases, the state carries the burden of proof and a high standard to relieve that burden: beyond a reasonable doubt.¹¹⁸

¹¹² See *id.* at 135-37; see also *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002) (enumerating suspect categories).

¹¹³ See, e.g., Collin P. Wedel, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges*, 7 STAN. J. C.R. & C.L. 293, 294 (2011); Rachel Hartje, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 CAL. W. L. REV. 479 (2005).

¹¹⁴ *In re Winship*, 397 U.S. 358, 372 (1970).

¹¹⁵ *Coffin v. United States*, 156 U.S. 432, 453 (1895).

¹¹⁶ *United States v. Thomas*, 757 F.2d 1359, 1363 (2d Cir. 1985).

¹¹⁷ Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1371 (1971) (emphasis in original); see generally William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (1995) (discussing the presumption of innocence).

¹¹⁸ See Laufer, *supra* note 117, at 334.

Applied to the case of juror extraversion, a norm of balancing criminal procedure in favor of defendants could justify the procedural discretion that enabled the peremptory strike described in the hypothetical.¹¹⁹ Many procedural protections for defendants supported by the norm are specific and institutionalized (e.g., reasonable doubt).¹²⁰ Theoretically, affording defendants the procedural latitude necessary to identify and act upon novel theories of what jury composition might yield the best outcome for them could serve the same purpose. In the hypothetical, the defendant's counsel believed that jurors who were higher in extraversion would be more persuaded by the prosecutor's expert witness. Estimating the prospective jurors' levels of extraversion and exercising three of the available strikes to those he thought to be particularly high in that characteristic was thus, merely the enactment of a strategy to obtain a more favorable outcome for the defendant within the basic procedural framework of a capital trial.

As a justification, however, a norm of favoring defendants is overly broad. In fact, the effects of axioms like the presumption of innocence generally do not extend beyond specific institutionalized protections.¹²¹ Moreover, the application of this norm to discretionary practice fails to account for a substantial portion of established practice.¹²² While much of the rhetoric concerning the exercise of the peremptory challenge focuses on criminal defendants, as discussed above, in practice prosecutors are afforded the same privilege, including the ability to challenge peremptory strikes made by defendants. A norm of favoritism toward the defendant cannot support a procedural rule that affords prosecutors a parity of strategic discretion.

¹¹⁹ See discussion *supra*, Part III.A.

¹²⁰ See, e.g., *In re Winship*, 397 U.S. 358, 363 (1970).

¹²¹ *Id.* at 334-40.

¹²² *Id.* at 337.

A second alternative set of criteria is tradition and the conservative nature of reform in legal procedure. As embodied in fundamental principles like *stare decisis*, the common law legal system is fundamentally bound to and constrained by its history.¹²³ To provide notice of the extant legal rules and to prevent judges from treating similarly situated parties differently over time, our system contains strong norms of adherence to prior decisions.¹²⁴ Where doctrinal and procedural reforms have been created through judicial action, they have tended to take shape incrementally.¹²⁵

The peremptory challenge privilege has far deeper roots in the history of legal practice than a juror's right to be free from exclusion.¹²⁶ Accordingly, absent the identification or development of a strong, countervailing interest that was not present or recognized historically, the scope of the peremptory challenge should not be curtailed. To the extent a newly recognized interest exists, under this criterion, the traditional practice ought to be curtailed only to the extent necessary to accommodate that interest.

The advent of concerted legal intervention to protect particular groups, such as racial minorities and women, from systematic discrimination is such an interest. However, protecting historically disadvantaged groups does not require a general curtailment of the privilege to strike prospective jurors for any reason other than their race, gender, or status as members of a protected group.¹²⁷ Taking the hypothetical case as an example, even where the three jurors who were struck all minority women, the fact that the process and criterion used to identify them were race- and gender-neutral means

¹²³ Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in A Common Law System*, 86 IOWA L. REV. 601, 650 (2001).

¹²⁴ *Id.*

¹²⁵ *See id.* at 648-50. *But see id.* at 641-43 (describing relatively rare periods of rapid legal change).

¹²⁶ *See, e.g., supra* Part I.A-B.

¹²⁷ *E.g., Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986).

peremptory challenges need not be restricted to satisfy the interest of protecting members of historically disadvantaged groups.¹²⁸ Therefore, both sides should be free to use psychological research examining juror extraversion and jurors' susceptibility to expert witnesses when selecting jurors for peremptory challenge.¹²⁹

Unlike the prior public policy grounds, this reasoning is also wholly consistent with what is observed in practice. Courts have tended to act in support of a party's privilege to exclude prospective jurors from service. As noted above, the Supreme Court has extended the right, limiting the basis for peremptory challenges only to jurors' race, gender, and ethnicity.¹³⁰ Federal appellate courts have added religious affiliation to the list.¹³¹ More importantly for our discussion, however, is that federal courts have *affirmatively declined* to recognize a substantive limit to the exercise of peremptory challenges based on a variety of criteria.¹³² These include some social categories, such as a juror's age¹³³ and disability,¹³⁴ which are recognized in other contexts as bases for

¹²⁸ The relationship between extraversion and suspect demographic characteristics such as race and gender is nominal. *See e.g.*, Lewis R. Goldberg, Dennis Sweeney, Peter F. Merenda, & John Edward Hughes, Jr., *Demographic Variables and Personality: The Effects of Gender, Age, Education, and Ethnic/Racial Status on Self-Descriptions of Personality Attributes*, 24 PERSONALITY & INDIVIDUAL DIFFERENCES 393, 401 (1998).

¹²⁹ To be sure, there are much harder cases. For example, the personality trait of conscientiousness (i.e., thorough, principled) has been found to be modestly lower in African-Americans than White Americans. *See id.* at 401. Thus, in the aggregate, selection of jurors based upon estimates of this characteristic could affect the racial composition of juries. We leave exploration of the question of how large the effect would be and whether it would justify curtailing the ability of litigants to exercise peremptory challenges under circumstances where the exclusionary effects of the criterion and method differently impact members of various protected groups for future analyses.

¹³⁰ *See Batson*, 476 U.S. 79; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

¹³¹ *E.g.*, *United States v. Greer*, 939 F.2d 1076 (5th Cir. 1991).

¹³² *See, e.g.*, KEVIN F. O'MALLEY ET AL., 1 FED. JURY PRAC. & INSTR. § 4:9 (6th ed. 2006) (collecting race-neutral justifications for striking jurors).

¹³³ *United States v. Helmstetter*, 479 F.3d 750, 754 (10th Cir. 2007) ("Even if not strictly bound by this precedent, we see no reason to reexamine it in light of the fact that every other circuit to address the issue has rejected the argument that jury-selection procedures discriminating on the basis of age violate equal protection.").

¹³⁴ *United States v. Watson*, 483 F.3d 828, 833-35 (D.C. Cir. 2007).

illegal discrimination,¹³⁵ as well as relatively stable characteristics such as physical appearance,¹³⁶ and occupation,¹³⁷ or the lack thereof.¹³⁸ In addition, parties may use peremptory challenges to strike jurors based on evidence of a variety of psychological characteristics, including a person's attitudes and beliefs (e.g., support for marijuana legalization,¹³⁹ opposition to capital punishment,¹⁴⁰ or the unwillingness, on religious grounds, to pass judgment on others¹⁴¹), personality traits (e.g., the tendency to exaggerate),¹⁴² and hostility.

It is common for lawyers or judges to ask prospective jurors about the particularities of their lives and viewpoints for the purpose of deciding what biases they may have. Exposure to pretrial publicity,¹⁴³ attitudes towards insurance,¹⁴⁴ feelings about damages for emotional suffering,¹⁴⁵ and attitudes toward sex offenders¹⁴⁶ are all appropriate topics of inquiry during voir dire. Finally, echoing Blackstone, at least one court has recognized that it is appropriate for parties to estimate relevant attitudes and traits of prospective jurors from observations of their behavior:

¹³⁵ See Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1967); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2000).

¹³⁶ *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989) (juror appeared "slovenly").

¹³⁷ *United States v. Maxwell*, 473 F.3d 868, 872 (8th Cir. 2007) (juror was a teacher).

¹³⁸ *Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933, 941 (7th Cir. 2001) ("We have approved the exclusion of potential jurors because of their professions, and their lack of a profession. We have also held that inadequate education and business experience are nondiscriminatory justifications for excluding prospective jurors.") (citations omitted).

¹³⁹ *United States v. Prince*, 647 F.3d 1257, 1261-64 (10th Cir. 2011).

¹⁴⁰ *United States v. Villarreal*, 963 F.2d 725, 729 (5th Cir. 1992) (Jurors believed capital punishment is never appropriate: "Political belief is not the overt and immutable characteristic that race is, and we decline to extend the *Batson* line of cases to this case.").

¹⁴¹ See, e.g., *United States v. DeJesus*, 347 F.3d 500, 506 (3d Cir. 2003) (Acceptable for prosecution to strike one juror based upon indications that he was devoutly Christian, forgiving, and would "hesitate to pass judgment on someone."); *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998).

¹⁴² *Hayes v. Woodford*, 301 F.3d 1054, 1082 (9th Cir. 2002) (Declaring race-neutral reason to strike juror who "was prone to exaggeration, including a comment that he had a 'photostatic' mind.").

¹⁴³ *Thomas v. State*, 452 So. 2d 899, 902 (Ala. Crim. App. 1984).

¹⁴⁴ *Purdy v. Gulf Breeze Enterprises*, 403 So. 2d 1325, 1330-31 (Fla. 1981).

¹⁴⁵ *Carver v. Neidermayer*, 920 So. 2d 123, 124 (Fla. Dist. Ct. App. 2006).

¹⁴⁶ *Hunter v. State*, 585 So. 2d 220 (Ala. Crim. App. 1991).

It is well to note that feelings are not always expressed in words, and, indeed, may be clearly manifested by gestures and facial expressions. A grimace or stare may express hostility or displeasure quite as clearly as words shouted across a room. Much literature may be found on interpreting “body language” as a fundamental and effective practice in the selection of a jury.¹⁴⁷

IV. Conclusion

The propriety of using social science in jury selection has generated much commentary and debate. Underlying the debate are two competing interests in jury selection and service. Parties have a traditional common law privilege to strike prospective jurors arbitrarily on subjective grounds, which enables scientific jury selection. More recently, the Supreme Court recognized an important collective interest of citizens in jury service, including a specific right of citizens to be free from exclusion from jury service based upon their status as a member of certain protected social categories, which runs counter to the practice of excluding prospective jurors based upon their psychological traits.

Reconciling the competing interests may be impossible in the abstract. We use the novel example of juror extraversion to illuminate the ways in which the competing interests function and the problems with their application to specific cases. Taken together, our analysis suggests that the common-law norms of adhering to tradition to facilitate predictions about the legal outcome of particular disputes and to constrain the influence of individual biases in judicial decision-making, coupled with the historical conceptualization of the peremptory challenges as an overtly arbitrary and capricious exercise, are the instrumental considerations in determining the propriety of exercising

¹⁴⁷ Reynolds v. Benefield, 931 F.2d 506, 512 (8th Cir. 1991) (citations omitted).

peremptory challenges based upon personality traits like extraversion. The Supreme Court's rhetoric aside, the supposed social benefits from jury service to individuals or society have comparatively little explanatory power. Consistent with this analysis, we conclude that, in theory and practice, the practice of striking jurors based upon estimates of their personality traits, such as extraversion, is entirely appropriate.