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## Religious Convictions

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## RELIGIOUS CONVICTIONS\*

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*The Anglo-American jury emerged at a time when legal and religious conceptions of justice were entwined. Today, however, though the American public remains comparatively religious, the country's legal system draws a distinction between legal and religious modes of determining culpability and passing judgment. This Article examines the doctrine that governs the place of religious belief and practice in U.S. jury selection proceedings. It argues that the discretion afforded to judges with respect to applying the Batson antidiscrimination doctrine has given these beliefs and practices an ambiguous status. On the one hand, judges aim to protect prospective religious jurors from discrimination. On the other, they seek to reinforce the primacy of a secular legal perspective on justice—even if it conflicts with a prospective juror's religious convictions and the broader imperative to build inclusive juries.*

*The open question is how legal actors—both judges and lawyers—should navigate the uncertain position of religion in voir dire to build juries. This Article draws on original empirical research with judges and lawyers to show that the treatment of religiosity in today's legal system is strikingly inconsistent, guided by biases and misunderstandings of the particular features of various religious traditions. To address this arbitrary treatment of religion, this Article outlines a new approach to navigating religious convictions in jury selection proceedings. Special attention is paid to preventing both the exclusion and the empanelment of jurors with specific religious commitments to gain a strategic advantage. This Article concludes by making the case that insofar as the legitimacy of the U.S. jury system hinges on the inclusive involvement of a diverse—and diversely religious—public, it must find a way to reconcile religious convictions with lay participation.*

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INTRODUCTION.....	272
I. THE UNSETTLED PLACE OF RELIGION FOR AMERICAN JURORS .....	274
A. <i>The Legal Status of Religious Juror Exclusion</i> .....	275
1. Allowing Religion-Based Strikes .....	277
2. Prohibiting Religion-Based Strikes .....	279
II. NAVIGATING RELIGION IN JURY SELECTION: AN EMPIRICAL STUDY .....	284
A. <i>Methods and Data</i> .....	284
B. <i>Summary of Findings</i> .....	286
1. Key Finding I: Uneasy Relationship with <i>Batson</i> .....	292
2. Key Finding II: The Use of Stereotypes.....	295
III. DISCUSSION AND PROPOSED REFORMS.....	298
A. <i>Settling the Place of Religion</i> .....	300
B. <i>Two Reforms</i> .....	302
1. Reform I: Judge-Led Questioning and Rehabilitation	302
2. Reform II: Enhancing <i>Batson</i> .....	305
CONCLUSION: ASPIRING TO THE INCLUSIVE JURY .....	310

## INTRODUCTION

In the U.S. criminal legal system, the public participates directly in determining the guilt or innocence of the accused. This public is characterized by striking diversity, as reflected in the country’s jury pools, even if not always in its actual juries, due to discrimination and persistent structures of exclusion. One basis of American diversity—religion—differs significantly from others. Unlike race, class, or gender, religious affiliation may be associated with a distinctive metaphysical (for example, a belief in the existence of souls, sin, spirits, an afterlife, reincarnation, eternal damnation, etc.) and moral system that can prove a hindrance to interpreting the law and reaching a verdict in accordance with the instructions of a judge. Religion thus introduces a paradox into the legal system: On the one hand, religious affiliation is a basis of identity, and thus religious individuals should seemingly be afforded protection against arbitrary exclusion as part of the broader commitment to antidiscrimination. On the other, religious beliefs have the potential to introduce alternative modes of interpreting evidence and determining blameworthiness that directly oppose and may even undermine the secular counterparts promoted by judges.

Drawing on original empirical research, this Article examines the challenges introduced by religious beliefs and practices in the U.S. jury system and how legal actors navigate these challenges to build juries. This Article

presents interviews with state and federal prosecutors, defense attorneys, and judges that indicate how concerns about the religiosity of jurors fall into several categories. First, there are those who deploy crude stereotypes to make sense of particular religious beliefs and practices. This can lead to flawed conclusions about how a prospective juror is likely to perceive victims or witnesses in cases, as well as what kinds of outcomes they are likely to find compatible with their faith. Second, some attorneys and judges focus on the perceived incompatibility of a juror's religious beliefs and the task of assessing evidence and deliberating. And still others are vexed by the ambiguity of religious affiliation. Notably, *Batson v. Kentucky*<sup>1</sup> fails to offer guidance on how pious jurors should be treated.<sup>2</sup>

Today's challenges reflect the origin of the country's legal institutions in an early modern environment where comparatively little religious diversity and restrictive criteria for juror eligibility created relatively homogeneous juror pools.<sup>3</sup> With the easing of these restrictions and the emergence of a more diverse population in the United States,<sup>4</sup> legal actors can no longer take for granted the fact that jurors share the same or even similar religious worldviews. This is an issue in a legal system where laypeople are supposed to make justice together.

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1. 476 U.S. 79 (1986).

2. *Batson* held that the "core guarantee of equal protection [is to] ensur[e] citizens that their State will not discriminate on account of race" in jury selection, without mention of religious discrimination. *Id.* at 97–98.

3. For much of the U.S. legal system's history, the figure of the "fair" and "impartial" juror was imagined as a propertied white man who was at least nominally Christian. See Barbara J. Shapiro, "To a Moral Certainty": *Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153, 167 (1986) (citing SAMUEL CLARKE, A DISCOURSE CONCERNING THE UNCHANGEABLE OBLIGATIONS OF NATURAL RELIGION, AND THE TRUTH AND CERTAINTY OF THE CHRISTIAN REVELATION 336–37 (London, 1st ed. 1706)).

4. *The 2020 Census of American Religion*, PUB. RELIGION RSCH. INST. (July 8, 2021), <https://www.prii.org/research/2020-census-of-american-religion/> [https://perma.cc/Z5SA-TJ8J] (noting a decline in recent decades of the proportion of people in the United States who are white Christians in recent decades by nearly one-third).

## I. THE UNSETTLED PLACE OF RELIGION FOR AMERICAN JURORS

Americans are among the world's most religious<sup>5</sup>—and diversely observant<sup>6</sup>—populations. And yet, today it is widely understood that for the purposes of jury service and other civic responsibilities, religious faith should not transcend allegiance to the rule of law.<sup>7</sup> Citizens who are otherwise eligible to serve on juries are thus routinely struck from jury panels based on their religiosity, with some scholars arguing that a juror's religious beliefs or practices can interfere with a defendant's right to a fair trial.<sup>8</sup>

The hegemonic approach to the contemporary jury trial sees religious conviction as something that can be separated from a person's subjectivity and the lens that they use to interpret the world. This approach also presumes—wrongly—that religion is not entwined with other aspects of a person's identity, such as race, gender, or class. This part surveys state-level statutes, constitutional provisions, and court rules that aim to prevent religious bias in jury selection,<sup>9</sup> as well as cases in which judges permitted the dismissal of jurors based on the juror's religious belief.<sup>10</sup> It underscores that contemporary antidiscrimination law is strikingly indecisive with respect to religion, and aims to show, above all, that the place of religious affiliation, belief, and practice remain an unresolved issue in U.S. jury selection proceedings, creating the possibility of the pernicious exclusion of people who should otherwise be eligible to serve.

5. See Dalia Fahmy, *Americans Are Far More Religious than Adults in Other Wealthy Nations*, PEW RSCH. CTR. (July 31, 2018), <https://www.pewresearch.org/fact-tank/2018/07/31/americans-are-far-more-religious-than-adults-in-other-wealthy-nations/> [<https://perma.cc/LA4N-L8RQ>]. For a discussion of how significant percentages of the American population are *familiar* with members of minority religious groups in the United States, see PEW RSCH. CTR., *HOW AMERICANS FEEL ABOUT RELIGIOUS GROUPS* (2014), <https://www.pewresearch.org/religion/2014/07/16/how-americans-feel-about-religious-groups/> [<https://perma.cc/Q68V-YULR>]. For example, 61% and 38% of Americans say they know individuals who identify as Jewish and Muslim, respectively—even though each group constitutes 2% and 1% of the population, respectively. *Id.*

6. There are almost 100 different denominations of Christianity alone in the United States, along with significant Jewish, Muslim, Buddhist, and Hindu populations according to the Pew Research Center. *Religious Landscape Study*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/> [<https://perma.cc/J575-A9RG>].

7. See Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFFS. 259, 262–63 (1989).

8. See generally 73 AM. JUR. 3D *Proof of Facts* § 89 (2022) (explaining that peremptory challenges based on perceived religious beliefs violate a defendant's right to fair trial).

9. See, e.g., ALA. CODE § 12-16-56 (Westlaw through Act 2022-442 of the 2022 Reg. and First Spec. Sess.); ARIZ. CONST. art. II, § 12; ARK. CONST. art. II, § 26; COLO. REV. STAT. ANN. § 13-71-104(3)(a) (LEXIS through all legislation from the 2022 Reg. Sess.); DEL. R. SUPER. CT. PETIT JURY PLAN § 7; MASS. GEN. LAWS ANN. ch. 234A, § 3 (Westlaw through ch. 230 of the 2022 2d Ann. Sess.).

10. See, e.g., *State v. Pacchiana*, 289 So. 3d 857, 859–62 (Fla. 2020); *State v. Fuller*, 812 A.2d 389, 395–97 (N.J. Super. Ct. App. Div. 2002), *rev'd*, 862 A.2d 1130 (N.J. 2004).

A. *The Legal Status of Religious Juror Exclusion*

Prospective jurors who are qualified to serve can be dismissed from jury venires on two grounds—through a challenge “for cause,”<sup>11</sup> exercised by a judge, or through an attorney’s use of an allotted number of peremptory strikes.<sup>12</sup> Challenges for cause often follow a judge’s determination that a prospective juror is unable to assess evidence fairly and impartially in a case.<sup>13</sup> Peremptory strikes, in contrast, can be exercised for a variety of reasons.<sup>14</sup> Though abolished in the United Kingdom, the peremptory strike remains widely used in the United States and has strong proponents on both sides<sup>15</sup>—even though it has proven susceptible to abuse, as legal actors attempt to strike jurors on the basis of race, gender, class, and other identities.

There have been numerous attempts to deal with this abuse, culminating in the Supreme Court’s development of the *Batson* doctrine in 1986, which allows parties that suspect a peremptory strike is motivated by race to appeal to the judge for redress.<sup>16</sup> Such *Batson* challenges include three steps. First, the party opposing a peremptory strike has to make a prima facie case of discrimination by proving the juror belonged to a protected class and that all “relevant circumstances” of the strike raised an inference of impermissible discrimination.<sup>17</sup> Second, and subject to such a prima facie finding by the judge, the burden shifts to the challenged party, who may be given the opportunity to provide a neutral rationale for having removed the juror (or jurors) in question.<sup>18</sup> Under the third and final step, the judge may deem the neutral

11. See, e.g., 47 AM. JUR. 2D *Jury* § 193 (2022) (citing *United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000)) (describing challenges to jurors for cause).

12. See *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that the State’s “privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause”).

13. See, e.g., ALA. CODE § 12-16-152 (Westlaw through Act 2022-442 of the 2022 Reg. and First Spec. Sess.) (disqualifying for cause those who would refuse to impose the death penalty in a capital punishment case or those who are biased against penitentiary punishment); TEX. GOV’T CODE ANN. § 62.105 (Westlaw through the end of 2021 Reg. and Called Sess. of the 87th Leg.) (disqualifying for cause those who for various reasons maybe biased in a particular case).

14. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (“In addition to challenges for cause, each side is typically afforded a set number of peremptory challenges or strikes. Peremptory strikes have very old credentials and can be traced back to the common law. Those peremptory strikes traditionally may be used to remove any potential juror for any reason—no questions asked.”).

15. See Amy Wilson, Note, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT’L & COMP. L. REV. 363, 364, 366 (2009) (chronicling the history of peremptory challenges in England and the United States and identifying historical proponents and detractors).

16. See *Batson*, 476 U.S. at 96–98.

17. See *id.* at 96–97.

18. See *id.* at 97.

rationale acceptable or instead find that the strike did in fact follow from the unconstitutional consideration of race, for example.<sup>19</sup>

While the U.S. Supreme Court extended *Batson's* prohibition of race-based discriminatory empanelment to gender-based strikes in 1994,<sup>20</sup> a prospective juror's religious belief or affiliation remain acceptable grounds for dismissal. This is something of an oddity: while lawyers cannot explicitly consider a juror's race or gender when exercising a peremptory strike, they are welcome to explore a prospective juror's religious views and affiliations to determine how these might influence their perception of a case.<sup>21</sup> The information elicited from such explorations can prompt a peremptory strike or even dismissal for cause, if a judge determines that certain religious commitments or frames of interpretation would prevent the juror from acting fairly and impartially.<sup>22</sup> Here, then, is the irony of religion in the contemporary court: having shaped the judicial system, including its practices and symbols, religion is now commonly understood to be a source of potential distortion—that is, the worldviews that were once seen as the precondition for justice are now widely believed to obstruct it.<sup>23</sup>

The awkward place of religion in the contemporary courtroom is expressed in the arbitrary ways it is handled. Though inquiries into prospective jurors' religious beliefs are generally viewed as appropriate, courts are more divided on the legality of strikes based solely on a prospective juror's belonging to a religious group.<sup>24</sup> In *Davis v. Minnesota*,<sup>25</sup> the Supreme Court had the opportunity to rule on the constitutionality of religion-based strikes but declined certiorari.<sup>26</sup> Jurisdictions that have ruled on this issue have taken one

19. See *id.* at 98; see also *Flowers*, 139 S. Ct. at 2236. *Batson* has since been extended to gender and ethnicity. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding that challenging a prospective juror on the basis of that juror's gender is unconstitutional); *Hernandez v. New York*, 500 U.S. 352, 371–72 (1991) (plurality opinion) (holding that challenging a prospective juror on the basis of that juror being Hispanic or Latino—referred to interchangeably in the opinion—is unconstitutional).

20. *J.E.B.*, 511 U.S. at 129.

21. See, e.g., *State v. Pacchiana*, 289 So. 3d 857, 859–62 (Fla. 2020) (allowing the prosecutor to remove a Jehovah's Witness explicitly because of their religion and the prosecutor's belief that the juror would not be able to sit in judgment, despite the juror's statements to the contrary).

22. See, e.g., *id.* (noting that the removed potential juror, a Jehovah's Witness, was originally challenged for cause and when the for cause challenge failed, the prosecutor used a peremptory strike).

23. See, e.g., *United States v. DeJesus*, 347 F.3d 500, 509–11 (3d Cir. 2003).

24. See, e.g., *State v. Fuller*, 812 A.2d 389, 395–97 (N.J. Super. Ct. App. Div. 2002); *Pacchiana*, 289 So. 3d at 859–61.

25. 511 U.S. 1115 (1994).

26. See *id.* In a concurring opinion, Justice Ginsburg reasoned that religious affiliation differed from race and gender insofar as religious affiliation is less readily discernable. See generally Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793, 795 (2009) (noting that “[o]n a descriptive level, there is ample Supreme Court case law supporting the proposition that the Court generally eschews decision making that requires adjudication of religious doctrine”).

of two approaches. The first is to expressly disallow strikes based on religious affiliation.<sup>27</sup> The second is to *allow* strikes based on religious affiliation, while sometimes trying to draw a distinction between degree of religiosity and mere religious affiliation.<sup>28</sup>

Both approaches attempt—problematically—to analogize religion to race or gender, when in fact religion is based on *practice*, such as going to a place of worship, volunteering, or observing particular holidays. These are all activities that lawyers can legitimately scrutinize.<sup>29</sup> In fact, religiosity can often only be discovered through active scrutiny. As some judges have noted, religious adherence is unlikely to be evident based on physical appearance.<sup>30</sup> Other judges have emphasized the difficulty of determining when a strike might be appropriate, which is why some courts have declined to make a clear determination altogether.<sup>31</sup>

### 1. Allowing Religion-Based Strikes

The status of religion-based juror dismissal varies by state. In Texas, for example, a peremptory strike can be legitimately exercised on the basis of a person's religious affiliation or membership.<sup>32</sup> In *Casarez v. State*,<sup>33</sup> the state's

27. See *infra* Section I.A.1.

28. See *infra* Section I.A.2.

29. See, e.g., *Casarez v. State*, 913 S.W.2d 468, 479 n.15, 480 (Tex. Crim. App. 1994) (en banc), *reh'g granted*, 913 S.W.2d 468, 492 (Tex. Crim. App. 1995).

30. *United States v. Girouard*, 521 F.3d 110, 116 (1st Cir. 2008). The court declined to make an official determination, instead holding that the issue was not properly preserved for appeal since the defendant had made no real effort to determine if Jewish venirepersons were excluded by the numbers. *Id.* However, the court noted that “[c]ompared to race and gender, religious affiliation is relatively hard to discern from appearances.” *Id.*; *United States v. Heron*, 721 F.3d 896 (7th Cir. 2013) (describing the issue of determining a juror's religiosity based, at least in part on appearance, as illusory); *Davis v. Minnesota*, 511 U.S. 1115 (1994) (Ginsburg, J., concurring) (noting in statement regarding denial of petition for certiorari that “[r]eligious affiliation, (or lack thereof) is not as self-evident as race or gender,” necessitating the imposition of “proper questioning” to determine whether that juror's religious affiliation would impact their ability to sit on the jury); see also *State v. Gowdy*, 727 N.E.2d 579, 582–87 (Ohio 2000) (affirming the exclusion of a juror who stated that he was active in his church where the questioning was spurred by observation of the juror's large cross necklace).

31. See *United States v. Heron*, 721 F.3d 896, 902 (7th Cir. 2013). The court in this case declined to rule on the merits because the issue of a religious strike was not preserved for appeal. *Id.* However, the court did note that

[t]his is a difficult area, fraught with risks whatever way we turn. Although one might think there would be value in a rule that categorically endorsed all religion-related strikes so long as they were not overtly based on a juror's religious affiliation, upon closer examination we think that such a rule would come with its own problems. The affiliation/practices distinction may often be illusory, since a person's religious affiliation may be hard to distinguish from religious practices and level of devotion.

*Id.*

32. *Casarez*, 913 S.W.2d at 496.

33. 913 S.W.2d 468 (Tex. Crim. App. 1995).



court of last resort ruled that while religious beliefs are protected by the First Amendment, these beliefs could also make someone biased and thus eligible for removal.<sup>34</sup> The dissent pointed out that adherence to a particular faith does not mean that a prospective juror holds the same beliefs as other members of that faith.<sup>35</sup> The dissent also highlighted the possibility of significant divergence between doctrine and practice.<sup>36</sup> For instance, while the Catholic Church holds that contraception is wrong, the dissenting judge noted that eighty-four percent of Catholics supported its use.<sup>37</sup>

A 2019 federal case in Alabama also affirmed the legitimacy of religion as grounds for juror dismissal.<sup>38</sup> There, a prosecutor was accused of striking fourteen prospective jurors on the basis of their “work with various churches and religious groups.”<sup>39</sup> The prosecutor responded that these prospective jurors worked in the church and that their familiarity with the Bible would make them more likely to show mercy.<sup>40</sup> The trial court held that this was a sound trial strategy, and that the strike based on religious affiliation was allowed.<sup>41</sup> Defense counsel pointed out, however, that the jurors were not uniformly questioned about their religious beliefs, nor asked follow-up questions before their dismissal.<sup>42</sup> Regardless, the court ruled in favor of the prosecution.<sup>43</sup>

In both the Texas and Alabama cases, the allowance of strikes based on religion hinged on three premises. The first is that an individual cannot set aside a religious worldview. The second is that religious worldviews may conflict with the frame of interpretation that is appropriate to the trial context, making that juror unfair and partial. Finally, these cases presume that exclusion from the jury trial based on one’s religious affiliation or belief does not violate the Constitution, as the First Amendment does not protect a religious individual’s right to introduce their worldview into court proceedings. As this Article will argue, the second and third premises are deeply flawed, as the First Amendment protections afforded to the public help to cultivate a religious diversity that has the potential to enrich, rather than subvert, the processes of interpretation and consensus building involved in the jury trial.

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34. *See id.* at 495–96.

35. *Id.* at 501 (Baird, J., dissenting).

36. *Id.*

37. *See id.* (citing GEORGE GALLUP JR., *THE GALLUP POLL: PUBLIC OPINION 1993*, at 145 (1994)).

38. *Smith v. Comm’r, Ala. Dep’t of Corr.*, 924 F.3d 1330, 1344, 1347 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 188 (2020).

39. *See id.* at 1335.

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.* at 1347.

## 2. Prohibiting Religion-Based Strikes

Not all courts take the view that religion is an acceptable basis for excusal. In Mississippi, the state's supreme court ruled in 1998 that a challenge on the basis of religion violated the state constitution's equal protection guarantee,<sup>44</sup> which prohibits religious tests for public office and holds sacrosanct the enjoyment of all religious sentiments and modes of worship.<sup>45</sup> The court interpreted peremptory strikes based on a person's faith to represent an implicit preference for certain religions, as well as a violation of a citizen's right, privilege, and responsibility to serve on a jury.<sup>46</sup> The court also noted that the Mississippi jury selection statute did in fact already prohibit exclusion on the basis of religion.<sup>47</sup>

Still, the court's ruling was nuanced. It affirmed that a juror could be dismissed for *individual* beliefs, including beliefs derived from participation in a religious tradition. As the court put it,

[W]hile we permit a party to strike a potential juror for her actual beliefs, even if that belief springs from her religion, we will not allow challenges based solely on a potential juror's religious affiliation. An individual's affiliation with the religious group of his or her choice shall not be a badge of second-class citizenship in Mississippi.<sup>48</sup>

Arizona has ruled similarly. There, a Catholic juror was stricken because of her opposition to the death penalty.<sup>49</sup> The Arizona Court of Appeals distinguished between the juror's beliefs, on the one hand, and her affiliation with the Catholic Church, on the other.<sup>50</sup> Applying strict scrutiny, the court noted that the latter had no demonstrable impact on the juror's ability to serve and viewed strict scrutiny as the proper level of judicial review.<sup>51</sup>

In New York, the Queens County Supreme Court held that jurors may not be excluded on the basis of religion.<sup>52</sup> Still, because federal law remained

44. *Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998).

45. *Id.* (citing MISS. CONST. art. 3, § 18).

46. *See id.* at 594–95 (“Religion or lack thereof is an inseparable part of a person’s character. Unlike race and gender, religious beliefs are not ordained at birth. A person may belong to a particular religious group without adopting all of the tenets and dogma of that religion. The critical determination is an individual’s beliefs, not the doctrines or dogma espoused by her religion.”).

47. *Id.* at 594 (citing MISS. CODE ANN. § 13-5-2 (1997)).

48. *See id.* at 595.

49. *State v. Purcell*, 18 P.3d 113, 118–19 (Ariz. Ct. App. 2001).

50. *Id.* at 120–23.

51. *Id.* at 118. It bears emphasis that religious prospective jurors are not the only individuals who face excusal during the so-called “death qualification” phase of voir dire in capital cases. ROBIN CONLEY, *CONFRONTING THE DEATH PENALTY: HOW LANGUAGES INFLUENCE JURORS IN CAPITAL CASES* 171–79 (1st ed. 2015); *see also id.* at 180–88 (discussing how prospective jurors are questioned about their willingness to assume responsibility for sentencing a defendant to death as a philosophical matter).

52. *People v. Langston*, 641 N.Y.S.2d 513, 514–15 (Sup. Ct. 1996).

unsettled, the court ruled based on the New York Constitution's Equal Protection Clause, which prohibits the denial of civil rights on the basis of creed or religion.<sup>53</sup> Because serving as a juror is a civil right, striking a juror on the basis of religion or a belief system would be a denial of that right.<sup>54</sup> More recently, in *State v. Flores*,<sup>55</sup> the Court of Appeals of Utah held that while in certain instances religion is an appropriate theme for questioning during voir dire, it is "ordinarily inappropriate to inquire into venire members' religious beliefs."<sup>56</sup> *Flores* involved alleged abuse within the Church of Latter-day Saints ("LDS").<sup>57</sup> The defendant, who belonged to the Church, wished to ask prospective jurors whether they, too, were affiliated.<sup>58</sup> The court refused to allow the question, which the defendant contended would help identify and remove atheists who might not be receptive to testimony by LDS leaders speaking on the defendant's behalf.<sup>59</sup> The court pointed out that this claim hinged on various unsubstantiated inferences.<sup>60</sup> Thus, while questioning a juror about her religious beliefs (or lack thereof) was fair game, one could not assume that an atheist would fail to credit testimony by religious figures. Here, again, we see a court drawing the distinction between religious (or irreligious) convictions and religious affiliations (or nonaffiliations), affirming the difficulty of distinguishing the two.

Some courts take an alternative approach to differentiating religious belief and affiliation. This approach focuses not on specific beliefs but rather on the degree of religiosity—or religious zeal—as a potential obstacle to fulfilling one's duties as a juror. In *United States v. DeJesus*,<sup>61</sup> a Third Circuit case, the prosecutor struck three jurors during retrial because they read the Bible and appeared active in church.<sup>62</sup> The prosecutor believed that religion had played a part in the previous mistrial and thus aimed to exclude prospective jurors with strong religious beliefs.<sup>63</sup> In finding this approach acceptable, the court held that the prosecutor had not targeted a specific faith, which was impermissible, but rather

53. *Id.* at 514. While not specifically discussed, Hawaii's supreme court also held in 1990 that their state constitution extended to ancestry and religion, and so they would be extending *Batson* to that as well. *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990).

54. *Langston*, N.Y.S.2d at 514.

55. 2015 UT App 88, 348 P.3d 361.

56. *Id.* at 88, ¶ 14, 348 P.3d at 366 (citation omitted).

57. *Id.* at 88, ¶¶ 1–4, 348 P.3d at 364–65.

58. *Id.* at 88, ¶ 5, 348 P.3d at 365.

59. *See id.*, 348 P.3d at 365.

60. *See id.* at 88, ¶ 20, 348 P.3d at 367.

61. 347 F.3d 500 (3d Cir. 2003).

62. *Id.* at 502–03.

63. *Id.* at 503, 508.

the *degree of religiosity*, as indicated by the prospective juror's participation in their faith community.<sup>64</sup>

Other cases in state and federal courts have also focused on this distinction. In New Jersey, for example, a prosecutor struck a white missionary of unknown affiliation and a Black Muslim man.<sup>65</sup> The prosecutor justified his actions by pointing out that “people who tend to be demonstrative about their religions tend to favor defendants to a greater extent than do persons who are . . . not as religious.”<sup>66</sup> Critically, the prosecutor *did not* ask jurors directly about their beliefs, instead guessing what they *might* be based on a stated occupation (missionary work) and clothing (“head to toe black and a skull cap”).<sup>67</sup> Though an earlier New Jersey opinion held that religious principles could not justify exclusion,<sup>68</sup> the Appellate Division held that the prosecutor had in fact targeted beliefs, not affiliations, which rendered the strikes permissible.<sup>69</sup> With this reversal, the New Jersey Supreme Court acknowledged the fundamental similarity, and necessary complementarity, of antidiscrimination principles underlying both the jury selection process and fair cross section requirements—illegal exclusion during voir dire could undermine the representativeness of the venire.<sup>70</sup> In a similar vein, Indiana allowed a strike based on religious employment by a prosecutor who routinely struck pastors, ministers, and priests.<sup>71</sup>

In New York, the Second Circuit weighed in on a rabbi's suitability as a juror in a case involving fraud in a Jewish school.<sup>72</sup> Here, the court noted that the rabbi might be viewed as an expert during deliberations<sup>73</sup> without reaching the question of whether *Batson* encompassed the religious affiliations of prospective jurors.<sup>74</sup>

Along the same lines, in Louisiana, the state supreme court upheld the exclusion of a juror based on the perceived degree of his religious fervor in a

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64. *See id.* at 510. The dissent in *DeJesus* argued, in contrast, that the strict scrutiny standard should have protected these excluded jurors; as religious members—active or not—they should be seen as a protected class in the same vein as members of a racial or gender group. *See id.* at 515 (Stapleton, J., dissenting).

65. *State v. Fuller*, 812 A.2d 389, 392–93 (N.J. Super. Ct. App. Div. 2002), *rev'd*, 862 A.2d 1130 (N.J. 2004).

66. *Id.* at 393.

67. *See id.* at 395; *id.* at 402 (Fuentes, J., dissenting).

68. *See id.* at 396 (majority opinion).

69. *See State v. Fuller*, 862 A.2d 1130, 1134–35, 1145 (N.J. 2004).

70. *See id.* at 1134, 1145 (“By excluding such persons based merely on religious bias rooted in stereotypes, neither the purpose of the peremptory challenge nor of the representative cross-section rule is served.”).

71. *Highler v. State*, 854 N.E.2d 823, 828, 830 (Ind. 2006).

72. *United States v. Berger*, 224 F.3d 107, 119 (2d Cir. 2000).

73. *See id.*

74. *Id.* at 120.

capital murder case.<sup>75</sup> There, the juror carried a Bible on his person during voir dire.<sup>76</sup> The Supreme Court of Louisiana agreed with the lower courts and held that allowing use of a strike in such a circumstance was not an abuse of discretion.<sup>77</sup> As the trial court noted, carrying a Bible is, at least, *some* evidence of religious conviction that could be expressed as a disinclination to impose the death penalty.<sup>78</sup>

In 2001, the Ohio Supreme Court elected to take a similar position in *State v. Gowdy*,<sup>79</sup> distinguishing between mere religious affiliation and strength of religious belief.<sup>80</sup> There, a prospective African American juror wore a large cross necklace outside of his clothing, which prompted the prosecutor to question him about the strength of his Christian beliefs, which he answered vaguely.<sup>81</sup> Such beliefs, especially combined with a lack of clarification, in the court's eyes, formed a sufficient basis for exclusion.<sup>82</sup>

Across these cases one sees a clear tendency to distinguish religious membership from religious belief. Still, courts are not uniform in this view. In 2013, the Seventh Circuit reflected on the difficulty of navigating religion in jury selection. In *United States v. Heron*,<sup>83</sup> the defendant tried to argue for the unconstitutionality of strikes based on "religion," which included not only membership but also devotion or religiosity.<sup>84</sup> The controversial strike in this case had been directed by a prosecutor against a Black juror whose mother ran a ministry—something the prosecutor said implied a level of religiosity that might lead to sympathy for the defendant.<sup>85</sup> The Seventh Circuit suggested that religious practices, held elsewhere to be a reliable indicator of religious devotion, were not necessarily indicative of a person's fidelity to a belief system.<sup>86</sup> As the court stated, these issues were "fraught with risks" no matter which way the court turned.<sup>87</sup> The court invoked a hypothetical to demonstrate the difficulty: Is a woman wearing a burqa doing so because she identifies as Muslim or because she is a *devout* Muslim?<sup>88</sup> The court considered that in some cases it may be easy to distinguish religiosity from affiliation but raised the question of why the latter ought to be afforded greater constitutional protection

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75. *State v. Neal*, 00-0674 (La. 6/29/01), 796 So. 2d 649, 656.

76. *Id.* at p. 8, 796 So. 2d at 656.

77. *Id.*, 796 So. 2d at 656.

78. *Id.*

79. 727 N.E.2d 579 (Ohio 2000).

80. *Id.* at 586.

81. *Id.* at 582–85.

82. *Id.* at 586–87.

83. 721 F.3d 896 (7th Cir. 2013).

84. *Id.* at 900.

85. *Id.* at 901.

86. *See id.* at 902.

87. *Id.*

88. *Id.*

than participation in religious *practices* arising from committed religious observance.<sup>89</sup>

In general, federal courts appear to find that it is improper to strike prospective jurors based on religious affiliation alone.<sup>90</sup> In *United States v. Stafford*,<sup>91</sup> the Seventh Circuit explained that there were three main categories of religion-based dismissal.<sup>92</sup> The first category consists of strikes based on affiliation, which are commonly deemed improper and arguably unconstitutional.<sup>93</sup> The second category pertains to strikes based on specific beliefs that would prevent a person from sitting in judgment.<sup>94</sup> These dismissals, in contrast, may be allowed.<sup>95</sup> Finally, there are strikes based on perceived tendencies associated with particular religious frameworks.<sup>96</sup> The court declared that the “most difficult to evaluate from the standpoint of *Batson* is a religious outlook that might make a prospective juror unusually reluctant, or unusually eager, to convict a criminal defendant.”<sup>97</sup> As the empirical study described in the next section will show, legal actors negotiate this difficulty in different ways, often leading to the arbitrary exclusion of religious jurors on the basis of stereotypes and for the purpose of gaining a strategic advantage during trial.

89. *See id.*

90. *See* *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (dismissing a venire member based on degree of religious conviction not to violate *Batson* and noting in dicta that there is a necessary distinction between religion and degree of piety); *United States v. Somerstein*, 959 F. Supp. 592, 595–96 (E.D.N.Y. 1997) (holding that while religion itself may be an improper reason for exercise of a peremptory strike, tangential connection to a religion through persons, events, or organizations can be proper); *United States v. Sheffler*, No. 19-cr-30067, 2021 WL 5184319, at \*5–6 (C.D. Ill. Nov. 8, 2021) (ruling that dicta in *Stafford* provides a basis to inquire during voir dire if a prospective juror maintained any religious belief would inhibit their ability to be a fair arbiter of the case); *see also* *United States v. Nelson*, 277 F.3d 164, 208–10 (2d Cir. 2002) (holding that a district court’s *sua sponte* “jurymanhandling” based on race and religion was in violation of the Fourteenth Amendment, and in so doing stating in dicta that exclusion of a venire member based on religion is improper). *But see* *United States v. DeJesus*, 347 F.3d 500, 510 (3d Cir. 2003) (affirming the district court’s ruling that the government’s peremptory strikes were based on “heightened religious involvement”).

91. 136 F.3d at 1109 (7th Cir. 1998).

92. *Id.* at 1114.

93. *Id.*; Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 145–56 (discussing several potential constitutional objections to striking a juror based on their religion).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1114.

## II. NAVIGATING RELIGION IN JURY SELECTION: AN EMPIRICAL STUDY

A. *Methods and Data*

This section presents findings from an empirical study carried out between 2013 and 2022 with the support of the National Science Foundation. This field research, which took place in state and federal courtrooms and prosecutors' offices, involved extensive exploration of jurors' religiosity as a factor in prosecutors' approaches to voir dire and the assessment of prospective jurors.<sup>98</sup> The study consisted of participant observation in thirty jury selection proceedings in state and federal court. It included semistructured interviews with thirty assistant district attorneys, thirty assistant U.S. attorneys, thirty federal public defenders, and thirty state public defenders about their experiences with and approaches to voir dire. This data is supplemented by interviews with three state and three district court judges. To protect their privacy, I assigned a two-letter code to each interviewee (for example, 1A, 1B, 1C, etc.). The quotations that appear in this Article are included to highlight formulations that emerged as typical and representative of lawyers who dealt with similar cases and jury selection processes.

Though the case names associated with the jury selection proceedings analyzed in this section have been deidentified to preserve the anonymity of the attorneys and judges involved, they include a range of civil and criminal cases—from car accidents and healthcare fraud to prosecutions of alleged public corruption, rape, child abuse, and drug trafficking. I selected the state and federal districts of such proceedings and interviews for their variable population density, racial diversity, and comparatively high level of socioeconomic inequality. In an effort to expand the applicability of these findings to diversely religious populations across the United States, I drew my interviewees from federal judicial districts and counties in different regions of the country.

The focus of this study was the identification and explication of common techniques, strategies, and practices that legal actors use and typically observe during jury selection to build juries. For this reason, it offers unique insight into how and why prospective jurors are dismissed. Still, as this is a qualitative study, some may question the value of general conclusions drawn from this data. My confidence in the broad applicability of these findings stems from the similarity of jurors' eligibility criteria across the United States, as well as the breadth of the study itself. With over 100 interviews over a nine-year research period, my study offers evidence that judges and lawyers—here, in very different districts—utilize a shared discursive and practical toolkit to assess and

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98. For a study examining the role that hypothetical jurors play in federal prosecutors' case preparation, see Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071 *passim* (2019).

grant excuses or exemptions to jurors who invoke religious beliefs, convictions, and commitments in court.

With few exceptions, empirical studies of the exclusionary character of jury selection practices typically focus on the demographics of empaneled (or excused) jurors.<sup>99</sup> My research, by contrast, combines participant observation with interviews of judges and lawyers<sup>100</sup> to connect off-transcript deliberations about voir dire<sup>101</sup> to the *production* of unrepresentative jury pools and panels. This kind of project uses qualitative data to illuminate the norms, beliefs, routines, and other features of professional behavior among legal actors that account for how a diverse public is actively sorted into less diverse juries in state and federal court.<sup>102</sup> Through extensive participant observation<sup>103</sup> and interviews with 126 actors across five groups, this study offers a ground-level view of the production of exclusion in the contemporary United States—including exclusion based on religious affiliation, beliefs, and practices.

In what follows, I present relevant findings from this study in three parts. The first part provides an overview of the techniques used to elicit information about the religiosity of prospective jurors. This includes an examination of why

99. See, e.g., Ronald Randall, James A. Woods & Robert G. Martin, *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effect on the Jury Pool*, 29 JUST. SYS. J. 1, 79 (2008) (explaining that one predominant focus of studies analyzing juror selection is exclusion based on appearance); Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations*, 16 J. EMPIRICAL LEGAL STUD. 515, 524 (2019) ("Our study systematically codes the conversations leading up to a decision to peremptorily strike or pass a potential juror. In so doing, it maps out the actual conversation documented in written transcripts between each targeted juror and the judge, prosecutor, and defense counsel trying the case."); Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 246–74 (2005) (analyzing voir dire practices in a local jurisdiction by conducting interviews with prosecutors, defense attorneys, civil litigators, and judges). See generally Anna Offit, *Peer Review: Navigating Uncertainty in the United States Jury System*, 6 U.C. IRVINE L. REV. 169 (2016) [hereinafter Offit, *Peer Review*] (examining American prosecutors' approaches to managing the unpredictability of the jury selection process).

100. See, e.g., Zalman & Tsoudis, *supra* note 99, *passim*; Offit, *Peer Review*, *supra* note 99, *passim* (providing examples of interview-based empirical studies of voir dire).

101. This includes data gathered from interviews with attorneys as well as informal discussions among lawyers—including those taking place during breaks in trial proceedings or out of court.

102. See ANNA OFFIT, *THE IMAGINED JUROR: HOW HYPOTHETICAL JURIES INFLUENCE FEDERAL PROSECUTORS* 70–88 (2022) (examining federal prosecutors' approaches to empanelling jurors based on participant observation and interviews over a five-year period in a U.S. Attorney's Office); ANN SOUTHWORTH & CATHERINE L. FISK, *THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE* 356–57 (1st ed. 2014) (discussing how plea bargains undermine the transparency of criminal procedure and trials); Candace McCoy, *Prosecution*, in *THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE* 663, 682 (Michael Tonry ed., 2011) (engaging in a similar discussion).

103. Participant observation is an ethnographic research method that entails an inductive and immersive field study aimed at attaining an understanding of the meaning research subjects impute to their decisions, actions, and multitude of social practices by their own accounts. See, e.g., Signe Howell, *Ethnography*, CAMBRIDGE ENCYC. ANTHROPOLOGY (Feb. 18, 2018), <https://www.anthroencyclopedia.com/entry/ethnography> [https://perma.cc/9JYL-FC41].



lawyers do—or do not—feel religion is important to consider during jury selection. It also examines how lawyers perceive the effect of a prospective juror’s religiosity on that person’s decision-making processes. Two subsequent parts explore legal actors’ use of stereotypes and their navigation of *Batson*, respectively, to offer insight into the flawed tools that are routinely used in contemporary courtrooms to transform heterogeneous jury pools into relatively homogeneous juries.

### B. *Summary of Findings*

The prosecutors and defense attorneys I interviewed took different approaches to eliciting information about prospective jurors’ religious affiliations and beliefs. In cases where they were afforded greater latitude, some included a question that traced the religious affiliations of prospective jurors from childhood through the present day.<sup>104</sup> Many of the lawyers I spoke with said that their approaches were limited by the questions included on the “standard issue” jury questionnaires or distributed in advance.<sup>105</sup> Further, lawyers could not take for granted that there would be sufficient time to explore the subject of religion with prospective jurors.<sup>106</sup> In such cases, religiosity might be assessed through practical and logistical questions, such as whether a prospective juror observed particular holidays or periods of prayer that would require trial schedule accommodations.<sup>107</sup>

The prosecutors and defense attorneys most attuned to the impact of the inclusion or absence of a religion-focused question were those who either (i) moved to a jurisdiction they perceived to have a more religiously observant

104. *See, e.g.*, Anonymous Interview with 5S, Assistant Dist. Att’y (2013–2022) (commenting on the discovery of prospective jurors’ varied religious identities, as some regularly identified as atheists, agnostics, Presbyterians, Baptists, Wiccans, etc.); Anonymous Interview with 6G, Assistant Dist. Att’y (2013–2022); Anonymous Interview with 5K, Assistant Dist. Att’y (2013–2022) (noting that it was this prosecutor’s practice to “grill” prospective jurors about “whether or not because of their religious beliefs they can’t sit in judgment”).

105. *See, e.g.*, Anonymous Interview with 5D, Assistant Dist. Att’y (2013–2022) (emphasizing the importance of having religious information to the extent that the “standard government issued federal” questionnaire includes references to the subject); Anonymous Interview with 5D, Fed. Def. (2013–2022) (noting that standard religion-focused questions probed whether prospective jurors had “any philosophical or religious or personal belief or issues”).

106. *See, e.g.*, Anonymous Interview with 5A, Def. Att’y and Former Assistant Dist. Att’y (2013–2022) (noting that her tendency not to ask prospective jurors about their religious beliefs has less to do with lack of interest than lack of time).

107. *See, e.g.*, Anonymous Interview with 5G, St. Ct. J. (2013–2022) (recalling jurors “who would say, ‘I can’t serve on Friday because I have to be at the mosque,’” along with Jewish jurors who noted that they observed religious holidays); Anonymous Interview with 5C, St. Ct. J. (2013–2022) (noting that there are “some people who we as judges want to know whether we have to make accommodations . . . someone who has to break for prayer”).

population than one they had left,<sup>108</sup> or (ii) noticed the removal of a religion-focused question in their jurisdiction that they had once found helpful.<sup>109</sup> Some attorneys expressed discomfort about probing prospective jurors' religious views, believing the subject to be inappropriate.<sup>110</sup> Others took the religiosity of prospective jurors for granted, based on their experience of summoning citizens from smaller and more insular pockets of "Bible Belt" communities.<sup>111</sup> And still others worried that religion-focused questions could be objectionable if not asked in a subtle and sensitive manner—necessitating a "delicate dance"<sup>112</sup> or "walking on eggshells"<sup>113</sup> during voir dire.<sup>114</sup> As one attorney put it, this entailed finding a way to ask about religion without doing so "directly,"<sup>115</sup> or focusing on

108. Anonymous Interview with 6O, Assistant Pub. Def. (2013–2022); Anonymous Interview with 6U, Assistant Fed. Def. (2013–2022) (noting that the attorney's discovery of a "strongly held religious belief" would "certainly play into" that lawyer's assessment of the prospective juror).

109. *See, e.g.*, Anonymous Interview with 6C, Assistant Dist. Att'y (2013–2022) (commenting that there has been a state-wide move away from including a religious-specific question on "juror cards"); Anonymous Interview with 5G, St. Ct. J. (2013–2022) (noting that a question related to religion had been part of the jury questionnaire for "many years" before it was statutorily removed).

110. *See, e.g.*, Anonymous Interview with 5P, Assistant Dist. Att'y (2013–2022) (noting that religion-focused questions can wade into irrelevant territory quickly and prosecutors often only posed the question because supervisors presented line attorneys with a "list . . . they wanted us to ask every panel in every case"—prompting the interviewee to throw the question in at the end); Anonymous Interview with 5D, Assistant Dist. Att'y (2013–2022) (noting ambivalence about questions that go beyond those probing whether "because of personal religious or philosophical beliefs you do not believe you could sit in judgment of another person" since this lawyer perceived religion to be a poor "substitute or surrogate for anything"); Anonymous Interview with 6Y, Assistant Fed. Def. (2013–2022) (commenting that "the subject does not come up very often" and felt to the defense attorney "a bit off limits unless they bring it up themselves").

111. *See, e.g.*, Anonymous Interview with 5A, Def. Att'y and Former Assistant Dist. Att'y (2013–2022) (commenting that "in the Deep South" where "everyone is considered to be Christian" posing religion-focused questions during voir dire seemed unnecessary").

112. *See, e.g.*, Anonymous Interview with 5I, Dist. Ct. J. (2013–2022) (noting some attorneys' practice of avoiding asking prospective jurors whether for religious reasons they could not "sit in judgment" and instead describing how lawyers' sought distinct but analogous questioning by probing whether prospective jurors had difficulty making decisions about more mundane issues in their lives); Anonymous Interview with 6E, Assistant Dist. Att'y (2013–2022) (commenting that prospective jurors' religious beliefs can be a "touchy area to wander into so you have to tap dance around that"); Anonymous Interview with 6W, Assistant Fed. Def. (2013–2022) (commenting that even if not illegal, inquiries into prospective jurors beliefs can be "emotionally off-putting"); Anonymous Interview with 6G, Assistant Dist. Att'y (2013–2022) (noting that although he personally found religion-focused voir dire questions to be a sensitive subject he did not object to other attorneys' decisions to pose them and would not object).

113. Anonymous Interview with DL, Assistant U.S. Att'y (2013–2022) (noting that federal prosecutors were concerned with exhibiting cultural sensitivity during voir dire).

114. *See, e.g.*, Anonymous Interview with 6K, Assistant Fed. Def. (2013–2022) ("Usually, if I'm going to strike someone there's usually multiple reasons I'm going to strike someone. There's rarely a single issue. People make improper objections all the time and nobody knows it.").

115. *See, e.g.*, Anonymous Interview with 6F, Assistant Dist. Att'y (2013–2022) (acknowledging that "most of the time if you ask, 'Can you sit in judgment,' someone who cannot for religious reasons volunteers that information on their own"); Anonymous Interview with 5Q, Assistant Dist. Att'y

prospective jurors' nonverbal responses to questions without probing more deeply.<sup>116</sup>

In general, those who took religion seriously believed that it was not just another feature of a juror's life—it was fundamental. “I think religion ties into how we view the world,” a state prosecutor reflected after work one evening.<sup>117</sup> In this prosecutor's view, religious jurors tended to “see the world [as] more black and white”—that is, they believed behavior was either morally good or bad, right or wrong.<sup>118</sup> This differed from prospective jurors who the prosecutor identified as taking a “shades-of-gray” approach to morality.<sup>119</sup> Through a combination of carefully worded questionnaires and “open jury selection” conversation, this prosecutor looked for a juror who, they said,

can still be gray but understands that there's a “right and wrong” part of my life. So, “I'm gray—but when it comes to following the law, I'm black and white” and I'd say, “I'm safe with you.” That's how I'd use the religion question more times than not. Depending on the type of offense that could help you—or people who didn't have anything—that didn't put anything in—I'd be like, I don't know if I want that person. There could be other things on the questionnaire that would make me like the person.<sup>120</sup>

If prospective jurors identified themselves as nondrinkers, for example, the prosecutor conceded that these individuals still demonstrated that they possessed a “moral compass”—if not an explicitly religiously oriented one.<sup>121</sup>

Sometimes the desire to discover whether a prospective juror's sense of morality was grounded in religious adherence stemmed from a lawyer's own religiosity. One federal prosecutor, for example, recalled a prospective juror who responded to voir dire questions about habits and hobbies by sharing that she enjoyed reading daily devotionals and listening to religious radio shows.<sup>122</sup> The prosecutor's trial partner felt an immediate connection with this juror, describing her as a “God-fearing woman” likely to take a “matter-of-fact” approach to the case—much like his own devout aunt.<sup>123</sup> Another federal prosecutor invoked their personal experience with Judaism to explain a decision

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(2013–2022) (choosing to phrase the question in terms of whether a person will be unable to “find a person guilty” without singling out religion).

116. *See, e.g.*, Anonymous Interview with 5E, Assistant District Att'y (2013–2022) (noting that seeing a prospective juror's “eyes light up” in response to a question about whether a person's religious or “deeply held personal beliefs” may lead to the excusal of that juror).

117. Anonymous Interview with 5S, Assistant District Att'y (2013–2022).

118. *Id.*

119. *Id.*

120. *Id.*

121. *See id.*

122. Anonymous Interview with AF, Assistant U.S. Att'y (2013–2022).

123. *Id.*

not to empanel an Orthodox Jewish person, who they believed might put adherence to a strict religious “code” over the law, as framed by the judge.<sup>124</sup> Another recognized that sharing a religious affiliation with a prospective juror might be advantageous.<sup>125</sup> One federal prosecutor commented: “I want people who will like me. If I see an old Jewish lady I think: she’s like my Jewish grandmother, she’ll like me.”<sup>126</sup> Still, the same prosecutor conceded that on one occasion a Jewish woman on a jury “turned the rest of the jury” against that prosecutor and was “on the defense’s side the whole time.”<sup>127</sup>

Other lawyers shared that the significance of an individual’s religion or religiosity hinged on community context. “The system is designed,” one attorney said, “so that you as a citizen decide what is acceptable in this community. If we live in Minneapolis and there’s a large Muslim population, they may handle that community differently for certain offenses than a very evangelical jurisdiction from the South.”<sup>128</sup> This responsiveness to the unique character of the community was, according to this lawyer, precisely the purpose of the jury system, and they felt strongly that no prospective juror should have to “compromise their conscience” on account of a judge or another juror.<sup>129</sup>

Still, many interviewees share that they did, in fact, see the religious convictions of prospective jurors as a potential source of conflict with the rule of law. These lawyers tended not to identify themselves or members of their family as religiously observant.<sup>130</sup> As one defense attorney put it, “People will say sometimes, ‘I get my rules from the Bible, those are the laws I follow,’” precipitating an inquiry into whether such a person is going to “follow God’s rules or the judge’s.”<sup>131</sup> In an effort to swiftly and definitively excuse jurors for cause who might bring religious reservations to their scrutiny of evidence, one

124. *See, e.g.*, Anonymous Interview with DC, Assistant U.S. Att’y (2013–2022). This federal prosecutor embraced a similarly nuanced—or “shades of gray”—approach to the religiosity of a prospective juror, recalling a case in which a prospective juror “hedged a little bit” while commenting that her beliefs would make it difficult to render judgment in light of the fact that the prospective juror had law enforcement family members and participated as a grand juror. *Id.*

125. *See, e.g.*, Anonymous Interview with BQ, Assistant U.S. Att’y (2013–2022).

126. Anonymous Interview with 6U, Assistant U.S. Att’y (2013–2022).

127. *Id.*

128. Anonymous Interview with 6K, Assistant Fed. Def. (2013–2022) (“Whoever from [the] North would look at [the] South’s standards and say that’s unacceptable—until you—if you want to rewrite structure of the system, great. But if you’re not willing to do that you can’t have it both ways. I personally don’t take offense to people making decisions on whatever basis they make their decisions.”).

129. *Id.*

130. *See, e.g.*, Anonymous Interview with 5P, Assistant Dist. Att’y (2013–2022) (noting that the lawyers’ lack of authority about religious practices and beliefs compounded concern about being perceived as “ignorant and disrespectful” in following up on prospective jurors’ sources of religious ambivalence).

131. Anonymous Interview with 6Y, Assistant Fed. Def. (2013–2022) (commenting that you do not want to empanel as a juror someone who already has a “framed mindset in that way”).

prosecutor asked prospective jurors to raise their hands if, despite proof beyond a reasonable doubt, they, for *whatever* religious or ethical reason, could never convict a defendant.<sup>132</sup>

Perhaps the most common way in which religion appeared as a potential obstacle for lawyers was when a prospective juror declared that they could not—or would not—“render judgment” in criminal cases, or “sit in judgment” of others.<sup>133</sup> Some lawyers distinguished between a definitive attitude (for example, “I *cannot* do this for religious reasons”) and a more uncertain one (for example, “This will be difficult, though not impossible, for me”).<sup>134</sup> One prosecutor shared that it was critical to determine which kind of juror you were dealing with, as one who felt definitively constrained might view the responsibility of convicting a defendant as putting them in an “impossible” position.<sup>135</sup> Other attorneys recounted experiences during which judges “cross-examined” prospective jurors who cited biblical objections to rendering judgment<sup>136</sup> or initiated “theological discussions” about why particular references to the Bible failed to overcome judges’ contrary interpretations.<sup>137</sup>

Attention to prospective jurors’ religious views was more pronounced in particular types of trials, including, for example, child abuse cases in which prospective jurors cited the Bible as supporting the proposition that corporal

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132. Anonymous Interview with 5Q, Assistant Dist. Att’y (2013–2022) (referring to this line of inquiry as a “cause” question aimed at identifying prospective jurors’ biases and excusing them before proceeding further in voir dire).

133. *See, e.g.*, Anonymous Interview with 6S, Assistant Pub. Def. (2013–2022) (noting the assumption that the numerous prospective jurors who “say ‘I can’t judge this person’” has “something to do with [the] religious background” of such prospective jurors due to the religiosity of the surrounding city’s population). *But see* Anonymous Interview with AC, Assistant U.S. Att’y (2013–2022) (commenting that this preconceived idea about religiously observant jurors belied her own sense that in practice “religious people are the most judgmental people out there” and the “least tolerant of anyone”); Anonymous Interview with 7F, Pub. Def. (2013–2022) (commenting on the frequency with which prosecutors, in particular, would ask this question); Anonymous Interview with CQ, Assistant U.S. Att’y (2013–2022) (commenting on prospective jurors’ practice of saying that they “would have a problem with judgment”); Anonymous Interview with DB, Assistant U.S. Att’y (2013–2022) (recalling a recent prospective juror who “felt she had a religious view [that] she wasn’t allowed to judge people”); Anonymous Interview with AU, Assistant U.S. Att’y (2013–2022) (“Sometimes you get people who say their religion doesn’t let them stand in judgment.”); Anonymous Interview with CE, Assistant U.S. Att’y (2013–2022) (recalling a prospective juror who indicated during voir dire that the Bible was her only source of reading material and that she did not feel that she “had the right to judge”).

134. *See, e.g.*, Anonymous Interview with CT, Assistant U.S. Att’y (2013–2022) (commenting that as a prosecutor this lawyer sought jurors who were “going to be able to make a decision”).

135. *See, e.g.*, Anonymous Interview with BS, Assistant U.S. Att’y (2013–2022).

136. *See, e.g.*, Anonymous Interview with 6P, Assistant Fed. Def. (2013–2022) (noting a judge’s practice of zeroing in on the particular Bible passage a prospective juror claimed to reference as grounds for excusal).

137. Anonymous Interview with 6L, Assistant Fed. Def. (2013–2022) (describing judges who “hate” prospective jurors’ moral objections to passing judgment that they “will not excuse a juror on that . . . unless they can identify the Bible verse”).

punishment could be an acceptable—and indeed necessary—part of parenting.<sup>138</sup> From time to time, lawyers and judges encountered cases in which religion was explicitly at issue, as in the prosecution of a defendant from Afghanistan whose background elicited irrelevant and discriminatory references to the Muslim faith.<sup>139</sup>

Other lawyers embraced the possibility that prospective jurors' religious ideation could be strategically advantageous. "If you have information that one of the jurors is religious or have a whole panel of religious people, it is no secret—you play to your audience," one federal defender commented.<sup>140</sup> In this lawyer's view, rather than seek to excuse a prospective juror who was Catholic, for example, they would "tailor [their] argument" in the hopes that the juror "would understand [it] through the lens of his faith."<sup>141</sup> This was particularly important in capital cases, where Catholic jurors' opposition to the death penalty was believed to be impervious to judicial instructions.<sup>142</sup>

Some prosecutors believed that religiously observant jurors might be favorably inclined to their arguments. For example, a prospective juror who is "very faithful" and "goes to church three times a week" might be a "gun-toting, law-and-order, perfect state juror."<sup>143</sup> The same prosecutor who expressed this view nonetheless conceded that a religious juror might believe that "everyone deserves a second chance" and be "easy on punishment."<sup>144</sup> Other prosecutors

138. See, e.g., Anonymous Interviews with 5K, Pub. Def., 6R, Assistant Dist. Att'y & 5I, Dist. Ct. J. (2013–2022) (noting the tendency of a religious juror to scrutinize behavior that might be viewed as appropriate "discipline" as opposed to abuse); Anonymous Interview with AY, Assistant U.S. Att'y (2013–2022) (noting prospective jurors' references to "spare the rod spoil the child" as the Bible's orientation toward child abuse prosecutions).

139. See, e.g., Anonymous Interview with 6P, Fed. Def. (2013–2022) (noting that prospective jurors associated Afghanistan with terrorism); see also Anonymous Interview with 6T, Fed. Def. (2013–2022) (identifying a case in which "religious issues were necessarily baked into the case" requiring use of a "jury selection survey which all the jurors filled out which asked them to provide answers on the role they thought religion should play in vetting individuals" who were not U.S. citizens); Anonymous Interviews with AY, Assistant U.S. Att'y & BQ, Assistant U.S. Att'y (2013–2022); Anonymous Interview with 5I, Dist. Ct. J. (2013–2022) (commenting on his unusual need as a former prosecutor to "cross-examine over interpretations of the Bible" despite his usual caution about how far to "go into" such subjects in the case of a dispute about whether a radio station was entitled to a religious exemption from property taxes).

140. Anonymous Interview with 6K, Assistant Fed. Def. (2013–2022).

141. *Id.*

142. See *id.* (commenting that posing religion-focused questions can elicit "very important stuff [that] absolutely affects jury decisions, as it should"); see also Anonymous Interview with 5L, Assistant Dist. Att'y (2013–2022) (commenting that numerous prospective jurors want the lawyers to understand their positions on punishment, particularly in death penalty cases).

143. Anonymous Interview with 6J, Assistant Dist. Att'y (2013–2022).

144. See *id.* The logic this prosecutor was familiar with was the notion that prospective jurors believed that God would render judgment on one's peers "in the long run" and that no individual should feel compelled to do so. Carol Greenhouse, *Praying for Justice: Faith, Order, and Community in an American Town*, in ANTHROPOLOGY OF CONTEMPORARY ISSUES 110 (Roger Saniek ed., 1986)

shared that routine church attendance signaled fidelity to a retributive approach to criminal prosecutions, leading defense attorneys to seek to remove such prospective jurors for cause.<sup>145</sup> As one public defender put it, religious jurors were “pretty harsh to people, kind of like, ‘you get what you deserve and once you’re arrested you must have done something wrong.’”<sup>146</sup> Still, the same defense attorney admitted that he had encountered religious people in his jurisdiction who were compassionate, even approaching his daughter who walked with a cane and asking if they could pray for her recovery.<sup>147</sup> Others seemed to build the possibility of considering context-specific tendencies among the religious into their calculus. One federal prosecutor, for example, shared the advice that one should “never pick a jury around Christmas,” as the holiday season may make people feel excessively “generous”—and thus, one assumes, forgiving and understanding.<sup>148</sup>

In general, the interviews conducted for this study suggest that lawyers hold different views with respect to the significance, desirability, and likely consequences associated with religious affiliation and belief. At the same time, they appear to share an understanding of religion as something that should be considered during jury selection because it is likely to—in some form—have an impact on the approach one takes to a case and thus the likelihood of conviction. Further, they seem to agree that this outcome stems from the unique way religious worldviews change how one categorizes people and practices, how they discern good and bad or normal and unusual, and who has the right to judge others. Finally, these lawyers generally relied on relatively simplistic understandings of the link between religious affiliation and these worldviews—that is, many consciously relied on stereotypes about how a person’s religion would cause them to act as a juror.

### 1. Key Finding I: Uneasy Relationship with *Batson*

“What interests me about jury selection,” one federal prosecutor commented during an interview, “is the stuff we’re *not* allowed to do.”<sup>149</sup> He

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(documenting, in the context of an ethnographic study of Baptists, that a similar vision of a community’s explicit avoidance of conflict and disputing recognizing the “inevitability of ultimate redress”); *see also* Anonymous Interview with AZ, Assistant U.S. Att’y (2013–2022) (commenting her disappointment that a prospective juror was “really into church” because she might be of the view that “everyone deserves fifteen chances”).

145. *See, e.g.*, Anonymous Interview with 5X, Assistant Dist. Att’y (2013–2022) (evinced the belief that while some observant jurors might bring “different standards” to assessments of blameworthy conduct resulting in carceral or capital punishment, others are considered to be a “good prosecution juror” who take an “eye for an eye” approach).

146. *See, e.g.*, Anonymous Interview with 7C, Pub. Def. (2013–2022).

147. *See id.* In this attorney’s experience, judges did not often permit extensive religion-focused questioning. *Id.*

148. *See, e.g.*, Anonymous Interview with DD, Assistant U.S. Att’y (2013–2022).

149. Anonymous Interview with CM, Assistant U.S. Att’y (2013–2022).

proceeded to list the kinds of information that he and his colleagues were prohibited from considering—including prospective jurors’ religious views.<sup>150</sup> This struck him as surprising.<sup>151</sup> The natural response to prosecuting a Catholic or Jewish defendant, from his perspective, would be to very explicitly take the religious affiliations of potential jurors into account in the hope of discovering who in the venire shared either of the defendants’ affiliations.<sup>152</sup>

The *Batson* doctrine—and the possibility of a challenge during voir dire—could require prosecutors to deny the existence of characteristics that they would otherwise feel “hardwired” to pay attention to.<sup>153</sup> Assessments of a prospective juror’s religion were, according to some prosecutors, made taboo despite their perceived importance by some attorneys. Others, however, were quick to point out that scrutiny of religion, ethnicity, and race could be difficult to disentangle, creating an end-run around the *Batson* doctrine and an opening for unchecked discrimination.

Commenting on the limitations *Batson* imposed on juror assessment, a trial team I spoke with agreed that there should be a consistent approach to differentiating jurors.<sup>154</sup> In the context of this prosecution, one prosecutor suggested that one should look to excuse “people who associate discipline with training a kid,” rather than focus explicitly on religion.<sup>155</sup> One of her supervisors agreed, suggesting the focus be on whether prospective jurors chose to use particular “terminology”—whether religiously oriented or not—that revealed “a child-rearing philosophy that’s inconsistent with our theory of the case.”<sup>156</sup> Because some of the prospective jurors about whom they had doubts were Black, federal prosecutors worried that religion-based peremptory strikes might subject the trial team to an accusation that a juror was struck based on race.<sup>157</sup> In this context, prosecutors interrogated the extent to which peremptory strikes that singled out religious beliefs would be viewed as “race neutral” if challenged. Federal prosecutors thus encouraged colleagues to be certain that no white jurors who shared a prospective juror’s concerning views be empaneled, allowing the trial team to make the case that they were “being consistent” and

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150. *Id.*

151. *Id.*

152. *Id.*

153. *See, e.g., id. See generally* Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 201 (2021) (discussing prosecutors’ analogous concerns about acknowledging the racial identities of prospective jurors in light of *Batson*’s scrutiny of race-based juror dismissals).

154. *See, e.g.,* Anonymous Interview with AY, Assistant U.S. Att’y (2013–2022); Anonymous Interview with BQ, Assistant U.S. Att’y (2013–2022).

155. *See* Anonymous Interview with BQ, Assistant U.S. Att’y (“If we want to get rid of her, obviously I don’t think we can say [it is] because she cited religious texts.”).

156. *See, e.g.,* Anonymous Interview with DR, Assistant U.S. Att’y (2013–2022).

157. *See, e.g.,* Anonymous Interviews with AC, BV, CR, Assistant U.S. Att’y’s (2013–2022).



that other Black prospective jurors they chose to strike presented the “same problem.”<sup>158</sup>

Prosecutors who were apprehensive about the possibility they might be perceived as excluding prospective jurors based on their religious views sometimes adjusted their strategies in capital cases. Some prosecutors drew generalized conclusions about prospective jurors’ likely approval of the death penalty based on religious affiliation, while others avoided asking jurors about their religious beliefs altogether.<sup>159</sup> “It’s not relevant to their qualifications as a juror whether they are Jewish, Baptist, Muslim, Seventh-day Adventist,” one federal prosecutor told defense counsel as they met to jointly draft a written questionnaire.<sup>160</sup> “Everything in my body says we should not be asking about their religious affiliation . . . no matter what their answer is you can’t strike them on that basis,” the prosecutor added.<sup>161</sup>

During jury selection in one drug trafficking case, a prosecutor expressed immediate concern about having considered a prospective juror’s religious beliefs.<sup>162</sup> This prosecutor initially worried about the prospective juror’s comment that he belonged to “the Muslim brotherhood” because of the defendant’s prior testimony that police officers had called him a “Muslim terrorist.”<sup>163</sup> Upon hearing this concern, the prosecutor’s trial partner immediately clarified that religion should have no place in their criticism.<sup>164</sup> Instead, “the problem,” as the lawyer saw it, was the prospective juror’s stated skepticism about confidential informants and cooperators—which were central to the case.<sup>165</sup>

Federal prosecutors were not alone in their cautious approach to juror dismissals based on religion in light of antidiscrimination law. With respect to inquiring about prospective jurors’ religious beliefs, a federal defender noted that he “would be fearful to ask that question because of *Batson*” since he did not know if the question implicated a prohibited form of discrimination—such as gender-based exclusion.<sup>166</sup> Other defense attorneys were more certain in their contention that *Batson* kept religious inquiries out of voir dire—despite its intrinsic value in assessing jurors. As one public defender put it, “Research

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158. See, e.g., Anonymous Interview with AY, Assistant U.S. Att’y (2013–2022).

159. See, e.g., Anonymous Interview with AD, Assistant U.S. Att’y (2013–2022).

160. *Id.*

161. See, e.g., *id.*

162. Anonymous Interview with AI, Assistant U.S. Att’y (2013–2022).

163. *Id.*

164. *Id.*

165. *Id.*

166. See, e.g., Anonymous Interview with 6Q, Fed. Def. (2013–2022) (distinguishing this concern from a case in which his client might be religiously observant, dressed in traditional, religious attire, and therefore might be subject to prejudicial religious thinking that should be identified during voir dire).

supports the fact that religion is a really critical factor in determining whether or not a jury is going to be fair or impartial,” despite his county’s practice of omitting religious voir dire questions and declining to strike prospective jurors for cause based on religious concerns unless they were unable to “fulfill their oath.”<sup>167</sup>

Others focused on the extent to which religious affiliation and practice could reflect overt forms of bias. This could include prospective jurors who belonged to the same church as a party in a prosecution.<sup>168</sup> It also included defense attorneys concerned that prospective jurors who were Christian might be unable to impartially participate in a trial that involved domestic violence among a same-sex couple to the extent that one’s intolerance of such relationships and religious views were entwined.<sup>169</sup>

One district court judge, for example, felt freer to probe prospective jurors whose jobs placed them in positions of counsel to students or congregants or as interpreters of religious texts<sup>170</sup> because their positions made them akin to judges within their religious communities. The judge explained: “I noticed you’re a professor of theology at a local seminary or religious school, or I see you’re the pastor of X, Y, or Z church or I see from your wimple you’re a Catholic nun—obviously at that point you’re allowed to ask some questions.”<sup>171</sup>

In this context, the judge was particularly interested in the possibility that religious identities might be associated with sympathy for defendants who were members of law enforcement and charged with shooting and killing Black victims.<sup>172</sup> Further, the judge acknowledged that consideration of religion was not always about “pure religion” but about the fact that “this group of people tends to be more liberal or socially-oriented than this other group of people.”<sup>173</sup> The challenge, according to some attorneys, is how to draw such conclusions given that they are likely to be based on inaccurate stereotypes.

## 2. Key Finding II: The Use of Stereotypes

A number of prosecutors and defense attorneys who focused on prospective jurors’ religious affiliations suggest that their thinking was shaped by stereotypes. Some attorneys and judges embraced such stereotypes as useful

167. *See, e.g.*, Anonymous Interview with 6V, Pub. Def. (2013–2022) (distinguishing his county from another in which he worked and where he “did have access to religious background on a lot of the background demographic information” about prospective jurors, which he viewed as an asset).

168. *See, e.g.*, Anonymous Interview with 5C, St. Ct. J. (2013–2022)

169. *See, e.g.*, Anonymous Interview with 6X, Pub. Def. (2013–2022).

170. *See, e.g.*, Anonymous Interview with 5I, Dist. Ct. J. (2013–2022).

171. *See id.*

172. *Id.*

173. *See id.*

tools for assessing prospective jurors.<sup>174</sup> Others doubted their utility.<sup>175</sup> In some cases, prosecutors acknowledged the role that office leadership could play in reinforcing crude associations between particular faith groups and orientations toward cases. This included reference to a previous district attorney who counseled colleagues to be wary of empaneling prospective jurors who were observant members of virtually every “mainstream religion” in cases that involved young defendants who might command sympathy.<sup>176</sup>

One state prosecutor who shared this concern recalled a case in which a pro se defendant asked each prospective juror whether they “believed in God and what they thought about heaven and hell” despite the judge’s effort to “steer her away” from a line of questioning that the judge feared might “taint the pool against her in the voir dire stage.”<sup>177</sup> The same prosecutor nonetheless agreed that it was important to establish whether prospective jurors felt, in a more generalized sense, that they could not return verdicts in criminal cases, noting that there is “some Bible verse about not standing in judgment of our brothers.”<sup>178</sup>

Though my interviews with lawyers tended to focus on religiosity in general, a few religious groups were routinely singled out and stereotyped: Southern Baptists, Jehovah’s Witnesses, and Orthodox Jews.<sup>179</sup> Some defense attorneys shared that they were on the lookout for Southern Baptists, whom they believed were more likely to give the benefit of the doubt to law enforcement witnesses and take a “fire and brimstone” approach to wrongdoing—to the obvious detriment of defendants.<sup>180</sup> The prosecutors who shared concerns about Jehovah’s Witnesses pointed to this group’s supposed

174. See, e.g., *id.* (noting that due to the lack of time provided to attorneys to conduct voir dire, stereotypes may be a reasonable point of departure for evaluating prospective jurors, adding “there’s a basis for stereotypes, otherwise they wouldn’t be there”).

175. See, e.g., Anonymous Interview with 6N, Assistant Fed. Def. (2013–2022) (stating “I find people generally don’t fall into neat categories on religious grounds” and noting, in particular, that there were no predictable alignments between politically and religiously conservative prospective jurors).

176. See, e.g., Anonymous Interview with 6F, Assistant Dist. Att’y (2013–2022) (acknowledging that “most of the time if you ask ‘can you sit in judgment?’ someone who cannot for religious reasons volunteers that information on their own”); Anonymous Interview with 5N, Assistant Dist. Att’y (2013–2022) (noting that in some cases earlier office leadership had encouraged the explicit exclusion of Jewish, Catholic, and Buddhist prospective jurors); Anonymous Interview with 6A, Assistant Dist. Att’y (2013–2022) (noting, as a prosecutor, that asking prospective jurors questions about their religious affiliations could help “weed out jurors who might not be favorable to the state”).

177. See, e.g., Anonymous Interview with 6J, Assistant Dist. Att’y (2013–2022).

178. See, e.g., *id.* (noting the frequency with which the “religious rural population” summoned to court as jurors faced excusal for cause for sharing religious concerns).

179. See Offit, *Peer Review*, *supra* note 99, at 192–93 (describing a federal prosecutor who advocated for the immediate dismissal of prospective jurors who identified themselves as Jehovah’s Witnesses among other groups on the basis of stereotypes, or shorthand “juror-types”).

180. See, e.g., Anonymous Interview with 6M, Assistant Fed. Def. (2013–2022).

reluctance to return guilty verdicts<sup>181</sup>—and preference to be excused from jury duty.<sup>182</sup> Orthodox Jewish jurors were a source of interest and concern for other prosecutors, who believed they would be “more harsh in their judgments” due to the stringent nature of the rules followed in “devout small religious communities.”<sup>183</sup>

The attorneys who regarded religious stereotypes with skepticism mentioned that they were likely to be inaccurate or misleading.<sup>184</sup> “With religion as with anything,” one public defender commented, “there is so much bias and stereotyping.”<sup>185</sup> Though the lawyer acknowledged the generalizations drawn in capital work about Catholics and “fire and brimstone” Baptists, it was never possible to control how religious issues might “surface” during voir dire and whether suspicions could be confirmed.<sup>186</sup> In one case, a state prosecutor who believed that “church leaders tend to be more rehabilitation minded” was surprised to discover the dominant voice on a jury supporting conviction came from a “gun-toting priest.”<sup>187</sup> The priest, it turned out, became the jury’s foreperson, suggesting “you can’t rely on those stereotypes.”<sup>188</sup>

In some cases, prosecutors and defense attorneys expressed surprise about the information prospective jurors volunteered about their religious views in light of other political and social affiliations they shared in court.<sup>189</sup> Even if they believed that stereotypes reflected the actual tendencies of members of

181. Anonymous Interview with 5E, Assistant Dist. Att’y (2013–2022); *see, e.g.*, Anonymous Interview with 6B, Assistant Dist. Att’y (2013–2022) (expressing surprise that there is a judge in the county who will *not* summarily disqualify prospective jurors who are Jehovah’s Witnesses despite the more widespread practice of doing so); Anonymous Interview with 6J, Assistant Dist. Att’y (2013–2022) (characterizing Jehovah’s Witnesses as belonging to “the one religion that really stands out” during voir dire).

182. *See, e.g.*, Interview with 6Y, Assistant Fed. Def. (2013–2022) (acknowledging the possibility that some might disingenuously identify themselves as Jehovah’s Witnesses because they “understand they may not have to serve on this theory”); Anonymous Interview with 5T, Assistant Dist. Att’y (2013–2022) (noting that although this prosecutor believed that some individuals who identified themselves during voir dire as Jehovah’s Witnesses “voluntarily” and earnestly indicated that they could not “sit in judgment,” others “figured out what to say and do to get out of jury selection”); Anonymous Interview with 5O, Assistant Dist. Att’y (2013–2022) (noting the extent to which prospective jurors who are asked whether they have “religious” or “moral” beliefs that might prevent them from sitting in judgment sometimes sought dismissal from jury service “no matter what”).

183. *See, e.g.*, Anonymous Interview with AU, Assistant Dist. Att’y (2013–2022) (commenting that the source of his expertise comes from “numerous cases where men of the cloth have duped other people who are their followers into frauds and other stuff that’s very problematic”); Anonymous Interview with 6C, Assistant Dist. Att’y (2013–2022) (commenting that prospective jurors often respond to questioning about their religious affiliations because they “are not interested in being on a jury” for reasons that have nothing to do with “religion or a moral stance on sitting in judgment”).

184. *See, e.g.*, Anonymous Interview with 7E, Pub. Def. (2013–2022).

185. *Id.*

186. *See id.*

187. Interview with 5J, Assistant Dist. Att’y (2013–2022).

188. *See id.*

189. *See, e.g.*, Anonymous Interview with 6O, Assistant Fed. Def. (2013–2022).

particular religious groups, some attorneys conceded that it was really quite difficult to know which side would benefit from the information gathered through religion-oriented questions.<sup>190</sup> In a county with a population that was eighty percent Hispanic, for example, one public defender estimated that close to eighty percent were Catholic.<sup>191</sup> Yet, even in capital cases the lawyer noted that religious affiliation did not necessarily translate to dogmatism that might be disadvantageous.<sup>192</sup>

### III. DISCUSSION AND PROPOSED REFORMS

Each of the prosecutors and defense attorneys I interviewed acknowledged that the religious affiliations and spiritual proclivities of lay citizens mattered. And even lawyers who tried to avoid letting prospective jurors' religious backgrounds influence voir dire conceded that a religious worldview could affect a case's outcome. Where my interlocutors differed was in their accounts of how they elicited, interpreted, or otherwise navigated religious information during voir dire. Some, lacking personal experience with individuals from certain faith groups, relied on crude stereotypes. Others considered the strategic advantages of either including or excluding people who, for religious reasons, suggested that their beliefs might preclude them from standing in judgment. Many lawyers cited *Batson* in their commentaries on religion—nobody wants to risk a challenge.

This last point is particularly important. In the United States, boundaries between religious affiliation, belief, practice, and identity are blurry. The desire to include or exclude jurors of particular faiths—or of particularly intense faith—is tempered at times by an understanding that doing so might mean disproportionately excluding or including people with social attributes that *are* protected by *Batson*. In short, religion occupies an awkward place in contemporary jury selection: there is a perception that religiosity is a potentially significant factor that should be engaged with strategically, as well as an understanding that religion is part of a person's identity and connected with dimensions of personhood that the law has deemed off-limits with respect to selecting jurors.<sup>193</sup>

190. See, e.g., Anonymous Interview with 6G, Assistant Dist. Att'y (2013–2022) (commenting with respect to a voir dire question about prospective jurors' religious beliefs that he had not “figured out if it helps defense more or prosecutors more to ask the question”).

191. See, e.g., Anonymous Interview with 7E, Pub. Def. Att'y (2013–2022).

192. See *id.* (“If you're Catholic [that] really doesn't mean much to me in terms of death work—for everyday cases I don't think it means anything at all . . . Most Catholics in [redacted] county probably have never been to catechism and I don't think it means anything to them—for the majority.”).

193. See *Davis v. State*, 633 A.2d 867, 871 n.1 (Md. 1993) (“Under common law rules of *voir dire*, jurors need not answer any questions likely to humiliate or embarrass them. The determination of

This awkwardness suggests that lawyers and judges should not be in the business of probing and evaluating the theological underpinnings of laypeople's worldviews and identities.<sup>194</sup> The removal of prospective jurors on the basis of religious affiliation or observance runs counter to the institutional history and virtue of lay participation. The criminal trial did not develop in a religious or sociocultural void, nor does it exist in one today. The jury system continues to rely on a public for whom the sacred, the spiritual, the supernatural, and other religious beliefs are all facts of life inseparable from considerations of guilt or innocence. The notion that religious beliefs—though not necessarily affiliations—should be legitimate grounds for dismissal seems questionable at best. At worst, given the intersectional relationship between religiosity, class, race, and educational attainment, dismissal based on religion may be pernicious and exclusionary.<sup>195</sup>

We are thus presented with two alternatives: the jury system can invite the diversity of American society into the courtroom, and thus function as a means of democratizing legal practice, or it can hold that diversity at bay, and protect a legal order in which hegemonic perspectives are shaped by a relatively small and homogenous group of legal professionals.<sup>196</sup> But perhaps the stakes are even higher. Other than voting, jury service is arguably the most direct form of participation in American civic life.<sup>197</sup> It is, without question, the most social form: twelve strangers are asked to come together to find consensus. This is the American project in miniature. We perhaps underappreciate that the rarity of such encounters likely undermines our ability to find consensus in other aspects

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which questions needed to be answered, however, rested within the trial judge's discretion." (citing J. Alexander Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 623, 638–39 (1986)).

194. See A.C. Johnstone, *Peremptory Pragmatism: Religion and the Administration of the Batson Rule*, 1998 U. CHI. LEGAL F. 441, 442 (noting the extent to which prospective jurors view voir dire as excessively "intrusive" and the value of diminishing invasions of juror privacy).

195. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) ("The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences.").

196. See, e.g., AM. BAR ASS'N, NATIONAL LAWYER POPULATION SURVEY (2022), [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/2022-national-lawyer-population-survey.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf) [<https://perma.cc/XD2M-Q2L7>] (noting that in 2022 a reported five percent of attorneys identified themselves as African American, a figure that has contributed to broader scrutiny of the lack of diversity of the legal profession); see also Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 282–316 (2014) (examining diversity in the legal field).

197. Close to forty percent of American citizens can expect to serve on a jury during their lifetimes. See GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT'L CTR. FOR STATE CTS. & STATE JUST. INST., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 8 (2007), [https://www.researchgate.net/publication/264870713\\_The\\_State-of-the-States\\_Survey\\_of\\_Jury\\_Improvement\\_Efforts\\_A\\_Compendium\\_Report](https://www.researchgate.net/publication/264870713_The_State-of-the-States_Survey_of_Jury_Improvement_Efforts_A_Compendium_Report) [<https://perma.cc/2JL9-9XBC>] (click on "Download full-text PDF").

of our social and political lives.<sup>198</sup> In all likelihood, by viewing religious difference as a potential obstacle to jury participation, we have misconstrued the arrow of causality. The most important effect is not that of religion on jury deliberation, but of jury deliberation on how religious people see themselves and others as different and yet part of the same sociopolitical experience.

This leaves us with two questions. What should the place of religion—as affiliation, belief, or practice—be in the U.S. jury system? And what reforms must be implemented to bring about this desired outcome? These I examine below.

#### A. *Settling the Place of Religion*

The Anglo-American jury system took shape in medieval and early modern contexts, which were characterized by intense and widespread religious belief. Indeed, some of the enduring features from these contexts—the swearing of oaths, for instance—reflect the perceived needs of a community that could only understand the nature of judgment in terms derived from dominant theological doctrines. Religion, therefore, is not alien to the American legal tradition, even if its primary and most direct influence lies in the past.

Religious diversity, however, is another issue. The history of the jury trial shows that it was an institution formed by, and responsive to, Christian commitments.<sup>199</sup> The existence of multiple and mutually exclusive religious traditions in the contemporary United States raises the problem of incompatible viewpoints. The criminal legal system seemingly solves this problem by permitting the dismissal of jurors on the grounds that their viewpoints may be at odds with the law, or that they may be unduly biased for or against a defendant because of a perceived religious affinity or antipathy.

But religious diversity is not a problem for the functionality of the criminal justice system. Rather, it is a problem for its *legitimacy*, as it raises the question of how exactly justice should be understood in a society replete with different religious and ethical traditions. Thankfully, the solution is straightforward: we

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198. John Gastil & Phillip J. Weiser, *Jury Service as an Invitation to Citizenship: Assessing the Civic Values of Institutionalized Deliberation*, 34 POL'Y STUD. J. 605, 606 (2006) (“[T]he most profound effect of deliberation is its *transformative* power. In this view, deliberation not only resolves conflicts in a way that yields improved policy outcomes, it also transforms the participants in the deliberation in important ways—altering how they think of themselves and their fellow citizens.”); see also VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 248 (Linda Regan ed., 1st ed. 1986) (citing ALEXIS DE TOCQUEVILLE, *Democracy in America*, in *AMERICAN INSTITUTIONS AND THEIR INFLUENCE* (1851)).

199. See, e.g., JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 65, 122 (1st ed. 2008) (discussing the Christian origin of the jury's composition of twelve and the reasonable doubt standard). See generally Ian P. Farrell, *From Premodern Christianity to the Postmodern Jury*, 53 TULSA L. REV. 247 (2018) (explaining how the burden of “beyond a reasonable doubt” and the modern structure of trials are derived from a deeply held premodern desire to protect jurors from damnation for passing judgment on another).

can promote a legal system that is inclusive to the people for whom these traditions are important. It is through inviting the diversity of the American public into the jury box that we are able to secure popular affirmation for a critical civic and legal institution.<sup>200</sup> We should not fear that religious perspectives might introduce conceptions of mercy or retribution that are alien to the law. Rather, such conceptions—in concert—enrich the legal system, imprinting it with the perspectives of actual laypeople.<sup>201</sup>

Moreover, we should take seriously that the jury experience has meaningful effects on people, and creates a dialogical space where members of a diverse public can meet and learn from one another.<sup>202</sup> Consensus during deliberation is something that people produce together, and in doing so, they contribute to the construction of a public that is itself capable of finding common ground across its striking diversity.<sup>203</sup> In other words, to make the case for an inclusive orientation toward religion, we might consider the effect not only of people who hold different religious convictions on the legal process but also the effect of the legal process on people who hold different religious convictions.

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200. See JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 19 (1st ed. 2010) (discussing how “the jury acts in a way that draws private citizens into political society to exercise official state power” and how this in turn leads to a healthy democratic state); Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 927 (2003) (discussing the importance of the jury in the American system by invoking a study indicating that verdicts were perceived as fairer when the petit jury was heterogeneous).

201. Melissa Schwartzberg, *Justifying the Jury: Reconciling Justice, Equality, and Democracy*, 3 AM. POL. SCI. REV. 446, 449–56 (2018) (“[T]he power of juries [is] derived from their special access to some forms of knowledge, on the basis of which they could render judgments *different* from, and potentially superior to, those rendered by elite judges. . . . Laypersons are at least as good as judges at making judgments of facts (rather than of law) and may be superior in competence, because of their non-elite status.”); cf. Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1463 (2004) (advocating that prosecutors should have discretion to appeal jury acquittals “that go so far against the great weight of evidence that no reasonable person would have acquitted except based on illicit grounds such as racial bias or undue compassion”).

202. 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 & SOC. PSYCH. 597, 597–612 (2006) (arguing that diverse groups of jurors exchange a “wider range of information” than racially homogenous jurors).

203. See, e.g., Nancy S. Marder, *The Myth of Nullifying Jury*, 93 NW. U. L. REV. 877, 917–18 (1999) (“The jurors might not start out at the same point in their initial view of the case, but through group discussions, they try to reach a common understanding. Through this process, they can correct each other’s mistaken notions, broaden each other’s perspectives, and suggest different ways of looking at the evidence. Their interpretation of the case benefits from this collaborative method—a method that is unavailable to the trial judge, who works alone. . . . Thus, the jury is a check on professionals, who may have grown too removed from the experiences and common sense reasoning of ordinary citizens.”).



B. *Two Reforms*

This section advances two proposals for protecting the right of religious jurors to participate in the legal system and the interest of the legal system in enhancing its diverse character. These reforms are aimed at facilitating the inclusion of prospective jurors who identify themselves as being religiously observant and strengthening the *Batson* doctrine to ensure that religious identification is not deployed as a pretext for illegal exclusion from the jury system. The overarching goal of these reforms is to increase the likelihood that empaneled jurors reflect the diversity of American communities that are comparatively religious.

## 1. Reform I: Judge-Led Questioning and Rehabilitation

The relationship between a juror's religious convictions and willingness to apply the law to the facts of a case is one that does not, as this Article demonstrates, lend itself to easy or accurate generalization. In practice, prosecutors and defense attorneys rely on subjective and idiosyncratic perceptions of how religious views might impact jurors' assessments of evidence. This can lead to styles of questioning and follow-up questioning during voir dire that invite disqualifying responses or inadequately rehabilitate jurors whose religious affiliations are irrelevant to their capacity to serve.

As a first step toward encouraging the thorough but evenhanded examination of prospective jurors, voir dire questions that have the potential to elicit information about prospective jurors' religious beliefs should be posed exclusively by judges rather than by attorneys.<sup>204</sup> In federal court, this is already a norm.<sup>205</sup> In state court, the picture is more mixed—with judges exclusively or predominantly conducting voir dire in nine states and the District of Columbia, and judges and attorneys participating equally in eighteen states.<sup>206</sup> A key benefit of judge-led questioning is standardization. This (i) prevents attorneys

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204. See WILLIAM F. DRESSEL & V. LEE SINCLAIR, NAT'L JUD. COLL., JUDGE'S RESOURCE GUIDE: MANAGING JURY TRIALS 9 (2016) (describing judicial discretion with respect to case management). Dressel & Sinclair describe that

At trial, the court's management power transcends the authority specifically conferred by the rules, statutes and decisions. The judge has broad inherent power over the management of the cases, attorneys, and parties. That inherent power, employed judicially, enables the court to do what is necessary to produce just, speedy and economical trials.

*Id.*

205. See Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV. 927, 931 (2015) (noting that voir dire in federal court most commonly consists of judge-led voir dire).

206. See MIZE ET AL., *supra* note 197, at 28 (finding that in AZ, D.C., DE, MA, MD, ME, NH, NJ, SC, and UT, judges predominantly or exclusively conducted voir dire questioning, while in CA, CO, HI, ID, IL KY, MI, MN, MS, NM, NV, NY, OH, OK, PA, VA, WI, and WV, judges and attorneys conducted voir dire equally).

from formulating leading questions that aim to eliminate prospective jurors for the sake of achieving a strategic advantage, and (ii) facilitates a rehabilitative line of questioning to identify, for purposes of a challenge for cause, those jurors who are truly and knowingly committed to a frame of interpretation that directly opposes judicial instructions.<sup>207</sup>

Judges are also better positioned to rehabilitate jurors who indicate they hold religious beliefs without necessarily finding those beliefs to be at odds with legal instructions in a case.<sup>208</sup> These judicial lines of questioning would be similar to those that seek to rehabilitate jurors whose personal experiences inform worldviews that do not diminish their credibility or ability to participate as a juror in a case for which they are summoned.

An example of this latter development can be found in the 2019 Massachusetts case, *Commonwealth v. Williams*,<sup>209</sup> in which a prospective juror was dismissed from service after sharing the view that the legal system is rigged against young Black men.<sup>210</sup> Notwithstanding this interpretive “lens,” the prospective juror contended that she could impartially assess evidence in the case.<sup>211</sup> Though the excusal of this juror, for cause, did not prompt a reversal, the Supreme Judicial Court of Massachusetts proposed a new approach to the assessment of cause challenges: a juror who agreed to set aside opinions related to the case before them should not be expected to “set aside an opinion born of the prospective juror’s life experiences or belief system.”<sup>212</sup>

207. AM. BAR ASS’N, ACHIEVING AN IMPARTIAL JURY TOOLBOX 22 (2020), <https://www.judges.org/wp-content/uploads/2020/03/Achieving-an-Impartial-Jury-Toolbox.pdf> [https://perma.cc/FM2H-48TP] (describing the extent to which judge-led questioning can facilitate inclusive juries by more effectively rooting out bias through contextually sensitive questioning). “[I]t seems preferable that the judge asks at least these particular questions as a set or as follow on; working from these materials the judge will be more likely to have the background to consider the responses in context.” *Id.*

208. *Id.* at 25–26 (providing an illustrative line of voir dire questioning aimed at discerning a prospective juror’s exposure to a diverse public).

209. 116 N.E.3d 609 (Mass. 2019).

210. *Id.* at 613.

211. *See id.* at 613 (explaining that the prospective juror responded to the judge’s repeated questioning by stating “I think I can be unbiased—I think I can be—I think I can listen to the evidence”).

212. *See id.* at 613–14 (“We agree that holding particular beliefs about how African-American men are treated in the criminal justice system should not be automatically disqualifying. . . [V]oir dire ultimately was incomplete because the judge did not inquire further to determine whether, given the prospective juror’s beliefs based on her life experiences, she nevertheless could fairly evaluate the evidence and follow the law.”). Judge Peter A. Cahill of the Fourth Judicial District instructed jurors along similar lines during jury selection proceedings in the prosecution of Derek Chauvin, stating to one prospective juror:

[Y]ou essentially have to be the blank slate and -- it’s okay to come in with some knowledge about the case, it’s okay to even have opinions, it’s even okay to have strong opinions about the case, but as a juror you have to put all that aside. Some people will say, yeah, I can’t do

Encouraging a uniform rehabilitative line of questioning for jurors would provide judges with the opportunity to empanel jurors for whom a cause challenge was proposed by an attorney on the basis of presumed bias.<sup>213</sup> This questioning could begin with a judge asking whether the prospective juror would be able to “put aside opinions formed based on . . . life experiences or belief system[s].”<sup>214</sup> Upon the prospective juror’s affirmation, the judge would then ask whether that individual could “put aside” religious views insofar as they touched on the “case to be tried.”<sup>215</sup> If the prospective juror agreed, the cause challenge against that juror could be stricken from the record. Supporting a lawyer’s ability to interrogate the rationale behind a cause challenge before a judge’s ruling on such a challenge would serve as a meaningful check on otherwise unrestrained judicial discretion in this context. And a judge’s decision to dismiss a prospective juror who was committed to fairly and impartially assessing evidence and following the law could create a pathway for appeal.

Judges’ reliance on this rehabilitative script would help mitigate the problem of religious exclusion during voir dire in at least two critically important ways. First, the distinction between setting aside one’s opinions, on the one hand, and setting aside attitudes about a *particular case*, on the other, is an essential first step in preventing lawyers from allowing stereotypical assumptions to orient their assessments of religiously affiliated or observant jurors. Relatedly, enabling prospective jurors to respond directly to follow-up questions about perceived biases would at least authorize, if not empower, them to intervene directly to combat inaccurate or disingenuous efforts to disenfranchise such jurors from participating.<sup>216</sup>

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that, I’ve got these very strong opinions, I cannot put them aside, I cannot be -- and very honestly say they can’t be fair and impartial. Some people, even with strong opinions, can say I understand my role and I -- actually, I feel I have the self-discipline to be able to do that, to put aside what I’ve heard before, decide just what we hear in court, and follow the law which obviously comes from the Court. Do you think you can do that?

Transcript of Proceedings at 180–81, *State v. Chauvin*, 2021 WL 531803 (Minn. Dist. Ct. 2021) (27-CR-20-12646).

213. To avoid the possibility that differences in the framing or phrasing of lawyers’ questions might yield disparate responses by prospective jurors, the proceeding questions would conform to a script. See Grosso & Brien, *supra* note 99, at 541 (finding that question form affects prospective juror responses during voir dire); Transcript of Oral Argument on Behalf of the Petitioner at 50–51, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (No. 17-9572) (recording Justice Kagan’s comments on prosecutors’ practice of formulating leading questions that influence prospective jurors’ responses).

214. See *Williams*, 116 N.E.3d at 615.

215. See *id.*

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

Second, if a judge concluded that a prospective juror should *not* be excused for cause based on that person's particular affiliation or worldview, this finding could prevent a challenged juror from facing a later peremptory strike on the same basis. That is, a juror successfully rehabilitated after facing a cause challenge that hinged on, say, an unsubstantiated stereotype, could not be subject to a peremptory strike based on such a stereotype once it had been determined to be prejudicial. The efficacy of this proposed rehabilitative line of judicial questioning would depend on a lawyer's ability and willingness to probe a cause challenge that might rest on dubious or otherwise prejudicial assumptions.<sup>217</sup> Yet addressing the problem of religious exclusion in this manner would not necessitate an accusatory orientation toward the judge or opposing party, as may be implied by *Batson* challenges that target expressions of racial animus.<sup>218</sup> This is an important feature of such a reform, since deliberate discrimination—or conscious stereotyping—is not solely responsible for systemically prejudicial legal processes and outcomes.<sup>219</sup>

## 2. Reform II: Enhancing *Batson*

The U.S. Supreme Court's silence on the question of whether religion-based peremptory strikes violate the Equal Protection Clause has not prevented state officials<sup>220</sup> and others engaged in jury reform efforts from taking on the issue. One such reform emerged from the Washington Supreme Court in *State v. Jefferson*,<sup>221</sup> an attempted murder, assault, and gun possession prosecution.<sup>222</sup> During voir dire in this case, the state used a peremptory strike to remove the

217. Such prejudicial assumptions are pervasive in cases of rape, for example, where jurors' perspectives on behavior expectations are intimately connected to gender. See, e.g., Gregory M. Matoesian, *Language, Law, and Society: Policy Implication of the Kennedy Smith Rape Trial*, 29 LAW & SOC'Y REV. 669, 682 (1995) (“[I]n the rape trial the incipient sexual relationship and rules of behavior are not generic or astructural standards governing the coequal sexual preferences of males and females. Rather, they represent what I refer to as the *patriarchal logic of sexual rationality*.” (emphasis in original)).

218. However, Washington State's new *Batson* regime does allow a party to object to a peremptory strike if a hypothetical objective observer—one who is aware of institutional and implicit racial bias—would perceive a racial motive. See WASH. CT. GEN. R. 37(e)–(f) (“For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”).

219. See ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE 7 (1998) (“Racial bias in a race-laden policy need not be the result of racism per se. It may instead result from institutions that mobilize and perpetuate racial bias in a society and its politics, even institutions that appear to be racially neutral.”); see also Matoesian, *supra* note 217, at 682–83 (discussing the distorting influence of “patriarchal logic” on the interpretation of testimony in a rape trial).

220. See, e.g., Susan Hightower, Note, *Sex and the Peremptory Strike: An Empirical Analysis of J.E.B. v. Alabama's First Five Years*, 52 STAN. L. REV. 895, 902 (2000) (enumerating states that have found religion-based peremptory challenges impermissible, including CA, CO, CT, FL, HA, MA, MS, NJ, NY, and NC).

221. 429 P.3d 467 (Wash. 2018).

222. See *id.* at 470.

only remaining Black prospective juror—“Juror 10”—on the grounds that the juror (i) felt jury selection was a “waste of time,” (ii) was familiar with the film *12 Angry Men*, and (iii) indicated that extraneous information entered deliberations while serving as a juror in the past.<sup>223</sup> As part of the third step of the *Batson* test, the court held that the trial court was not “clearly erroneous” in finding these rationales “race-neutral” and therefore not indicative of purposeful discrimination on the part of the state.<sup>224</sup>

But the state’s supreme court was not satisfied. Citing *Batson*’s documented limitations,<sup>225</sup> including those noted in the last section, the *Jefferson* court adopted General Rule 37 (“GR37”) and a new framework for discerning litigant bias.<sup>226</sup> Among the innovations of GR37 was the substitution of subjective assessments of purposeful discrimination for consideration of how an “objective observer could view race or ethnicity as a factor in the use of the peremptory challenge” during the adjudication of a *Batson* challenge.<sup>227</sup> Moreover, the objective observer imagined by the rule would be someone trained in the prevalence of “implicit, unconscious, and institutional” bias, able to look beneath the surface of apparently neutral strike rationales.<sup>228</sup> Though GR37 did not apply to *Jefferson*’s prosecution, the rule came into effect during the case’s appeal.<sup>229</sup>

Due to the intersectionality of religious and racial identity, GR37 may provide the court with tools not only to scrutinize religion-based peremptory strikes but create a framework for *Batson*’s future encompassment of religious exclusion. Though courts appear to isolate religion when trying to determine whether a religiously motivated strike is allowed, there are numerous cases in which religion has been found to have an intersectional connection with race and gender. In some cases, the entwining of religious traditions with particular racial or ethnic groups make religion-based exclusion tantamount to

223. *See id.* at 471.

224. *See id.* at 472.

225. *See, e.g.,* *City of Seattle v. Erickson*, 398 P.3d 1124, 1131 (Wash. 2017); *State v. Saintcalle*, 309 P.3d 326, 334–36 (Wash. 2013).

226. *Jefferson*, 429 P.3d at 479–80. GR37 was the product of the collaborative labor of a workgroup convened by the Supreme Court of Washington, drawing on input from the American Civil Liberties Union and Washington Association of the Prosecuting Attorney. *See* JURY SELECTION WORKGROUP, PROPOSED NEW GR 37: FINAL REPORT 1 (2018) [hereinafter WORKGROUP FINAL REPORT], <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf> [https://perma.cc/3599-PMEL].

227. WASH. CT. GEN. R. 37(e) (emphasis added).

228. *Id.* at 37(f) (“For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”).

229. *Jefferson*, 429 P.3d at 478.

racial or ethnic exclusion.<sup>230</sup> For example, in *Casarez*, both of the prospective jurors whom the prosecution was permitted to remove for religious reasons were Black.<sup>231</sup> When the defendant raised a *Batson* challenge, the prosecutor responded that the strike could be explained by the jurors' affiliations as Pentecostals, which could mean they were more merciful than their nonreligious peers.<sup>232</sup> Here, the court failed to consider racial identity and its entwinement with a particular belief system.<sup>233</sup>

The challenged jurors who were at issue in *DeJesus* were also Black, though the prosecutor similarly defended the strikes as based on religion rather than race.<sup>234</sup> While the defendant in *DeJesus* tried to make the argument that this distinction was pretextual and that the strikes were racially motivated, the court found that the challenged jurors' religious beliefs met the low bar for the alternative explanation a prosecutor must provide.<sup>235</sup> The defendant argued unsuccessfully on appeal that religion-based challenges would have a disparate impact on Black jurors, who are more likely to be religious<sup>236</sup>—something that recent surveys suggest is true.<sup>237</sup> The court found that there is no reason to believe that the government knew of and acted based on this correlation.<sup>238</sup>

As it turns out, disputes about religion-based strikes are often accompanied by concerns about, if not claims of, racial exclusion. For example, in *Highler v. State*,<sup>239</sup> from the Indiana Supreme Court, *Heron*, from the Seventh Circuit, and *United States v. Brown*,<sup>240</sup> from the Second Circuit, all of the individuals struck for religious reasons were prospective jurors of color, with religious explanations provided only after *Batson* challenges were raised.<sup>241</sup> This

230. See generally Ashley Rich, *Bye, Bye, Bilinguals: The Removal of English-Spanish Bilinguals from the Criminal Jury and Latino Discrimination*, 95 CHI.-KENT L. REV. 697 (2020) (discussing how the dismissal of bilingual prospective jurors is tantamount to illegal ethnicity-based jury exclusion).

231. *Casarez v. State*, 913 S.W.2d 468, 492 (Tex. Crim. App. 1995).

232. See *id.*

233. See *id.* at 492–96.

234. See *United States v. DeJesus*, 347 F.3d 500, 502–03 (3d Cir. 2003).

235. See *id.* at 507–08.

236. See *id.* at 508–09.

237. See generally David Masci, Besheer Mohamed & Gregory Smith, *Black Americans Are More Likely than Overall Public To Be Christian, Protestant*, PEW RSCH. CTR. (Apr. 23, 2018), <https://www.pewresearch.org/fact-tank/2018/04/23/black-americans-are-more-likely-than-overall-public-to-be-christian-protestant/> [perma.cc/2SQN-VJLM] (stating that nearly eight in ten Black Americans identify as Christian compared to seven in ten Americans overall).

238. *DeJesus*, 347 F.3d at 508–09.

239. 854 N.E.2d 823 (Ind. 2006).

240. 352 F.3d 654 (2d Cir. 2003).

241. *Highler*, 854 N.E.2d at 827–30 (Ind. 2006) (holding that the general tendency for pastors to be inclined towards forgiveness and leniency was a sufficient reason to justify striking the only Black pastor from the venire). “[W]e believe that the [court of appeals] was correct in upholding the trial court’s ruling because the State’s justification for striking [the pastor] was not his religious affiliation, but his occupation,” which is not unconstitutional. *Id.* at 830; see also *United States v. Heron*, 721 F.3d

suggests that whatever the issues posed by religious affiliation or fervor to a juror's fairness and impartiality, religion has become a way for some legal actors to sidestep antidiscrimination law to disproportionately exclude those from certain racial and ethnic groups from service. The failure to acknowledge religion's intersectional connection to other dimensions of a person's identity—race, ethnicity, gender, class—may therefore facilitate courts' *de facto* authorization of strikes that should otherwise be prohibited by the *Batson* framework. This is because the nexus between religion and race suggests that the dismissal of religious prospective jurors may serve as an indirect, though equally pernicious, vehicle for racial exclusion. The trouble with pretextual rationales for jury exclusion, and what has left the *Batson* doctrine vulnerable to critique, is that deterring end runs around antidiscrimination law requires special vigilance.

Recognizing this flaw in the doctrine, GR37<sup>242</sup> and the U.S. Supreme Court<sup>243</sup> have emphasized the importance of scrutinizing how the elicitation of even permissible and seemingly neutral information about prospective jurors can facilitate their selective removal on prohibited grounds. GR37, for instance, asks judges to consider how illegal discrimination can be effectuated through

- (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.<sup>244</sup>

To this end, the *Batson* doctrine's deterrent effect would be strengthened by encouraging judicial recordkeeping and comparative scrutiny during the questioning and rehabilitation of jurors by attorneys. Even without the inclusion of religiously affiliated or observant jurors as members of a protected

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896, 902 (7th Cir. 2013) (declining to extend *Batson* to peremptory strikes based on an African American prospective juror's "religiosity" or degree of piety); *Brown*, 352 F.3d at 662 (affirming a ruling that striking a Black prospective juror for attending church was "race-neutral and non-pretextual").

242. See WASH. CT. GEN. R. 37(g).

243. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2247 (2019) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003)) (noting that the differential questioning of prospective jurors may be "some evidence of purposeful discrimination").

244. WASH. CT. GEN. R. 37(g).

class under *Batson*, as others have urged,<sup>245</sup> it is possible to follow the tide of reform in jurisdictions like Washington, where vigilance about pretextual references to religion appears to deter the prejudicial scrutiny of religion more broadly. Judges' use of predictable lines of juror questioning that touch on religious commitments may therefore have the welcome effect of helping deter forms of impermissible discrimination already recognized under *Batson*.

Attention to the position and interests of the questioner during voir dire should be paired with attention to the style of such questioning. To this end, judges should refrain from explicitly requesting information about prospective jurors' religious views in favor of an open-ended and standardized line of questioning that invites, without necessitating, such disclosures. This would prevent the needless and potentially exclusionary scrutiny of social characteristics that have no bearing on participation in a case as a lay decision-maker. Indeed, nonlawyers are summoned for jury service precisely *because* they bring diverse expertise and conceptions of judgment to their work.<sup>246</sup> Examples of such questioning that emerged from interviews included some federal judges' framing of their inquiries as exploring whether "there is anything about the nature of these allegations that would make it difficult to be a fair and impartial juror in this case"<sup>247</sup> or present "any other reason . . . as to why you could not sit on this jury and render a fair verdict based on the evidence presented to you and in the context of the court's instructions to you on the law."<sup>248</sup>

The style and source of voir dire questions is consequential. Empirical research on lawyers' approaches to questioning prospective jurors during voir dire shows that a question's form can dictate the substance of the responses.<sup>249</sup> Benefits of judicial questioning include the likelihood that jurors will divulge details of their religious affiliations only insofar as they perceive their beliefs or practices to pose a fundamental obstacle to participation. Distinctions may be drawn, to this end, between juror bias and religion as a feature of social identity

245. See, e.g., Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1893 n.153 (2015) (urging the expansion of *Batson* to "other suspect categories like national origin and religion not yet adopted by the Supreme Court for application of the *Batson* rule").

246. See SONALI CHAKRAVARTI, *RADICAL ENFRANCHISEMENT IN THE JURY ROOM AND PUBLIC LIFE* 33–38 (2020) (characterizing jury service as a form of engaged and empowered democratic participation).

247. Anonymous Jury Proceedings, ED, Assistant U.S. Att'y (2013–2022) (observing that a judge or attorney's style of questioning could "flag" for jurors a particular, desired response).

248. FED. JUD. CTR., *BENCHBOOK FOR U.S. DISTRICT COURT JUDGES* 91 (6th ed. 2013).

249. See, e.g., Zalman & Tsoudis, *supra* note 99, at 326 ("Even if this line of questioning does not convince a judge to excuse for cause, the series of voir dire questions provides important evidence for the attorney to use in considering the exercise of a peremptory strike."); Grosso & O'Brien, *supra* note 99, at 522–24 (explaining ties between voir dire questioning styles and the amount of information obtained); see also Transcript of Oral Argument on Behalf of the Petitioner at 27–28, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (No. 17-9572) (noting Justice Kagan's comments on prosecutors' practice of formulating leading questions—or tag questions—that influence prospective jurors' responses).



like any other. Inquiries into juror bias born of religious views—like bias stemming from jurors’ past contact with the legal system, previous participation as a juror, or familiarity with a high-profile case due to media coverage (among other examples)—can be addressed by judges as grounds for dismissals “for cause” rather than as subjects of more subjectively formulated attorney questions.

Judge-initiated scrutiny of religiously affiliated jurors, coupled with attention to the pretextual function of religious jury exclusion holds several benefits for both lay and professional legal actors from the standpoint of a religiously diverse country. First, it concedes the significance and impact of religion in peoples’ lives. It further transfers responsibility from attorney to judge, as is most frequently the practice in federal court,<sup>250</sup> to question prospective jurors about sources of bias during the cause challenge phase of jury proceedings. Taken together, these reforms—the encouragement of judge-led voir dire and judicial vigilance about the pretextual excusal of jurors based on religion—aim to create an inclusive environment that welcomes the diversity of American society into the jury and invites prospective jurors to take the lead in determining whether their religious commitments constitute a hindrance to their substantive participation in the legal process.

#### CONCLUSION: ASPIRING TO THE INCLUSIVE JURY

The American criminal legal system is built on many fictions. A pernicious one is that people can be separated from the cultural lenses through which they see and understand the world and their place in it. All jurors—religious and nonreligious—have worldviews, and these inform how they interpret evidence and conceptualize justice. The cultural diversity of the United States means that there are potential points of friction between worldviews, and between these worldviews and those of legal actors like judges and lawyers. And yet, the legitimacy of a jury system in a heterogeneous country depends on inclusive institutions that give laypeople the opportunity to find consensus across their differences. Stereotypes about race or gender are not legitimate grounds for dismissing jurors. Why, then, are stereotypes about religion permitted to justify excusal?

The problem is, of course, deeper. As this Article has suggested, leaving religion outside the umbrella of antidiscrimination law creates openings and workarounds for lawyers who wish to dismiss jurors on identity grounds without fearing a *Batson* challenge. Religious affiliations, beliefs, and practices are not evenly spread throughout American society, and thus the exclusion of certain kinds of religious jurors is likely to disproportionately diminish the

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250. See generally MIZE ET AL., *supra* note 197 (detailing a multiyear study of jury improvement efforts across the country).

participation of certain groups in the legal process. The *Batson* doctrine represents progress, but empirical legal research reveals its lingering issues.

The obvious counter to all of this is that there may in fact be religious convictions that are simply incompatible with the principles of the U.S. legal system. For instance, what should the legal system make of laypeople who refuse to render judgment when called to do so? Or laypeople who insist on centering mercy and forgiveness in their consideration of a case? Some legal actors fear that these individuals will misapply the law. However, if a religious juror acknowledges that they understand the law and its application, why should the peculiarities of their worldview not be permitted to inform their participation in the legal process? No such qualifications are made when it comes to offering the right to vote.<sup>251</sup> From the way judicial instructions are sometimes given, it would seem that some legal actors view the ideal juror as little more than a decultured automaton, or someone who can follow directions and apply the law as that judge would. If this is indeed the ideal, why have a jury system at all? Why risk introducing the idiosyncrasies of the public into what is supposed to be a rational process?

The reason is obvious. The Anglo-American juror's directive to render judgment is both a privilege *and* a burden. Though meting out verdicts and punishments for crimes marks one as having authority, there are risks for those who deliver judgment—as well as for legal institutions—if the public perceives these verdicts and punishments to be inappropriate, incorrect, or illegitimate. Spreading the responsibility of judgment helps to give the law its legitimacy. Justice is not simply handed down. It is made for a diverse population *by* a diverse population. Or at least, it should be.

This Article is thus ultimately a call to consider reforms that would guarantee that the diversity of the American population is reflected in its juries. Further, it is a reminder that the jury system is one of the few institutions where people of different backgrounds are asked to work together intimately as part of the same civic process. It is in such processes that the rudiments of commonality are created, that people cease to read each other through stereotypes and come to see one another as complex individuals. The vitality of democracy depends on the success of such processes, and therefore they must be protected with an antidiscrimination framework that safeguards one's right to simultaneously hold religious convictions and serve as a juror.

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251. CHAKRAVARTI, *supra* note 246, at 24 (“Just as with universal suffrage, with the final decision-making power of juries, power is truly in the hands of the people, with all of their foibles.”).

