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## Gentlewomen of the Jury

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## GENTLEWOMEN OF THE JURY

Vivian N. Rotenstein & Valerie P. Hans\*

### ABSTRACT

*This Article undertakes a contemporary assessment of the role of women on the jury. In 1946, at a time when few women served on U.S. juries, the all-male Supreme Court opined in *Ballard v. United States*: “The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence of one on the other is among the imponderables.”<sup>1</sup> Three-quarters of a century later, women’s legal and social status has changed dramatically, with increased participation in the labor force, expanded leadership roles, and the removal of legal and other barriers to their civic engagement, including jury service. Theoretical developments and research have produced new insights about how gender-conforming individuals enact their gender roles. We combine these insights with a substantial body of jury research that has examined the effects of jurors’ gender on their decision-making processes and verdict preferences in criminal and civil cases. We also consider how nonbinary and gender-nonconforming individuals might bring distinctive perspectives and experiences to the jury. After a review of the historical record, describing shifts over time in women’s jury participation in the face of legal and societal barriers, we summarize evidence from decision-making research, gender scholarship, and jury studies to examine whether women bring a different voice to jury service. Our review, which demonstrates substantial commonalities as well as significant areas of divergence in jurors’ attitudes and verdicts as a function of their gender, altogether underscores the importance of full and equitable participation on the jury.*

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1. *Ballard v. United States*, 329 U.S. 187, 193-94 (1946).

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## I. INTRODUCTION

After half a century of activism, women gained the right to serve on juries in the United States in the early 1900s. However, their participation was only sporadic until the late 20th century.<sup>2</sup> In recent decades, women now participate nearly equally alongside men on juries in most U.S. jurisdictions, in both state and federal courts. We believe it is time to take a new look at women's participation on juries and to examine the consequences of full gender representation on this important democratic decision-making body.

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2. See, e.g., Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115 (1994).

There are several reasons to undertake a contemporary assessment of this topic. Women's participation in the labor force, the legal community, and leadership positions increased in the late 20th and early 21st centuries.<sup>3</sup> Social science research on gender has produced new insights about the impact of gender in individual and group decision-making.<sup>4</sup> A now-substantial body of research on jury decision-making has examined the role of jurors' gender on their decision-making processes and verdict preferences. Additionally, recent work from legal scholars and social scientists has raised questions about whether and how to modify jury selection to accommodate non-binary or gender non-conforming individuals.<sup>5</sup>

In this article, we first provide a historical overview of women's decades-long struggle to be granted the right to serve on a jury, whether criminal or civil. Next, we explore the question of whether and how juror gender is associated with distinctive decision preferences and perceptions of evidence. In criminal cases, research confirms that a juror's gender is associated with different views of defendant culpability and victim blameworthiness in sexual assault and child sexual abuse trials, resulting in distinct judgments in those cases.<sup>6</sup> This distinction also emerges in capital cases: women as a group are significantly less likely than men as a group to support the death penalty.<sup>7</sup> In the civil realm, less research has been conducted to identify the unique role that gender may play in civil jurors' determinations of defendants' liability and in their calculation of compensatory and punitive damages. Even so, the gender salience of sexual harassment cases leads men and women of the jury to take dis-

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3. See, e.g., Elyce J. Rotella, *Women's Labor Force Participation and the Decline of the Family Economy in the United States*, 17 EXPL. ECON. HIST. 95 (1980); Abraham Mosisa & Steven Hipple, *Trends in Labor Force Participation in the United States*, 129 MONTHLY LAB. REV. 35, 35 (Oct. 2006).

4. See, e.g., Rebecca J. Hannagan & Christopher W. Larimer, *Does Gender Composition Affect Group Decision Outcomes? Evidence from a Laboratory Experiment*, 32 POLIT. BEHAV. 51 (2010); Katherine Coffman, Clio Bryant Flikkema & Olga Shurchkov, *Gender Stereotypes in Deliberation and Team Decisions*, 129 GAMES & ECON. BEHAV. 329 (2021).

5. See, e.g., Ceci Bruni, *Transgressing the Gender Binary: The Dangers of Juror Bias Against Gender Nonconforming Criminal Defendants* 1, 3 (2020) (seminar final paper, Cornell Law School) (on file with author).

6. See, e.g., Jodi A. Quas, Bette L. Bottoms, Tamara M. Haegerich & Kari L. Nysse-Carris, *Effects of Victim, Defendant, and Juror Gender on Decisions in Child Sexual Assault Cases*, 32 J. APPLIED SOC. PSYCH. 1993 (2002) [hereinafter Quas et al.].

7. See, e.g., Jon Hurwitz & Shannon Smithey, *Gender Differences on Crime and Punishment*, 51 POL. RSCH. Q. 89 (1998), cited in John T. Whitehead & Michael B. Blankenship, *The Gender Gap in Capital Punishment Attitudes: An Analysis of Support and Opposition*, 25 AM. J. CRIM. JUST. 1, 2 (2000).

tinctive perspectives in these cases.<sup>8</sup> The jury deliberation process offers another context to explore the potential for the differential contributions of men and women. After surveying this research, we close with some reflections about the overlap and divergence of gender differences in criminal and civil cases, and offer some policy recommendations that flow from our survey of research.

## II. HISTORICAL BACKGROUND: WOMEN'S PARTICIPATION IN JURIES

It is useful to begin discussing the intersection of gender and juries with a historical account of women's participation within this decision-making body. Within this account, the rationales invoked for excluding women from the jury, and subsequently for including them, reveal the persistence of stereotypes and related expectations about how women's participation on a jury would affect the substance and process of jury decision-making.

Participation in a jury is a civic duty, a civil and political right similar to voting.<sup>9</sup> Historically, however, jury service was an exclusively male enterprise. The initial exclusion of women on the jury, first in colonial times and later in the young United States, was an inheritance from English common law. The English legal theorist William Blackstone wrote that due to what he called the *propter defectum sexus* (defect of sex), women were unfit for the reasoned decision-making tasks required of jurors, and thus were rightfully excluded from jury service.<sup>10</sup> A notable, albeit infrequent, exception to this exclusionary tendency was the jury of matrons, a group of women called to assess the possible pregnancy of a litigant.<sup>11</sup> However, the jury of the jury of matrons was limited to determining whether the female litigant was indeed pregnant; an all-male jury decided the other facts in the case and reached the binding verdict.<sup>12</sup>

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8. See, e.g., Margaret Bull Kovera, Bradley D. McAuliff & Kellye S. Hebert, *Reasoning About Scientific Evidence: Effects of Juror Gender and Evidence Quality on Juror Decisions in a Hostile Work Environment Case*, 84 J. APPLIED PSYCH. 362 (1999).

9. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995) (describing the common characteristics of jury service and voting).

10. 3 WILLIAM BLACKSTONE, COMMENTARIES \*362 (describing qualifications of jurors).

11. Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 59 n.2 (1986) (describing the use of the jury of matrons).

12. Claudine A. Schweber, *But Some Were Less Equal . . . The Fight for Women Jurors*, in WOMEN ORGANIZING: AN ANTHOLOGY 329, 330 (Bernice Cummings & Victoria Schuck eds., 1979) (describing two situations in which a jury of matrons might be

In 1870, the first American grand and petit juries to include women were selected in Laramie, within the Territory of Wyoming. Laramie had a serious crime problem, and the all-male juries “could not, or would not, convict those who were captured red-handed in their crimes.”<sup>13</sup> The “better element” of the community was determined to see the lawless residents punished, a situation that “rather forced the issue of having women serve on the jury.”<sup>14</sup> Women, it was assumed, would be eager to support convictions of lawless elements in order to protect their community.<sup>15</sup> The novelty of women’s jury service occasioned a great deal of press coverage, including artists’ caricatures showing women jurors holding babies on their laps and accompanied by such texts as “Baby, baby, don’t get in a fury; Your Mamma’s gone to sit on the jury.”<sup>16</sup> Women on the first petit mixed jury were presumed to be “chicken-hearted” and “easily won over.”<sup>17</sup> Surely, it was argued, they would be “easily swayed by the oratory of attorneys and that the women’s sympathy would be aroused in favor of a man who was on trial for his life.”<sup>18</sup> In spite of such presumptions, the jury’s women members reportedly all voted to convict the defendant, whereas the men were split between conviction and acquittal; the final verdict of manslaughter proved to be a popular outcome in the community.<sup>19</sup> After three successful court terms with mixed-gender juries, however, a new chief justice hostile to women’s jury service was appointed, ending Wyoming’s experiment with women jurors following the previous justice’s resignation in September of 1871.<sup>20</sup>

In the 1879 case of *Strauder v. West Virginia*, the Supreme Court found that race-based disqualifications from serving on a jury violated the Fourteenth Amendment’s protection of due process. However, rather than extend this due process protection to women, the Court expressly noted that state laws confining the selection of jurors to males

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called: a criminal defendant asking that her execution be delayed until after the birth of her baby; and a widow asking for a delay in the disposal of her husband’s estate until after the birth of their baby).

13. Grace Raymond Hebard, *The First Woman Jury*, 7 J. AM. HIST. 1293, 1302 (1913) (describing the Wyoming jury trials that included female jurors).

14. *Id.*

15. *Id.* at 1304.

16. *Id.* at 1304, 1313 (describing the press’s reaction to the first women selected to serve on juries in Wyoming in 1870).

17. *Id.* at 1316.

18. *Id.*

19. *Id.*

20. *Id.* at 1325.

would be constitutionally acceptable.<sup>21</sup> Although the Court's narrow interpretation of the Fourteenth Amendment did not prohibit women's jury service, it failed to guarantee women the equal opportunity to serve on juries. Nevertheless, *Strauder's* ruling banning race discrimination in jury selection led some jurisdictions and states to begin calling women to jury service. In 1898, Utah was the first state to permit women to sit on juries, and a handful of other states and territories did so as well.<sup>22</sup> Nonetheless, it seems clear from the historical record that even in these jurisdictions, women's participation was exceedingly rare.<sup>23</sup>

Stereotypes about women on juries, including the insistence that women were unsuitable and unprepared to serve as jurors, feature prominently in early debates over women's jury service. Women were said to lack the worldly knowledge necessary for jury service, possessing only domestic virtues that were not applicable or useful to a jury.<sup>24</sup> In the words of one observer, "[j]uries deal with all manner of crimes, from innocuous offenses to the vilest and most revolting aberrations of the human beast. Their educations, their habits of mind, their points of view have not prepared women to deal with such cases."<sup>25</sup> In the Wyoming jury trial described earlier, women's tendency to favor conviction compared to their male counterparts was said to derive from the fact that they knew "nothing of the dangers besetting men sometimes and the conditions under which men are sometimes compelled to slay in defense of their own lives."<sup>26</sup> Additionally, opponents articulated concerns that women's jury participation would injure the family.<sup>27</sup> Because jury service required women's presence away from the domestic sphere, they argued women might fail in their duties as wives and mothers. Beyond this, the sordid nature of courtroom dramas might poison the sanctity

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21. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879); Gretchen Ritter, *Jury Service and Women's Citizenship before and after the Nineteenth Amendment*, 20 LAW & HIST. REV. 479 (2002).

22. MCCAMMON, THE U.S. WOMEN'S JURY MOVEMENTS AND STRATEGIC ADAPTATION: A MORE JUST VERDICT 38 tbl.3-1 (2012) (indicating the years in which women became eligible to serve on state juries); Grossman, *supra* note 2, at 1135.

23. MCCAMMON, *supra* note 22, at 39-41 (documenting rare participation of women on juries).

24. Laura Gaston Dooley, *Sounds of Silence on the Civil Jury*, 26 VAL. U. L. REV. 405 (1991); Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1 (2005); Grossman, *supra* note 2.

25. *Asking for Trouble*, 114 INDEP. 368 (Apr. 4, 1925), *quoted in* Weisbrod, *supra* note 11, at 66 n.24.

26. Hebard, *supra* note 13, at 1316.

27. *Id.* at 1313.

of the home front.<sup>28</sup> The idea that women's purity might be compromised by exposure to trial proceedings persisted through generations; as late as 1966, a Mississippi court opined that the legislature "has a right to exclude women . . . to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial."<sup>29</sup>

Arguments in favor of women's participation on juries often echoed suffragist appeals for women's voting rights, including a pervasive theme that women "had a different, sometimes higher, moral sense."<sup>30</sup> Further, women's greater desire to protect the community was marshaled as a reason in favor of their jury participation in the Territory of Wyoming.<sup>31</sup> Advocates noted that women would be especially sensitive to and knowledgeable about domestic problems, given their expertise in the separate sphere of the home.<sup>32</sup> It was also argued that domestic virtues provided women jurors with "a heightened ability to sense the truth"<sup>33</sup> and that their different life experiences positioned them to better understand domestic crimes and the testimony of other women.<sup>34</sup>

In sum, women's justice, based on their distinctive life histories and different moralities, was expected to diverge from the justice traditionally delivered by all-male juries. Both opponents and advocates of women's jury service assumed that women would bring a different voice to jury deliberations.

The 1920 passage of the Nineteenth Amendment affording women the right to vote was a culmination of decades of suffragist activism, and a milestone in women's political rights.<sup>35</sup> However, the immediate impact of this amendment on women's jury service was mixed. Some states applied the law to expand jury eligibility for women, partly because their state laws specified that jury lists were drawn from voters' lists.<sup>36</sup> However, even when jury eligibility was expanded, some of these states erected barriers that made it more difficult to serve. Other state and federal courts claimed that the Nineteenth Amendment's protections only extended to voting rights and that jury service was a privilege, not a civic

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28. Weisbrod, *supra* note 11, at 66 ("Opponents of women jurors also seemed to fear that the indelicacies of jury service would interfere with women's ability to maintain the purity required by their role in the home.").

29. *State v. Hall*, 187 So.2d 861, 863 (Miss. 1966), *appeal dismissed*, 385 U.S. 98 (1966).

30. Weisbrod, *supra* note 11, at 62.

31. Hebard, *supra* note 13, at 1302.

32. Weisbrod, *supra* note 11, at 67.

33. *Id.* at 71.

34. *Id.*

35. U.S. CONST. amend. XIX; Grossman, *supra* note 2; Ritter, *supra* note 21.

36. MCCAMMON, *supra* note 22, at 41.



right.<sup>37</sup> Women's groups such as the League of Women Voters petitioned state legislatures for jury trial rights, but struggled to gain them. Those opposing women's service repeated older arguments, maintaining that it would harm children and home life.<sup>38</sup> Some businesses also expressed concern that women would be overly sympathetic to accident victims, and in any case, would make jury trials more unpredictable.<sup>39</sup>

Some common half-measures to women's eligibility for jury service included allowing automatic exemptions for women who were summoned, or requiring women to affirmatively register their willingness to serve.<sup>40</sup> The effects of an affirmative registration requirement were on full display in the U.S. Supreme Court case of *Hoyt v. Florida*.<sup>41</sup> In this case, Mrs. Hoyt killed her husband upon discovering his adultery and asserted a defense of temporary insanity at her trial.<sup>42</sup> The all-male jury convicted her of second-degree murder. Florida had an affirmative registration plan for female jurors in place at the time of her jury trial, and as such, just 220 women's names appeared on the master jury list, out of a total of 10,000 names.<sup>43</sup> Mrs. Hoyt argued that Florida's affirmative registration plan denied her the right to a jury drawn from a representative cross-section of the population. She also argued that women's representation would likely have been important in her case, because women jurors might have been more sympathetic to her. The Supreme Court dismissed these arguments, holding that Florida's affirmative registration plan was consistent with the Constitution.

A significant advance in women's jury service came with the passage of the Civil Rights Act of 1957, which ensured women the right to serve as federal jurors.<sup>44</sup> However, the law did not immediately create

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37. Grossman, *supra* note 2; Ritter, *supra* note 21.

38. See, e.g., Weisbrod, *supra* note 11, at 66.

39. MCCAMMON, *supra* note 22, at 48.

40. See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961) (exemption from jury service and affirmative registration for women).

41. *Hoyt*, 368 U.S. at 58.

42. George B. Crawford, *Murder, Insanity and the Efficacy of Woman's Role: The Gwendolyn Hoyt Case*, 89 FLA. HIST. Q. 51, 51-52 (2010) (describing the circumstances of the killing and the defense of temporary insanity).

43. *Hoyt*, 368 U.S. at 65 (noting that 220 women had affirmatively registered for jury service, but just 10 women's names were included on the jury list from which Hoyt's jury was selected).

44. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957). See Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35 (1992) (describing the effect of the Civil Rights Act of 1957); Fowler, *supra* note 24 (describing the effect of the Civil Rights Act of 1957). Additionally, in 1946, the Supreme Court held that if a woman was allowed to serve on a jury in the state

gender parity on juries. Legal scholar Jon Van Dyke surveyed more than 200 studies of jury panels in state and federal courts in the early 1970s.<sup>45</sup> He found that women were still underrepresented, sometimes substantially, in jury panels in nine out of every ten jurisdictions.<sup>46</sup>

Nonetheless, changes eventually arrived. As women's participation in the labor force increased, attitudes towards women shifted, and other Supreme Court decisions underscored the desirability of representativeness in jury selection. In 1975, *Taylor v. Louisiana* reversed *Hoyt*, concluding that affirmative registration violated the constitutional right to a jury drawn from a representative cross-section of the population.<sup>47</sup> At the time of *Taylor*, Louisiana required women to submit a written declaration of their desire to serve as a condition of their eligibility for jury service. The male defendant in *Taylor* argued that by excluding women from participating, the jury at his trial violated his Sixth Amendment right to an impartial jury of his peers.<sup>48</sup> The Supreme Court held that this Louisiana provision violated the Sixth Amendment, since the special burden placed upon women prevented the jury from representing a fair cross-section of the population.<sup>49</sup>

These decisions promoted the ideal of equal treatment of men and women in the summoning of jury venires. However, even today, jurisdictions vary in their success in summoning representative cross-sections of their communities.<sup>50</sup> In addition, gender discrimination has remained an issue in the context of jury selection in the courtroom.

### III. GENDER DISCRIMINATION IN JURY SELECTION FOR CIVIL & CRIMINAL CASES

#### A. *Resistance to Women on Juries and the J.E.B. Decision*

As women overcame obstacles to their jury service and started appearing in jury pools, trial tactic manuals began recommending the re-

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she came from, she could not be barred from jury service in that state's federal district court. *Ballard*, 329 U.S. at 190-91 (1946).

45. JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 39-42 (1977).

46. *Id.*

47. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

48. *Taylor*, 419 U.S. at 524.

49. *Taylor*, 419 U.S. at 535.

50. *See, e.g.*, Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, U. ILL. L. REV. (forthcoming) (on file with authors) (documenting deficiencies in the summoning process that lead to unrepresentative jury pools).

moval of prospective jurors on the basis of gender stereotypes.<sup>51</sup> Some male lawyers took a dim view of women's potential participation. For example, in 1936, Clarence Darrow advised that defense lawyers should avoid women jurors altogether.<sup>52</sup> Other lawyers suggested that women might be acceptable defense jurors if the principal opposing witness was a woman, asserting that women were generally distrustful of one another.<sup>53</sup> Yet another opined that women's greater capacity for sympathy made them desirable defense jurors.<sup>54</sup> Even if women were not able to be excluded through challenges for cause, the peremptory challenge allowed lawyers to remove prospective jurors based on their stereotypical thinking about gender.

Reliance on stereotypes was not limited to gender, of course; lawyers also liberally exercised their peremptory challenges on the basis of race, ethnicity, age, and occupation.<sup>55</sup> Indeed, the generally constrained approach to *voir dire* questioning during jury selection, common up until the 1970s, offered only limited information about prospective jurors' views and attitudes, leaving attorneys with little else besides demographic characteristics.<sup>56</sup> That allowed stereotypes to flourish, unchecked. The blatant wholesale exclusion of Black Americans from juries was especially pernicious.<sup>57</sup> As Jon Van Dyke described in 1977, after extensive litigation finally resulted in Black Southerners being called for jury service, "the prosecution frequently used its peremptory challenges to exclude them from the jury box."<sup>58</sup> Racist and sexist assumptions intersected to block the participation of Black women on juries.<sup>59</sup> The 1986 case of

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51. April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 STAN. J. C.R. & C.L. 1 (2020).

52. Clarence Darrow, *Attorney for the Defense*, ESQUIRE, May 1, 1936, at 43-44.

53. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 73 (1986).

54. *Id.*

55. *Id.* at 72-76.

56. See, e.g., Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505 (1964) ("Voir dire was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.'").

57. VAN DYKE, *supra* note 45, at 28-35, 152-60 (documenting underrepresentation of nonwhite jurors).

58. *Id.* at 150.

59. Courts appear to have difficulty contemplating intersectionality. See, e.g., Christy Chandler, *Race, Gender, and the Peremptory Challenge: A Postmodern Feminist Approach*, 7 YALE J.L. & FEMINISM 173 (1995). As Christy Chandler observed:

Prior to *J.E.B.*, prosecutors often removed black women from the jury because of their sex. In the majority opinion, the *J.E.B.* Court expressed concern about the use of gender as a pretext for racially-based peremptory

*Batson v. Kentucky* held that prosecutors could not exercise peremptory challenges on the basis of the prospective juror's race, as it violated the Fourteenth Amendment's Equal Protection Clause.<sup>60</sup> That precedent limiting the prosecutor's reliance on race as the basis for peremptory challenges was soon expanded in subsequent Supreme Court cases beyond the prosecutor as a state actor, to include attorneys in civil cases and defense attorneys in criminal cases.<sup>61</sup>

Although *Batson* applied to race, it did not provide gender-based protections in jury selection. Numerous commentators subsequently argued that *Batson's* decision should extend to a prospective juror's gender.<sup>62</sup>

The U.S. Supreme Court eventually took up the issue of gender discrimination in the exercise of peremptory challenges in the 1994 case of *J.E.B. v. Alabama ex rel T.B.*<sup>63</sup> In jury selection for this case, a paternity lawsuit, the State used almost 90% of its available peremptory challenges to exclude men from the jury.<sup>64</sup> The presumed motivation behind doing so was that women would be more likely to agree with a finding of paternity.<sup>65</sup> The all-female jury found that the male defendant, J.E.B., was the child's father, and must be financially responsible for his child.<sup>66</sup> In his appeal, J.E.B. claimed that the State's exercise of peremptory challenges violated his rights under the Equal Protection

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challenges exercised against black women. The concern was that permitting gender-based strikes 'contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.' Interestingly, the Court expressed concern with racially-motivated strikes, not because such strikes may affect women of color as a class, but because *race* is a suspect class. The implication is that black women are not harmed because they are black women, but because they are black. *J.E.B.* refuses to recognize that women of color uniquely suffer from a 'synergistic' form of race *and* gender discrimination" (footnotes omitted).

*Id.* at 184.

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

61. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (litigants in civil cases); *Georgia v. McCollum*, 505 U.S. 42 (1992) (criminal defendants).

62. See, e.g., Forman, *supra* note 44 (analyzing arguments for and against expansion of *Batson* to gender); Bonnie L. Mayfield, *Batson and Groups Other than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377 (1988); Jere W. Morehead, *Exploring the Frontiers of Batson v. Kentucky: Should the Safeguards of Equal Protection Extend to Gender*, 14 AM. J. TRIAL ADVOC. 289 (1990); Shirley S. Sagawa, *Batson v. Kentucky: Will It Keep Women on the Jury?*, 3 BERKELEY WOMEN'S L.J. 14 (1987).

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

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

65. *J.E.B.*, 511 U.S. at 137-38.

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

Clause. The Supreme Court agreed, citing women's historical exclusion from juries to support their holding that relying on gender when exercising peremptory challenges violated the Equal Protection Clause.<sup>67</sup> By expanding protections against the discriminatory use of peremptory challenges to include gender in addition to race, this case affirmed the principles that the creation of a jury should uphold not only a defendant's rights (under the Equal Protection Clause and the Sixth Amendment right to a fair and impartial trial), but also the rights of the jurors themselves not to be excluded based on protected status characteristics.<sup>68</sup>

Thus, peremptory challenges may not be exercised on the basis of race or sex. Although it has not yet been specifically addressed by the Supreme Court, our reading of the cases indicates that gender identity should be incorporated into the peremptory challenge prohibition because it depends on sex. Indeed, a handful of states already expressly prohibit discrimination in jury selection on the basis of sexual orientation or gender identity.<sup>69</sup> Moreover, the 2020 U.S. Supreme Court decision in *Bostock v. Clayton County* held that sex "plays a necessary and undisguisable role in the decision" of an employer to fire an individual for their sexual orientation or gender identity, as that employer "fires that person for traits or actions it would not have questioned in members of a different sex."<sup>70</sup> The Court's inclusion of sexual orientation and gender identity as facets of sex-based discrimination in the employment context, although grounded in Title VII law, points to the likelihood that gender identity and gender expression will also be subject to heightened scrutiny in other contexts. Reviewing the cases and legislative efforts around sexual orientation and gender identity, we have observed a number of instances of expansive treatment of the terms "sex" and "sexual orientation" to include gender identity and gender expression.<sup>71</sup> Gender identity thus also appears to be an illegitimate basis for an attorney's peremptory challenge.

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67. *J.E.B.*, 511 U.S. at 127, 131-34.

68. *J.E.B.*, 511 U.S. at 140-41.

69. Mark E. Wojcik, *Extending Batson to Peremptory Challenges of Jurors Based on Sexual Orientation and Gender Identity*, 40 N. ILL. U. L. REV. 1 (2019).

70. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

71. See summaries in Wojcik, *supra* note 69, and *Bostock*, 140 S. Ct. 1731 (2020). However, A. Russell argues that "the language and framework chosen by litigators and courts to clarify the protection of nonbinary employees under *Bostock* will impact the degree to which nonbinary plaintiffs do or do not enjoy equal antidiscrimination protection." Note, *Bostock v. Clayton County: The Implications of a Binary Bias*, 106 CORNELL L. REV. 1601, 1603 (2021).

### B. *Empirical Studies of Gender and Jury Selection*

Despite the precedential and symbolic significance of *Batson* and *J.E.B.*, many observers have concluded that creative attorneys can readily sidestep the prohibition by generating pretextual and neutral-sounding reasons for excluding prospective jurors, even if the actual grounds for the challenge rest in the forbidden characteristics of race and gender.<sup>72</sup> Attorneys may also hold implicit and explicit gender biases, which can consciously or unconsciously shape the jury selection process.<sup>73</sup> Jury consultant Claire Plotkin, who has worked with attorneys to select jurors, has commented, “[w]henever I am consulted about an upcoming sexual-harassment or assault case, the first question I get asked is, ‘Are men or women good (or bad) for me?’ The answer is always, ‘It depends.’”<sup>74</sup> Nonetheless, examining attorneys’ jury selection behavior indicates the frequent prominence of a prospective juror’s gender during jury selection.

Mary Ann Lane’s observational study of six *voir dire*s that included 154 prospective jurors illustrates some of the subtle ways in which a prospective juror’s gender is salient during *voir dire*. Lane noted that “the use of gendered titles and Mrs./Ms. highlights the awareness of gender and brings it into the discussion.”<sup>75</sup> She recounted one exchange in which the male attorney misidentified a juror’s gender, calling her “Mr.” which the juror corrected to “Ma’am.” When the flustered attorney apologized, the juror responded that “it was fine, and it happened all the time because of her haircut.”<sup>76</sup> In another case, a male defense attorney referred to a woman juror as “Ms.,” and the juror immediately corrected him saying that she was a “Mrs.” When he emphasized the “Mrs.” in subsequent questions, there were grimaces all around.<sup>77</sup> As seen in these examples, the presence of and emphasis on gendered titles

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72. Anuva Ganapathi, Current Development, *Re-thinking Batson in Light of Flowers: An Effort to Cure a 35-Year Problem of Prosecutorial Misconduct*, 33 GEO. J. LEGAL ETHICS, 503, 506-08 (2020) (discussing the widespread judicial acceptance of pretextual reasons for challenging minority jurors).

73. Valerie P. Hans, *Challenges to Achieving Fairness in Civil Jury Selection* 23-25 (Cornell L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 21-23, 2021), [<https://perma.cc/ZBL4-PUQT>] [hereinafter Hans, *Challenges*] (citing research and theory on the influence of conscious and unconscious biases in jury selection).

74. Claire Plotkin, *Jury Selection for Sexual Harassment and Sexual-assault Cases*, ADVOCATE (Apr. 2020), [<https://perma.cc/V94V-7DEJ>].

75. Tasha Ann Lane, *Gender and the Voir Dire Process*, 43 (2019) (M.A. thesis, Portland State University) (on file with Portland State University Library).

76. *Id.* at 30.

77. *Id.*

can often create missteps and tension between attorneys and prospective jurors during *voir dire*.

In an empirical analysis of appeals to gender-based peremptory challenges in the five years after the Supreme Court's *J.E.B.* decision,<sup>78</sup> Susan Hightower examined all published state and federal cases citing *J.E.B.* Hightower found a modest number of cases that raised *J.E.B.* issues and an even smaller number in which the application of *J.E.B.* led to different outcomes.<sup>79</sup> Although commentary about the likely impact of prohibiting gender-based challenges suggested that gender-sensitive cases would be most affected, Hightower discovered that appeals of gender-based peremptory challenges were most frequent in murder and manslaughter cases.<sup>80</sup> They constituted 60 of the 120 *J.E.B.* criminal cases in Hightower's sample.<sup>81</sup> Just seven *J.E.B.* appeals occurred in civil cases.<sup>82</sup>

Additional research has documented strong gender patterns in lawyers' exercise of peremptory challenges in capital cases. Lawyers' expectations about attitudinal differences between men and women appear to play a role in lawyers' exercise of their peremptory challenges in death penalty cases, perhaps because men and women have different levels of support for capital punishment.<sup>83</sup> David Baldus and his colleagues studied 317 jury venires in Philadelphia that were used in the capital trials of 401 defendants between the years of 1981 and 1997, a period spanning the years before and after the Supreme Court's decisions about peremptory challenges.<sup>84</sup> They analyzed venire member strike rates, finding that prosecutors' peremptory strike rates for potential women jurors was .40 and for potential men jurors was .33, a 7-point difference.<sup>85</sup> Defense attorneys' strikes showed the opposite pattern, with a .39 strike rate for women and a .50 strike rate for men, an 11-point difference.<sup>86</sup> The anal-

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78. 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 (2000).

79. *Id.* at 908-10 (summarizing data, Hightower identified a total 127 cases, with 27 remands and 23 reversals).

80. *Id.* at 912-15 (analyzing case types).

81. *Id.* at 914 tbl.4.

82. *Id.* at 915. This is comparable to the way in which *Batson* is relied upon in appeals much more frequently in criminal cases compared to civil cases. See discussion in Hans, *Challenges*, *supra* note 73, at 24-25.

83. See Hans Zeisel & Alec M. Gallup, *Death Penalty Sentiment in the United States*, 5 J. QUANTITATIVE CRIMINOLOGY 285 (1989).

84. David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 46 (2001).

85. *Id.* at 53 tbl.2.

86. *Id.*

ysis considered the prospective jurors' gender along with their race and age. Baldus and his colleagues concluded that race was a major factor in peremptory challenges for both prosecutors and defense attorneys, and the combination of gender and age also appeared to be important. Prosecutors favored older men over older women; for the defense, gender effects were detected mostly in non-Black prospective jurors.<sup>87</sup>

Ann Eisenberg studied thirty-five South Carolina death penalty trials and found that "the defense used 41% of its strikes on women and 59% of its strikes on men whereas the prosecution used 59% of its strikes on women and 41% of its strikes on men," a statistically significant difference.<sup>88</sup> A follow-up study with more detailed information about the race and gender of the prospective jurors likewise confirmed these gendered patterns in prosecutors' and defense attorneys' peremptory challenges.<sup>89</sup> The additional data allowed Eisenberg and her colleagues to compute the strike rates for different gender and race combinations: the State struck Black men at a rate of 33% and white men at 10%, Black women at 25%, and white women at 15%.<sup>90</sup> In contrast, the defense struck Black men at 6% and white men at 42%, with strike rates for Black women at 8% and white women at 34%.<sup>91</sup> Successful challenges for cause due to death penalty attitudes also reflected gender differences, with 14.28% of potential women jurors and 9.94% of potential men jurors removed for cause because of their stated unwillingness to give a death sentence.<sup>92</sup> At the opposite end of the attitudinal spectrum, 7.97% of potential men jurors and 3.96% of potential women jurors were excluded for cause because of their preference for an automatic imposition of the death penalty.<sup>93</sup>

There is limited systematic data about the use of gender-based peremptory challenges outside of capital cases. In the Hightower five-year

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87. *Id.* at 60. Interestingly, analyzing the relationship between the jury's eventual composition and the jury's sentence, Baldus and colleagues found that gender by itself did not affect the likelihood of a death sentence; rather, it operated in combination with race and age. *Id.* at 92-95 fig.10.

88. Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. U. L.J. 299, 334 tbl.4, 340 (2017) (documenting the gender differences in strikes).

89. Ann M. Eisenberg, Amelia Courtney Hritz, Caisa Elizabeth Royer & John H. Blume, *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373 (2017) (reporting results of analysis of voir dire transcripts in 35 capital trials and 3,159 venire members).

90. *Id.* at 384-85.

91. *Id.* at 384 tbl.2.

92. *Id.* at 387-88.

93. *Id.* at 387.



study of *J.E.B.* appeals cases, although murder and manslaughter accounted for close to half of all the appeals, about 10% occurred in rape cases and a similar number occurred in cases of child sexual abuse.<sup>94</sup> In a study of jury selection in thirteen non-capital felony trials, Mary Rose found that men were more likely than women to be removed through peremptory challenges (54% versus 41% respectively), although the pattern appeared largely attributable to one particular case.<sup>95</sup> Rose did not find that prosecutors and defense attorneys exercised their challenges differentially with respect to gender, in contrast to the pattern found in capital cases. Altogether, further research is needed to identify in what non-capital contexts, if any, gender differences in the use of peremptory challenges may be present, as well as the underlying reasons for such gender-based exclusions.

### *C. Gender-Diverse Identity and its Implications for Jury Selection*

Courts have only recently begun to grapple with the novel issues arising with respect to transgender, nonbinary, and other gender-nonconforming people. Although we could find no systematic analysis of the experiences of gender-diverse prospective jurors, it is worth considering the implications for jury selection.

Jury selection questionnaires usually include a question about sex and/or gender, with male/female as the typical binary choices. Jury commissioners and other analysts may compare a jury pool's responses to census information or other data about the percentages of men and women in the jurisdiction, assessing whether the groups constitute a representative cross-section of the local community.<sup>96</sup> However, to obtain the most precise and accurate picture of the population, questionnaires should ask both about the individual's assigned sex at birth and the individual's current gender identity. Expanding beyond the male/female binary to include an "other" category (or a number of additional options) could offer a more accurate reflection of the community. Interestingly, in its most recent Household Pulse survey, the U.S. Census

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94. Hightower, *supra* note 78, at 913-14.

95. Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW. & HUM. BEHAV. 695, 699 (1999) (documenting peremptory challenges with respect to prospective jurors' gender).

96. *See, e.g.*, VAN DYKE, *supra* note 45, app. I at 349-71.

Bureau has introduced dual questions about gender identity.<sup>97</sup> The questions are worded in the following manner: “What sex were you assigned at birth on your original birth certificate?” with a choice of “male” or “female” answers; and “Do you currently describe yourself as male, female or transgender?” with a choice of answers of male, female, transgender, or none of these.<sup>98</sup>

Although such an expansion on jury selection questionnaires would increase the accuracy of the responses, there is a downside to expanding the gender question. There is extensive evidence of prejudice and discrimination experienced by transgender, nonbinary, and other sexual minority individuals.<sup>99</sup> Cisgender individuals identify with the gender assigned to them at birth. Both implicit and explicit preferences for cisgender over transgender individuals have been found to predict transphobia and opposition to transgender rights.<sup>100</sup> Surveying the law enforcement and courts landscape, Ceci Bruni reported that, compared to cisgender individuals, gender-nonconforming individuals had higher arrest rates and more appearances in court.<sup>101</sup> Bruni also cited instances in which legal professionals misgendered gender-nonconforming people, refusing to use preferred pronouns or names.<sup>102</sup> A survey conducted by Lambda Legal found that “transgender respondents were at least twice as likely—and transgender women at least four times more likely—to report misconduct in the courthouse than their cisgender counterparts.”<sup>103</sup> One court observed: “other than certain races, one would be

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97. Thom File & Jason-Harold Lee, *Phase 3.2 of Census Bureau Survey Questions Now Include SOGI, Child Tax Credit, COVID Vaccination of Children*, U.S. CENSUS BUREAU (Aug. 5, 2021), [https://perma.cc/38LC-LQHE].

98. *Id.*

99. Bruni, *supra* note 5, at 3 (citing sources documenting prejudice and discrimination). See also Katie Eyer, *Transgender Constitutional Law*, U. PA. L. REV. (forthcoming) (on file with SSRN) (“[C]ourts have observed [that] there is an extensive and irrefutable history of discrimination against the transgender community, extending into the modern era.”).

100. Jordan R. Axt, Morgan A. Conway, Erin C. Westgate & Nicholas R. Buttrick, *Implicit Transgender Attitudes Independently Predict Beliefs About Gender and Transgender People*, 47 PERSONALITY & SOC. PSYCH. BULL. 257 (2021).

101. Catherine Hanssens, Aisha C. Moodie-Mills, Andrea J. Ritchie, Dean Spade & Urvasi Vaid, *A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV*, CTR. FOR GENDER & SEXUALITY L. (2014), [https://perma.cc/4CN5-QPSS]. The authors report, “[t]he policing of gender and sexuality pervades law enforcement and the operation of courts and the penal system, often operating within the larger context of racial profiling and targeting of homeless and low-income communities, and disproportionately affecting LGBT people of color.” *Id.* at 5.

102. Bruni, *supra* note 5, at 3-4.

103. *Protected and Served?*, LAMBDA LEGAL 1, 12 (2015), [https://perma.cc/UU9D-8X3C].

hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people.”<sup>104</sup>

Because responses on juror questionnaires are made under oath, an expansion of the single male/female question to dual birth sex and gender identity questions on jury selection questionnaires would force prospective jurors who are gender-diverse to respond truthfully. However, such individuals might prefer not to reveal their nonbinary or transgender status in light of potentially prejudicial responses of lawyers and judges during jury selection.

Responses about a juror’s gender can be useful to jury commissioners and others who need to assess the representativeness of the jury pools. However, because gender is a protected status, courts might consider removing information about prospective jurors’ gender responses during the conduct of in-person jury selection. Doing so can minimize attorneys’ reliance on gender during the course of *voir dire*, and facilitate greater accommodation of gender-diverse members of the jury pool.

#### IV. JURORS’ GENDER AND CRIMINAL JURY TRIALS

What might we expect in comparing men’s and women’s responses to jury trials? Social scientists have been examining the question of sex and gender differences for many decades, as an individual characteristic by itself and as gender interacts with other individual characteristics such as race, ethnicity, age, sexual orientation, and social class.<sup>105</sup> In addition, jury scholars have regularly explored whether a juror’s gender is associated with differential assessments in criminal or civil cases.<sup>106</sup> In

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104. *Flack v. Wis. Dept. of Health Servs.*, 328 F. Supp.3d 931, 953 (W.D. Wis. 2018). Eyer cites several judicial opinions that concur that transgender individuals have been the target of discrimination. Eyer, *supra* note 99, at 18-19.

105. *E.g.*, MARGARET L. ANDERSEN, *THINKING ABOUT WOMEN: SOCIOLOGICAL PERSPECTIVES ON SEX AND GENDER* (11th ed. 2020) (surveying sociological theory and research on gender); RACE, CLASS, GENDER: INTERSECTIONS AND INEQUALITIES (Margaret L. Andersen & Patricia Hill Collins eds., 10th ed. 2020) (“Race, class, and gender are interconnected, and they must be understood as operating together if one wants to understand the experiences of diverse groups. . . .”); ELEANOR EMMONS MACCOBY & CAROL NAGY JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974) (surveying the research evidence about differences between males and females throughout the life cycle).

106. *See infra* Sections IV(B) and IV(C) (gender in criminal cases); *infra* Sections V(B) and V(C) (gender in civil cases).

this section, we outline current thinking on the social psychology of gender differences and summarize the substantial jury research on the impact of juror gender. Although jury research finds substantial overlap in the case-relevant views and attitudes of men and women, it has also identified reliable gender differences in attitudes toward sexual assault, child abuse, and the death penalty.

A. *Factors Underlying Gender Differences in Criminal Cases*

Social scientists have analyzed gender roles that prescribe what are considered to be gender-congruent behaviors for men and women in contemporary society.<sup>107</sup> From early childhood to adulthood, and through multiple mechanisms, individuals learn the content of gender roles and gender stereotypes, and how to perform as a gendered individual.<sup>108</sup> In 1974, Eleanor Emmons Maccoby and Carol Nagy Jacklin published a 634-page compendium, *The Psychology of Sex Differences*.<sup>109</sup> They concluded that although a modest number of behavioral, moral, or psychological differences between men and women were “well-established” through empirical research, many other claims about gender differences could not be supported by available evidence.<sup>110</sup> Interestingly, many supposed differences about the social behavior of men and women, including differential sociability and suggestibility, did not find support in the empirical research.<sup>111</sup> Maccoby and Jacklin explained the dogged persistence of gender stereotypes:

[I]f a generalization about a group of people is believed, whenever a member of that group behaves in the expected way the observer notes it and his belief is confirmed and strengthened; when a member of the group behaves in a way

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107. See, e.g., Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125 (1987); Jill McCorkel, Frederika E. Schmitt & Valerie P. Hans, *Gender, Law, and Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 301 (Joseph Sanders & V. L. Hamilton eds., 2001).

108. Tyler N. Livingston, Peter O. Rerick & Monica K. Miller, *Psychological Explanations of How Gender Relates to Perceptions and Outcomes at Trial*, in 4 ADVANCES IN PSYCHOLOGY & LAW 137, 155-56 (Brian H. Bornstein & Monika K. Miller eds., 2019) [hereinafter Livingston et al.].

109. MACCOBY & JACKLIN, *supra* note 105.

110. *Id.* at 351-52. The “well-established” differences included girls’ and women’s superior verbal ability and boys’ and men’s greater visual-spatial and math abilities. Greater aggression in men than in women was also described as well-established.

111. *Id.* at 349-50.

that is not consistent with the observer's expectations, the instance is likely to pass unnoticed, and the observer's generalized belief is protected from disconfirmation.<sup>112</sup>

This reminds us to be cautious about overclaiming gender differences in the context of jury behavior. We also need to keep in mind that what is seen as gender-normative may differ by race, class, and other individual characteristics.

Nevertheless, it is useful to analyze whether what are considered to be gender-congruent characteristics produce differences in how men and women approach their roles as jurors and the cases they decide. Some compelling projects identify ways in which gender-conforming men and women might differ that have implications for their perspectives as jurors. In her landmark book, *In a Different Voice*, psychologist Carol Gilligan offered evidence suggesting that men and women hold somewhat different value systems. Men, she found, tend to be more interested in upholding rights and justice and emphasize separateness; women, in contrast, tend to be more compassionate and emphasize connectedness between groups.<sup>113</sup> Some studies conclude that these differences emerge from disparate socialization practices between men and women: men are socialized to value aggression and the use of force, and women are raised to be more compassionate and nurturing.<sup>114</sup>

Research regarding views on criminal punishment has documented significant gender differences in agreement with retributivist justice: punishing a transgressor in a manner proportional to the severity of their transgression, such that men have been found to agree with retributivist tenets to a greater extent than women.<sup>115</sup> Such differences in men and women's support for retributivism may be driven by, and are con-

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112. *Id.* at 355.

113. GILLIGAN, *IN A DIFFERENT VOICE* (1982); *see also* Carol Gilligan & Jane Attanucci, *Two Moral Orientations: Gender Differences and Similarities*, 34 MERRILL-PALMER Q. 223 (1988) (examining different moral orientations between men and women). We note that Maccoby and Jacklin specifically reject the claim that there is a "well-established" empathy difference between men and women: "the two sexes appear to be equally 'empathic,' in the sense of understanding the emotional reactions of others; however, the measures of this ability have so far been narrow." MACCOBY & JACKLIN, *supra* note 105, at 349.

114. *See, e.g.*, Hurwitz & Smithey, *supra* note 7, at 94.

115. *See* Robert M. Bohm, *Retribution and Capital Punishment: Toward a Better Understanding of Death Penalty Opinion*, 20 J. CRIM. JUST. 227, 231-33 (1992) (providing evidence that with respect to the death penalty, men usually agree more with retributivist statements than women do); *see generally* Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 31 (Joseph Sanders & V. Lee Hamilton eds., 2001) (framing retribution as a psychological and sociological phenomenon).

sistent with, Maccoby and Jacklin's finding that typical levels of aggression toward others is a "well-established" gender difference.<sup>116</sup>

Divergent life experiences may also create reliable gender differences in response to criminal jury trials. In the United States, women experience higher rates of sexual assault,<sup>117</sup> which may influence their perceptions of the evidence in sexual assault cases and their predisposition to empathize with victims of such assaults.<sup>118</sup> Likewise, the experiences of pregnancy and childbirth, as well as the expectation that women take primary responsibility for childcare, may lead women to consider that children are in their domain of control, and to uphold values of concern and care for children.<sup>119</sup>

The distinct approaches of nonbinary and transgender individuals to issues of gender may also lead them to respond to cases differently than their cisgender counterparts. Gender-diverse individuals often reject gender norms from a young age,<sup>120</sup> raising the possibility that their decision-making as jurors is less affected by the gender of criminal defendants, victims, and witnesses, than that of cisgender individuals.

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116. MACCOBY & JACKLIN, *supra* note 105, at 352.

117. *See, e.g.*, Sharon G. Smith, Xinjian Zhang, Kathleen C. Basile, Melissa T. Merrick, Jing Wang, Marcie-jo Kresnow & Jieru Chen, *The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief - Updated Release*, NAT'L CTR. FOR INJ. CONTROL & PREVENTION, CTR. FOR DISEASE CONTROL (2018), [<https://perma.cc/5388-CHEK>]. Data from this 2015 iteration of the CDC's National Intimate Partner and Sexual Violence survey indicates that approximately 21.3% of U.S. women were victims of completed or attempted rape, 16.0% were victims of sexual coercion, and 37% of women were victims of unwanted sexual contact. *Id.* at 2. In contrast, approximately 2.6% of U.S. men were victims of completed or attempted rape, 9.6% were victims of sexual coercion, and 17.9% were victims of unwanted sexual contact. *Id.* at 3; *see also* *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK (RAINN) (2019), <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/M3EX-R8PT>]. RAINN's report of sexual violence statistics indicates that 17.7 million women in America were victims of a completed or attempted rape as of 1998, with female college students being especially vulnerable to sexual violence victimization compared to the general female population. *Id.* In contrast, 2.78 million American men had been victims of an attempted or completed rape as of 1998, with male college students being five times more likely to be victimized compared to their same aged but non-college enrolled male counterparts. *Id.*

118. *See* discussion *infra* Section IV(B).

119. *See, e.g.*, Alice H. Eagly & Wendy Wood, *Social Role Theory*, in 2 HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY 458 (Paul A. M. Van Lange, Arie W. Kruglanski & E. Tory Higgins eds., 2012).

120. *See, e.g.*, Michelle Dietert & Dianne Dentice, *Growing Up Trans: Socialization and the Gender Binary*, 9 J. GLBT FAM. STUD. 24 (2013); Cecillia Barron & Moshoula Capous-Desyllas, *Transgressing the Gendered Norms in Childhood: Understanding Transgender Children and Their Families*, 13 J. GLBT FAM. STUD. 407, 419 (2013).

With these mechanisms in mind, we now review evidence about the role that a juror's gender has been found to have on case perceptions and verdicts in criminal cases. Few studies have documented overall effects of an individual juror's gender.<sup>121</sup> Instead, reliable differences have emerged in two categories of cases where gender is prominent or where a punishment response is required: cases involving child or adult physical and sexual abuse, and cases involving the death penalty as a potential punishment.

B. *Juror Gender in Gender-Salient Criminal Cases:  
Child and Adult Physical and Sexual Abuse*

Researcher Tyler Livingston and colleagues suggest that “[j]uror gender might become especially relevant in cases in which sexuality and gender are salient.”<sup>122</sup> The evidence bears this out. In sexual assault cases, the gender of jurors has routinely been associated with case-relevant judgments; it is linked to the likelihood of jurors blaming sexual assault victims and believing damaging rape myths, which in turn influence final verdicts and proposed sentences.<sup>123</sup> Women are significantly less likely than men to believe rape myths.<sup>124</sup> Rape myths may include statements or beliefs such as “[s]he asked for it; it was not really rape; he did not mean to; she wanted it [the rape]; she lied [about the rape]; and rape is a trivial event . . . .”<sup>125</sup> In the context of rape perpetrated against a woman by a man, these myths can serve to undermine the gravity of the sexual assault, minimize the male rapist's personal responsibility, and discredit and blame the female victim. Relatedly, women serving as mock jurors have been found to empathize more with sexual assault vic-

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121. Shari S. Diamond & Leslie Ellis, *Jury Selection*, in ENCYCLOPEDIA OF WOMEN AND CRIME 120, 121 (Nicole Hahn Rafter ed., 2000) (“Research has revealed few systematic differences between men and women in their verdict preferences in criminal cases. The few differences that have been detected have emerged in cases involving sexual assault, domestic abuse, physical and sexual abuse of children, and the death penalty.”). Livingston et al. also summarize the literature and find that it is primarily in cases in which sexuality and gender are salient or in cases involving capital punishment that juror gender differences emerge. *Supra* note 108, at 149-50.

122. Livingston et al., *supra* note 108, at 150.

123. See, e.g., Donna M. Vandiver & Jessica Rager Dupalo, *Factors that Affect College Students' Perceptions of Rape: What is the Role of Gender and Other Situational Factors?*, 57 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 592 (2012) (documenting gender effects on perceptions of rape).

124. *Id.* at 592; Eliana Suarez & Tahany M. Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 J. INTERPERSONAL VIOLENCE 2010 (2010).

125. Vandiver & Dupalo, *supra* note 123, at 594.

tims than men do, providing higher ratings for victims' credibility, believability, and truthfulness.<sup>126</sup> Experimental research shows that women jurors are more strongly and frequently able to take the perspective of, believe, and empathize with a sexual assault victim than their male counterparts.<sup>127</sup>

The effects of a juror's gender on conviction rates and proposed sentences for sexual assault cases have also been studied. A historical analysis of approximately 3,000 jury trials in the Central Criminal Courts of London revealed that following the inclusion of women on English juries in 1921, the overall conviction rate did not change appreciably, but the conviction rate in sex offenses cases significantly increased.<sup>128</sup> Experimental jury research confirms the effect; multiple studies have found that women serving as mock jurors are more likely to convict in rape cases.<sup>129</sup> Related work on the impact of a jury's gender composition on rape conviction rates has been mixed, with one study finding that the quantity of male and female jurors on a jury was unrelated to sexual assault conviction rates,<sup>130</sup> while other mock jury studies found that a significant female-majority jury increased the likelihood of a guilty verdict.<sup>131</sup>

In child sexual abuse cases, prior work has examined how the gender of a mock juror and child victim involved in the case can impact perceptions of the perpetrator and child victim and rates of conviction.

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126. Joanna D. Pozzulo, Julie Dempsey, Evelyn Maeder & Laura Allen, *The Effects of Victim Gender, Defendant Gender, and Defendant Age on Juror Decision Making*, 37 CRIM. JUST. & BEHAV. 47, 55 (2010); Natalie Taylor, *Juror Attitudes and Biases in Sexual Assault Cases*, TRENDS & ISSUES IN CRIME & CRIM. JUST., Aug. 2007, at 1.
127. See, e.g., Linda A. Foley & Melissa A. Pigott, *Belief in a Just World and Jury Decisions in a Civil Rape Trial*, 30 J. APPLIED SOC. PSYCH. 935 (2000); Bette L. Bottoms, Liana C. Peter-Hagene, Margaret C. Stevenson, Tisha R. A. Wiley, Tracey Schneider Mitchell & Gail S. Goodman, *Explaining Gender Differences in Jurors' Reactions to Child Sexual Assault Cases*, 32 BEHAV. SCI. & L. 789, 804-06 (2014) (citing Tamara M. Haegerich & Bette L. Bottoms, *Empathy and Jurors' Decisions in Patricide Trials Involving Child Sexual Assault Allegations*, 24 LAW & HUM. BEHAV. 421 (2000)).
128. Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *A Jury of Her Peers: The Impact of the First Female Jurors on Criminal Convictions*, 129 ECON. J. 603 (2017).
129. E.g., HANS & VIDMAR, *supra* note 53, at 211-12; Gloria J. Fischer, *Cognitive Predictors of Not-Guilty Verdicts in a Simulated Acquaintance Rape Trial*, 68 PSYCH. REPS. 1199, 1205-6 (1991); Kathleen McNamara, Frank Vattano & Wayne Viney, *Verdict, Sentencing, and Certainty as a Function of Sex of Juror and Amount of Evidence in a Simulated Rape Trial*, 72 PSYCH. REPS. 575 (1993); James W. Schutte & Harmon M. Hosch, *Gender Differences in Sexual Assault Verdicts: A Meta-Analysis*, 12 J. SOC. BEHAV. & PERSONALITY 759 (1997).
130. Peter J. Nelligan, *The Effects of the Gender of Jurors on Sexual Assault Verdicts*, 72 SOCIO. & SOC. RSCH. 249 (1988).
131. Cf. Fischer, *supra* note 129, at 1205-6 (finding that men are more likely than women to give a not-guilty verdict).



James Schutte and Harmon Hosch conducted a 1997 meta-analysis to examine the role of mock juror gender on verdicts and conviction rates.<sup>132</sup> They examined thirty-six studies of sexual assault, nineteen involving rape and seventeen involving child sexual abuse.<sup>133</sup> The cases varied in terms of sample type (undergraduate students, community members, registered voters), scenario content (if it was a child sexual abuse or rape case, if it was a criminal or civil case, if claims of repressed memories were presented), whether the case presented involved a male perpetrator and female victim, and other factors.<sup>134</sup> Overall, across and within the case types presented to participants, women were significantly more likely than men to vote to convict the defendant.<sup>135</sup>

A pro-victim, anti-defendant attitude among female mock jurors evaluating child sexual assault cases was identified in later research as well. In studying the impact of victim and defendant gender in combination, Jodi Quas and colleagues found that upon their reading of an assault case involving either a man or woman perpetrator and an adolescent male or female victim,<sup>136</sup> women mock jurors were generally more likely to render a guilty verdict than men mock jurors, across different defendant and victim gender combinations.<sup>137</sup> Male mock jurors, in contrast, were affected by defendant and victim gender in rendering their verdicts against female, but not male, defendants. That is, male mock jurors were less likely to convict a female defendant accused of assaulting a young male victim, compared to a female defendant accused of assaulting a young female victim.<sup>138</sup>

More recent experimental and meta-analysis work of mock juries has continued to find that when presented with child sexual abuse cases, women jurors are more likely to find the defendant guilty.<sup>139</sup> They also tend to be more supportive of and favorable toward child victims,<sup>140</sup> a

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132. Schutte & Hosch, *supra* note 129.

133. *Id.* at 762.

134. *Id.* at 766.

135. *Id.* at 767.

136. Quas et al., *supra* note 6, at 1999.

137. *Id.* at 2003.

138. *Id.* at 2004.

139. See, e.g., Jennifer Pettalia, Joanna D. Pozzulo & Jennifer Reed, *The Influence of Sex on Mock Jurors' Verdicts Across Type of Child Abuse Cases*, 69 CHILD ABUSE & NEGLECT 1, 5 (2017) (finding that when mock jurors were presented with trial transcripts of male-perpetrated child abuse cases varying the type of abuse and sex of the victim depicted, overall, "the odds of a female mock juror finding the defendant guilty were 6.67 times larger than a male mock juror finding the defendant guilty").

140. See, e.g., *id.* at 3 (explaining that female mock jurors assign higher attributes of guilt to defendants in child abuse cases); Bottoms et al., *supra* note 127.

phenomenon that reflects female jurors' general tendency to be more empathetic towards victims and hold a greater degree of belief in their credibility.<sup>141</sup>

Gender patterns in criminal domestic violence cases seem to match that of child sexual abuse and adult sexual assault cases: women, compared to men, show greater sympathy and leniency toward victims of physical violence who turn on their attackers.<sup>142</sup> In an impressive series of mock juror research studies, Regina Schuller and her colleagues have consistently found that women mock jurors are inclined to be more lenient toward women victims of domestic abuse who subsequently killed their male abuser.<sup>143</sup> Other research has confirmed that women mock jurors are more generous than men toward women defendants who claim self-defense in killing their male abusers.<sup>144</sup> Interestingly, men and women also appear to respond differently to factual patterns in these cases. For example, a research project by Emily Hodell and colleagues found that “[o]verall, women [are] convicted at much lower rates when the killing occurred within the same time period as the confrontation (6-hr delay), with conviction rates rising . . . when the delay was long (3-day delay). Men, in contrast, [are] convicted at high rates regardless of the delay.”<sup>145</sup>

Earlier, we raised the possibility that gender non-conforming individuals, who have rejected traditional gender norms, might not respond to cases in which gender is salient in the same way as gender-conforming individuals. Nonetheless, we suspect that gender-nonconforming individuals might be especially attuned to understanding and empathizing with the victims of sexual and physical violence. We documented earlier the evidence that gender-nonconforming people experience substantial prejudice, discrimination, and physical and sexual assaults within the le-

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141. Bottoms et al., *supra* note 127; see also Ashmyra Voogt & Bianca Klettke, *The Effect of Gender on Perceptions of Credibility in Child Sexual Assault Cases: A Systematic Review*, 26 J. CHILD SEXUAL ABUSE 195 (2017) (finding that females rate victim credibility higher than males).

142. See, e.g., Regina A. Schuller & Sara Rzepa, *Expert Testimony Pertaining to Battered Woman Syndrome: Its Impact on Jurors' Decisions*, 26 LAW & HUM. BEHAV. 655, 666-68 (2002) (showing women mock jurors provided more lenient judgments than men mock jurors in evaluating domestic abuse cases involving a female victim who later killed her male abuser); Emily C. Hodell, Emily E. Dunlap, Nesa E. Wasarhaley & Jonathan M. Golding, *Factors Impacting Juror Perceptions of Battered Women Who Kill Their Abusers: Delay and Sleeping Status*, 18 PSYCH. PUB. POL'Y & L. 338, 342 (2012) (reporting mock juror research and documenting gender differences) [hereinafter Hodell et al.].

143. Schuller & Rzepa, *supra* note 142, at 666-68.

144. Hodell et al., *supra* note 142.

145. Hodell et al., *supra* note 142, at 354.

gal system and society at large.<sup>146</sup> These life experiences might lead non-binary individuals in turn to be especially sensitive to the experiences of these crime victims, even if the crimes make gender salient.

### C. *Juror Gender and Death Penalty Attitudes and Case Judgments*

A second broad set of cases in which gender differences are strong and reliable involve cases in which the death penalty is a potential punishment for the crime. Gender differences have robustly been identified in capital punishment attitudes for the better part of a century. In their 1989 review of death penalty attitudes within the United States, Hans Zeisel and Alec Gallup examined responses from fifty years of Gallup polls, starting in 1936.<sup>147</sup> In averaging death penalty sentiment from Gallup polls from 1936 to 1986, gender was a primary determinant of citizens' death penalty attitudes. Overall, men were more likely to support the death penalty than women.<sup>148</sup> It interacted with other demographic features such as ethnicity, socio-economic status, and political ideology.<sup>149</sup> Furthermore, white, Republican, high socio-economic status men from the West, Midwest, or Southern United States were most likely to strongly support the death penalty.<sup>150</sup> Conversely, racial minority (Black or Hispanic, in this case), low socio-economic status, non-Republican women from the U.S. East Coast were the least likely to support the death penalty.<sup>151</sup> These demographic trends, especially with respect to gender, have continued to persist into the present day. The 2021 Gallup Poll assessing Americans' capital punishment attitudes revealed that men continue to be more likely to favor the death penalty compared to women (though only by a 9% margin).<sup>152</sup> Research conducted in the late 1980s and 1990s, including a project that tested whether death penalty attitudes could change as a function of being in a

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146. Bruni, *supra* note 5, at 8-11.

147. Zeisel & Gallup, *supra* note 83, at 286 fig.1.

148. *Id.* at 291 tbl.6.

149. *Id.* at 292.

150. *Id.* at 292 tbl.7.

151. *Id.*

152. 2021 Gallup Poll: Public Support for Capital Punishment Remains at Half-Century Low, DEATH PENALTY INFO. CTR. (Nov. 19, 2021), [<https://perma.cc/4AFX-6LC8>].

death penalty class,<sup>153</sup> has confirmed these attitudinal differences as a function of gender.<sup>154</sup>

The confirmation of this finding into the 1990s is especially pertinent, as it demonstrates that gender differences in death penalty attitudes have persisted, even after the 1972 Supreme Court holding in *Furman v. Georgia*, which held that the use of the death penalty could violate the Eighth Amendment's protection against cruel and unusual punishment.<sup>155</sup> Furthermore, current work from the last twenty years has continued to replicate, even cross-culturally, the finding that women are less likely than men to be supportive of capital punishment.<sup>156</sup>

These attitudinal gender differences in death penalty support might be expected to have less pronounced effects in the jury box, since jury selection in capital cases removes those individuals who so strongly oppose or support capital punishment that they cannot be fair and impartial. Researcher Michael Antonio's detailed analysis of post-trial interviews with capital jurors revealed that the experiences of men and women differed.<sup>157</sup> Over 60% of the capital jurors reported that jury service on a death penalty case was emotionally upsetting.<sup>158</sup> Women

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153. Robert M. Bohm, *Death Penalty Opinions: A Classroom Experience and Public Commitment*, 60 SOCIO. INQUIRY 285, 290 tbl.2 (1990) [hereinafter Bohm, *Death Penalty Opinions*].
154. *Id.* at 290 tbl.2; Robert M. Bohm, *American Death Penalty Attitudes: A Critical Examination of Recent Evidence*, 14 CRIM. JUST. & BEHAV. 380, 385 (1987); Robert M. Bohm, *American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls*, in THE DEATH PENALTY IN AMERICA: CURRENT RESEARCH 113, 123-25 (Robert M. Bohm ed., 1991); James Alan Fox, Michael L. Radelet & Julie L. Bonsteel, *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 519 fig.2c (1990) [hereinafter Fox et al.].
155. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972); see also Fox et al., *supra* note 155 (discussing death penalty opinions in the post-*Furman* era).
156. See, e.g., John K. Cochran & Beth A. Sanders, *The Gender Gap in Death Penalty Support: An Exploratory Study*, 37 J. CRIM. JUST. 525 (2009); Chandrika M. Kelso & Thomas M. Green, *Examining Changes in Attitudes on the Death Penalty: 40 Years of Public Opinion*, J. FORENSIC SCI. & CRIM. INVESTIGATION, 1, 3 fig.3 (2017); Whitehead & Blankenship, *supra* note 7; Steven Stack, *Support for the Death Penalty: A Gender-Specific Model*, 43 SEX ROLES 163 (2000); see also Eric G. Lambert, Shanhe Jiang, O. Oko Elechi, Mahfuzul I. Khondaker, David N. Baker & Wang Jin, *A Preliminary Study of Gender Differences in Death Penalty Views of College Students From Bangladesh, China, Nigeria, and the United States*, 12 J. ETHNICITY CRIM. JUST. 44 (2014) (finding gender differences in college students' degree of support towards the death penalty only among participants from the United States, when comparing the attitudes of college students from the United States, Bangladesh, China, and Nigeria).
157. Michael E. Antonio, *Stress and the Capital Jury: How Male and Female Jurors React to Serving on a Murder Trial*, 29 JUST. SYS. J. 396 (2008).
158. *Id.* at 399.

were more likely to report being upset (with 71% of women jurors compared to 50% of men jurors reporting this), as well as say they had trouble sleeping and eating as a result of their jury service (with 48% of women jurors and 24% of men jurors reporting such an experience).<sup>159</sup>

## V. JUROR GENDER AND CIVIL JURY TRIALS

### A. *Factors Underlying Gender Differences in Civil Juries*

We now turn our attention to the role of juror gender in the civil realm and examine how a juror's gender may affect decisions about liability and damages. We frame this examination by first discussing the attitudinal and situational mechanisms that may undergird male versus female civil jurors' case judgments.

In criminal cases, we saw that differences in general attitudes toward punishment in capital cases, exemplified by death penalty support, were related to gender. Another set of gender differences appeared in criminal cases in which gender issues were salient. Civil cases show some intriguing similarities. First, in civil cases, perceptions of the merits of civil litigation constitute a relevant cluster of views that is associated with judgments of liability and damages. Significant numbers of both the lay public and civil jurors have complained of a civil litigation crisis in which meritless lawsuits are brought by greedy plaintiffs who seek damages from the deep pockets of wealthy corporate defendants.<sup>160</sup> Those who endorse this cynical and pessimistic view of civil litigation endorse the need for tort reform and, perhaps not surprisingly, are significantly more likely to favor defendants in civil lawsuits.<sup>161</sup> Interestingly, in a project in which participants made judgments of criminal and

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159. *Id.*

160. See NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* (1997); Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497 (2003); Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992); Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L. J. 217 (1993) [hereinafter Vidmar, *Empirical Evidence*].

161. See VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* 74-76 (2000) [hereinafter HANS, *BUSINESS ON TRIAL*] (summarizing research evidence that litigation crisis views are associated with defense verdicts and, in plaintiff win cases, with damage award amounts).

civil cases, participants who were more in support of tort reform due to a perceived excess of lawsuits and greedy plaintiffs were more likely to be pro-prosecution in criminal cases and pro-defense in tort cases.<sup>162</sup>

Research findings on whether beliefs in a litigation crisis vary by gender have been mixed. In an examination of 745 registered voters from the state of Louisiana, researchers found that race, more so than gender, political attitudes, or prior litigation experience, was an especially influential factor in an individual's support of the notion that Americans are too quick to sue.<sup>163</sup> White voters in the state were significantly more likely than Black voters to believe there were too many lawsuits.<sup>164</sup> Race, along with other factors, also emerged as a significant contributor in an analysis of litigation crisis attitudes in a study of 269 civil jurors; gender, however, was unrelated to views about civil litigation.<sup>165</sup>

As we proposed with respect to jurors in criminal cases, divergent life experiences between men and women may also create reliable gender differences in how they respond in particular civil jury trials. For example, in 2017, the nonprofit Stop Street Harassment found that women experience substantially higher rates of different forms of sexual harassment, from verbal sexual harassment to being physically followed, than their male counterparts.<sup>166</sup> Such disparities can translate into differences

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162. Gary Moran, Brian L. Cutler & Anthony De Lisa, *Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict Inclination in Criminal and Civil Trials*, 18 LAW & PSYCH. REV. 309, 310 (1994).

163. David Neubauer & Stephen S. Meinhold, *Too Quick to Sue? Public Perceptions of the Litigation Explosion*, 16 JUST. SYS. J. 1, 4 tbl.1, 5(1998). ("Among Louisiana voters, however, there exists no gender gap regarding suing behavior (see Table 1). Women are equally as likely as men to believe that Americans are too quick to go to court.")

164. *Id.*

165. Hans & Lofquist, *supra* note 160, at 91 (race was a significant predictor in a statistical analysis examining the predictive power of demographic and attitudinal variables; gender was not significant). One interesting question is whether men and women differ in their use of the civil justice system. In an analysis of differences in rates of compensation seeking between the United States and Canada, work by Herbert Kritzer, W. A. Bogart, and Neil Vidmar in 1991 revealed that Canadian women in Ontario were actually more likely to file an injury claim than men. This gender difference in compensation-seeking behavior did not extend to their American sample, however. See Herbert M. Kritzer, W. A. Bogart & Neil Vidmar, *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, 524, 529 (1991).

166. See Rhitu Chatterjee, *A New Survey Finds 81 Percent Of Women Have Experienced Sexual Harassment*, NAT'L PUB. RADIO (Feb. 21, 2018, 7:43 PM), [<https://perma.cc/C5L4-ZWAZ>] (reporting data from a January 2018 online survey conducted by the nonprofit group Stop Street Harassment, and indicating 81% of women versus 43% of men had experienced some form of sexual harassment in their lifetimes; women experienced higher rates of all sub-types of harassment that were assessed than their

in how male and female jurors determine liability in a sexual harassment case, as well as what range of behaviors they may believe to constitute sexual harassment, further informing their case attitudes and judgments. Differences in case judgments and verdicts by male, female, and gender non-conforming jurors may also be apparent in medical malpractice or personal injury suits. These differences may be driven by women's higher likelihood of using medical services compared to men,<sup>167</sup> thus perhaps enhancing their sensitivity to the issues involved in such lawsuits. Further, transgender individuals experience harassment and discrimination both societally and within the medical field; their distinctive life experiences could also influence, for example, their beliefs in the trustworthiness or credibility of medical professionals.<sup>168</sup>

Civil cases involve not only liability judgments but also assessments of the monetary damages that a successful plaintiff deserves. Here, a plaintiff's personal and household income could certainly be a significant factor in determining damages. In estimating a plaintiff's deserved damages, civil jurors may use their own income as a numerical "anchor."<sup>169</sup> Anchoring refers to the psychological process by which a number (for example, a juror's income) provides a starting point for a judgment (for example, a damage award). The juror will adjust their awards from this initial starting number, but the adjustments are usually insuf-

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male counterparts: e.g. verbal harassment (77% versus 34%), being physically followed (34% versus 12%), or unwanted sexual touching (51% versus 17%).

167. See, e.g., Klea D. Bertakis, Rahman Azari, L. Jay Helms, Edward J. Callahan, & John A. Robbins, *Gender Differences in the Utilization of Health Care Services*, 49 J. FAM. PRAC. 147 (2000) (documenting greater use of health services by women than men).

168. AM. COLL. OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION NO. 823, HEALTH CARE FOR TRANSGENDER AND GENDER DIVERSE INDIVIDUALS (2021). "Transgender and gender diverse individuals face harassment, discrimination, and rejection within society. Lack of awareness, knowledge, and sensitivity as well as bias from health care professionals leads to inadequate access to, underuse of, and inequities within the health care system for transgender patients." *Id.* at 76.

169. Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 129-34 (2011). Hans & Reyna argue that in deciding on a damage award, a civil juror first develops a gist sense of whether or not a damage award is warranted in the first place (a categorical judgment). If they feel that damages are warranted, they next make an ordinal judgment about whether that damage award should be nil, low, medium, or high, drawing on numbers from their everyday, personal experiences that they personally feel would be low, medium, or high award quantities. Altogether, based on these gist judgments (generated at both a categorical and ordinal level), jurors will then try to match their gist judgment with a specific dollar value, which can be conceptualized as their verbatim judgment of the damage award.

ficient.<sup>170</sup> In calculating lost income damages, men and women's awards may vary based on the different anchors they implement in calculating these awards. There is a persistent pay gap in the United States today, with women making \$0.82 for every \$1 a man makes.<sup>171</sup> Women of color face an especially pronounced gender pay gap, such that American Indian and Native Alaskans make \$0.71; Hispanic women make \$0.78; and Black or African-American women make \$0.79 for every dollar a white man makes.<sup>172</sup> Therefore, if women jurors rely on their own income as an anchor, their damage award estimates could also be lower than men's.

Another factor that could produce gender differences in damage award calculations involve the juror's level of numeracy (a general ability with numbers). Gendered differences in these capabilities and experiences could lead to different awards. In assessing the appropriateness of specific recommendations for a damage award, jurors can benefit from general proficiency in the calculation and manipulation of numbers, and for having sound number sense (that is, being able to assess numbers in their broader context).<sup>173</sup> Mock juror research by Rebecca Helm and colleagues experimentally assessed the impact of jurors' numeracy, finding that jurors with stronger numeracy ability were less variable in their proposed awards, and suggested awards that were more commensurate with the amount of pain and suffering incurred by the plaintiff.<sup>174</sup> Past work has identified a difference in men and women's numeracy, though the exact cause of this difference (whether through different life experiences such as lack of accessibility to math classes, or through differences in self-selection into STEM classes) is debated.<sup>175</sup> These gender differ-

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170. JENNIFER K. ROBBENNOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 131-32 (2016) (defining anchoring and describing its impact in damage award judgments).

171. *2022 State of the Gender Pay Gap Report*, PAYSACLE (2022), [<https://perma.cc/5FY8-KKZZ>].

172. *Id.*

173. Rebecca K. Helm, Valerie P. Hans & Valerie F. Reyna, *Trial by Numbers*, 27 *CORNELL J. L. & PUB. POL'Y* 107, 130-32 (2017).

174. Rebecca K. Helm, Valerie P. Hans, Valerie F. Reyna & Krystia Reed, *Numeracy in the Jury Box: Numerical Ability, Meaningful Anchors, and Damage Award Decision Making*, 34 *APPLIED COGNITIVE PSYCH.* 434, 434 (2020). ("Jurors higher in numeracy gave awards that more appropriately reflected the duration of pain and suffering and showed less variability in awards.")

175. *See, e.g.*, Alka Arora & Emily Pawlowski, *Examining Gender Differences in the Mathematical Literacy of 15-Year-Olds and the Numeracy Skills of the Age Cohorts as Adults*, PROGRAM FOR THE INT'L ASSESSMENT OF ADULT COMPETENCIES (2017), [<https://perma.cc/9S53-85JF>]. The American Institutes for Research analyzed students' mathematical literacy in the Program for International Student Assessment (PISA) in



ences could be manifested as differences in preferred awards, or greater variability in award suggestions.

We now turn to a review of research on the role of juror gender in civil cases. Although jury research on gender and civil cases is not as extensive as it is in the criminal context, we are able to observe some patterns that echo the earlier discussion of gender differences in criminal cases. Gender differences emerge largely when the cases are gender salient, such as trials of sexual harassment and related employment discrimination.

B. *Juror Gender and Civil Liability Judgments: Gender Emerges as a Factor in the Gender-Salient Context of Sexual Harassment*

Our review of jury scholarship indicates that the individual juror characteristic of gender is occasionally, but not reliably, related to liability judgments in civil cases. Altogether, compared to the demographic characteristics of civil jurors, case-relevant factors such as the defendant's conduct and intentionality level, as well as the severity of the plaintiff's injuries, have been shown to be more influential in shaping liability determinations.<sup>176</sup> In addition, the litigation crisis and tort reform attitudes that we discussed above are more often predictive of jurors' liability verdicts than the demographic characteristic of gender.<sup>177</sup> For example, one project that included civil jurors, mock jurors, and survey participants found that participants who perceived the civil litigation system as out of control were much less likely to find the defendant was negligent, and to recommend lower awards if they did find negli-

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2003 and adults' numeracy skills in the Program for the International Assessment of Adult Competencies (PIAAC) in 2012. *Id.* They found that the gender gap in mathematical literacy in 2003 (male students had greater literacy than females) either stayed consistent or increased (in half of the countries evaluated, with most pointed increases found in the United States) when the same individuals' numeracy skills were evaluated as adults. *Id.* Additionally, more females than males in nearly all countries evaluated chose non-STEM classes in college. *Id.*

176. Edith Greene, Michael Johns & Jason Bowman, *The Effects of Injury Severity on Jury Negligence Decisions*, 23 LAW & HUM. BEHAV. 675, 675 (1999).

177. Katherine V. Vinson, Mark A. Costanzo & Dale E. Berger, *Predictors of Verdict and Punitive Damages in High-Stakes Civil Litigation*, 26 BEHAV. SCI. & L. 167, 184 (2008). ("First, the effects of personal characteristics appear to be modest, and second, whether or not a juror characteristic has an impact depends heavily on characteristics of the individual case. . . . However, it is clear that in certain types of cases a juror's belief about whether or not the court system is experiencing a litigation crisis can predict this verdict and punitive damage decisions.").

gence.<sup>178</sup> However, in that research project, jurors' gender "was never a consistent predictor of reactions to plaintiffs in the statistical analyses."<sup>179</sup> In another study examining reactions to a product liability case, racial minority and lower socioeconomic status mock jurors were more likely to find a defendant liable compared to their white, higher socioeconomic status counterparts, but juror gender was not a significant influence on liability judgments.<sup>180</sup>

In most civil litigation, whether juror gender is a factor appears to depend on the case. This is evidenced by trial consultant Sean Overland's analysis of litigation consulting firm data from approximately 2,500 community members throughout the U.S. who had participated in pretrial research.<sup>181</sup> He examined men and women's responses to three different types of cases: auto manufacturing cases in which a design defect caused an injury; prescription drug cases in which medicine caused side effects; and accounting malpractice cases in which an accountant's misconduct caused the plaintiff harm.<sup>182</sup> Women were significantly more likely than men to favor the plaintiff in the automobile manufacturer cases, even when race and attitudes toward business and litigation were taken into account.<sup>183</sup> They also were more likely to favor the plaintiff in the prescription drug cases, but that effect disappeared once race was taken into account.<sup>184</sup> The participants' gender did not affect judgments in the accounting malpractice cases.<sup>185</sup> Another mock juror project found that women were more likely than men to favor the plaintiff in a products liability trial involving a toxic substance;

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178. HANS, BUSINESS ON TRIAL, *supra* note 161, at 75-76 (describing correlations between Litigation Crisis attitudes and civil case judgments).

179. *Id.* at 42. Hans observed that "[t]rials like [a child's injury in a paint store], in which the women's perspective seemed to lead to a harsher view of the mother's role, may be offset by other cases where the reverse occurs or no difference is found." *Id.*

180. Brian H. Bornstein & Michelle Rajki, *Extra-Legal Factors and Product Liability: The Influence of Mock Jurors' Demographic Characteristics and Intuitions About the Cause of an Injury*, 12 BEHAV. SCI. & L. 127, 143 (1994).

181. SEAN G. OVERLAND, THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS (Melvin I. Urofsky ed., 2009).

182. *Id.* at 53-58.

183. *Id.* at 58-59 (reporting a statistically significant gender difference in automobile cases); *id.* at 64 tbl.2-1 (showing a statistically significant effect for gender when race, other demographic variables, and attitudes were taken into account).

184. *Id.* at 59 (reporting statistically significant gender difference in prescription drug cases); *id.* at 68 tbl.2-3 (showing no statistically significant gender differences when race is taken into account).

185. *Id.* at 60 (reporting no statistically significant gender difference in accounting malpractice cases); *id.* at 71 tbl.2-4 (showing no statistically significant gender differences).

when mock jurors' attitudes toward litigation and business were included in the statistical analysis, however, the gender effect became nonsignificant.<sup>186</sup>

In contrast to this variable pattern, one case category reliably shows differences between men and women: sexual harassment and related employment discrimination. Research on juror gender differences in sexual harassment cases reveals a pattern similar to the gender differences found in jurors' judgments of sexual assault cases. In the context of sexual harassment cases, experimental and meta-analytic work has demonstrated that a person's gender<sup>187</sup> and endorsement of sexist attitudes<sup>188</sup> along with the type of legal standard used,<sup>189</sup> all affect perceptions of sexually harassing behavior. These perceptions include an individual's attitudes towards the defendant and victim of sexual harassment, the perceived seriousness of the harassing behavior, and the behaviors or actions that one may consider to constitute sexual harassment.

Documenting the influence of respondent gender on harassment perceptions, a meta-analysis of sixty-two studies by Maria Rotundo and colleagues found that compared to men, women perceive a broader range of behaviors to constitute harassment.<sup>190</sup> Moreover, gender differences were especially pronounced in interpreting behaviors such as derogatory attitudes towards women or a hostile work environment, and less strong in evaluating instances of sexual proposition or coercion.<sup>191</sup>

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186. Shari Seidman Diamond, Michael J. Saks & Stephan Landsman, *Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 307-08 (1998) (showing gender effect in liability judgments and that gender effect for liability persists with other demographic characteristics but becomes nonsignificant when attitudes are included in the statistical model).

187. Manish Madan & Mahesh K. Nalla, *Sexual Harassment in Public Spaces: Examining Gender Differences in Perceived Seriousness and Victimization*, 26 INT'L CRIM. JUST. REV. 80 (2016); Maria Rotundo, Dung-Hanh Nguyen & Paul R. Sackett, *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCH. 914 (2001).

188. Brenda L. Russell & Kristin Y. Trigg, *Tolerance of Sexual Harassment: An Examination of Gender Differences, Ambivalent Sexism, Social Dominance, and Gender Roles*, 50 SEX ROLES 565 (2004); Richard Wiener & Linda E. Hurt, *How Do People Evaluate Social Sexual Conduct at Work? A Psycholegal Model*, 85 J. APPLIED PSYCH. 75 (2000).

189. *E.g.*, a "reasonable person" versus a "reasonable woman." *See, e.g.*, Richard L. Wiener & Linda E. Hurt, *How Do People Evaluate Social Sexual Conduct at Work? A Psycholegal Model*, 85 J. APPLIED PSYCH. 75 (2000).

190. Rotundo et al., *supra* note 188, at 914.

191. *Id.* at 919 ("Separate meta-analyses within each category showed that the gender difference was larger for the less extreme and more ambiguous behaviors like derogatory attitudes and dating pressure than for sexual propositions and sexual coercion.").

An earlier meta-analysis by Jeremy Blumenthal, in 1998, confirmed similar small, albeit consistent, gender differences in harassment perceptions, though his work did not delineate how perceptions could differ by the type of harassing behavior.<sup>192</sup>

Additionally, in a study that presented participants with seventeen semi-fictional sexual harassment cases that varied in their severity, researchers Mary Gowan and Raymond Zimmerman found that judgments of defendant liability and damages differed based on a mock juror's gender.<sup>193</sup> Across all levels of case severity—ambiguous, innocuous, and severe—women jurors were more likely than men jurors to side with the plaintiff.<sup>194</sup> Women were also more likely than men to interpret ambiguous behavior presented in the scenarios as offensive.<sup>195</sup>

In a study about a hostile work environment case, Margaret Bull Kovera and colleagues examined how mock jurors' gender, and the inclusion of expert testimony on gender stereotyping and sexual harassment, influenced jurors' judgments.<sup>196</sup> Participants in the study were presented with a woman plaintiff who argued she experienced gender discrimination due to a hostile work environment.<sup>197</sup> Female jurors were 3.4 times more likely than males to perceive the plaintiff's depicted workplace as hostile and to find the defendant liable.<sup>198</sup> Compared to those who did not hear the expert testimony, mock jurors who heard expert testimony were also twice as likely to find the defendant liable.<sup>199</sup> Interestingly, expert testimony significantly increased the proportion of men who found for the plaintiff, but did not increase the already high proportion of women jurors who found liability.<sup>200</sup>

In another study, using a civil case of liability and damages arising from rape victimization, Linda Foley and Melissa Pigott examined the role that mock jurors' gender and their Belief in a Just World (BJW),

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192. Jeremy A. Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUM. BEHAV. 33, 46 (1998) ("the claims of narrative reviews... that gender differences in perceptions of sexual harassment are relatively small was supported, challenging claims of a 'wide divergence' between men and women's perceptions. Nevertheless, these small differences appeared stable across age, culture, and professional status.")

193. Mary A. Gowan & Raymond A. Zimmermann, *Impact of Ethnicity, Gender, and Previous Experience on Juror Judgments in Sexual Harassment Cases*, 26 J. APPLIED SOC. PSYCH. 596 (1996).

194. *Id.* at 611.

195. *Id.* at 608.

196. Kovera et al., *supra* note 8.

197. *Id.* at 367.

198. *Id.* at 369.

199. *Id.*

200. *Id.*

the notion of justice being served and people “getting what they deserve,” had on judgments of a rape victim’s degree of responsibility and damages awarded.<sup>201</sup> In this study, participants were presented with a scenario in which a woman plaintiff was raped by an employee in her apartment building; the defendant in this scenario was the owner /manager of the apartment building, by whom the rapist was employed.<sup>202</sup> Compared to women, men found the sexual assault victim more responsible for the rape.<sup>203</sup>

Although there is no research contrasting civil case judgments of gender-diverse and gender-conforming individuals, we expect that the discrimination faced by nonbinary and transgender people would make them particularly sensitive to claims of harassment and employment discrimination.

### C. Juror Gender Differences in Damage Awards

Earlier, we discussed the possibility that differences in income and numeracy might produce gender differences in damage award judgments. In particular, we speculated that a juror’s income might serve as an anchor that would influence damage award judgments. Previous research has found that a juror’s income influences their judgments in civil cases.<sup>204</sup> Work by Shari Diamond and her colleagues revealed that participants’ internal “guidepost” for what they felt would be appropriate to compensate an accident victim predicted their actual damage awards, but, in contrast to our speculation, mock jurors’ damages were not significantly correlated with their gender or income level.<sup>205</sup> On our proposal that gender differences in numeracy might create gender differences in damage award decision-making, we have not located studies that have examined the interaction between numeracy and gender in damage award decision-making, so it remains an open question.

In a 1972 study, one of the earliest examining the role of juror gender and damages, Stuart Nagel and Lenore Weitzman analyzed 364 personal injury cases from the Jury Verdict Research Corporation.<sup>206</sup>

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201. Foley & Pigott, *supra* note 127.

202. *Id.* at 941.

203. *Id.* at 942-43.

204. See, e.g., Diamond et al., *supra* note 186, at 306 (finding that lower-income mock jurors were more likely to find the civil defendant liable); Vidmar, *supra* note 160, reports household income is related to size of award (as quoted in note 217).

205. *Id.* at 314-15.

206. Stuart Nagel & Lenore Weitzman, *Sex and the Unbiased Jury*, 56 JUDICATURE 108 (1972).

They found an interesting pattern of same-gender favoritism, with male-dominated civil juries awarding higher damage awards to male plaintiffs than to female plaintiffs.<sup>207</sup> Similarly, female-dominated civil juries favored female plaintiffs over male plaintiffs, although the favoritism was not as pronounced.<sup>208</sup> However, this gender difference was qualified by the fact that male plaintiffs' injuries were more severe than those of females, so injury severity was confounded with juror gender effects.<sup>209</sup> More recent scholarship on this topic has not yielded evidence of in-group favoritism. Indeed, some authors caution that similarity between a juror and a litigant can produce more negative treatment instead of more favorable treatment.<sup>210</sup>

In two mock jury experiments involving an environmental damages case, male jurors awarded higher punitive damages than their female counterparts, though the effect of a juror's gender was generally modest, accounting for only 3% of the variance in the punitive damage awards.<sup>211</sup> In contrast, in their 1998 examination of the psychology underlying punitive damages awarded in a wide variety of personal injury cases, Daniel Kahneman and colleagues found that women participants expressed greater outrage at the defendants' behavior and greater desire to punish the defendants; they also gave higher punitive damage awards.<sup>212</sup> In one of the few studies that examined the intersectionality of gender, race, age, and education, James Underwood and colleagues found that younger white women mock jurors were the least generous group in awarding damages to the plaintiff in an automobile accident case.<sup>213</sup>

The aforementioned work by Foley and Pigott, which found that liability judgments in a civil case arising from rape were influenced by a

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207. *Id.* at 109.

208. *Id.* ("Note, however that although women favor women, they do so to a lesser extent than men favor men.").

209. *Id.*

210. EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 87-89 (2003) (describing the role of juror-litigant similarity, and describing the "black sheep" effect whereby jurors are more negative toward plaintiffs who are similar to them).

211. Reid Hastie, David A. Schkade, & John W. Payne, *Juror Judgements in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445, 464 (1999) [hereinafter Hastie et al.].

212. Daniel Kahneman, David Schkade & Cass R. Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49, 62 (1998).

213. James H. Underwood, III, Denis Oris Boudreaux & Spuma Rao, *Demographics in Civil Trials: Biases and Implications*, 7 J. BUS. & ECON. RSCH. 33, 38 (2009).

juror's gender, also examined jurors' damage award decisions.<sup>214</sup> Interestingly, the psychological construct of Belief in a Just World (BJW) affected men and women jurors' awards differently: men with high levels of BJW awarded less in damages compared to those with low levels of BJW, while in striking contrast, women with high levels of BJW awarded *more* in damages compared to those with low BJW.<sup>215</sup> Thus, it seems for men, their belief in a just world led them to attribute greater responsibility to the victim and award less to the plaintiff, while for women, their justice attitudes prompted them to be more supportive of the plaintiff. The notion of men's belief in justice translating into more punitive attitudes toward the plaintiff in sexual assault cases arguably aligns with the previously mentioned work demonstrating that men's greater death penalty support is driven by their retributivist attitudes—attitudes which, like a belief in a just world, are also based in notions of restoring justice.<sup>216</sup>

Other work, however, has yielded no differences based on a juror's gender or other demographic features in damage award determinations, in either personal injury or medical negligence cases.<sup>217</sup> For example, in their 2008 study comparing noneconomic damages proffered in a medical negligence case between professional arbitrators and mock jurors, Neil Vidmar and Jeffrey Rice found no significant relationship between a mock juror's gender and their pain and suffering awards.<sup>218</sup> Instead, they found that case-relevant factors such as the specific dollar amount requested by plaintiffs more consistently influenced jurors' proposed damage awards, an effect in alignment with well-known anchoring effects at play in jurors' determination of civil damages.<sup>219</sup> That is, the higher the damage award requested by the plaintiff, the higher the subsequent damage award granted.<sup>220</sup>

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214. Foley & Pigott, *supra* note 127.

215. *Id.* at 947-48.

216. *Id.*

217. Neil Vidmar, *Empirical Evidence*, *supra* note 160, at 252 ("Finally, the juror's gender, age, and household income were not related to the size of the award."); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883 (1993); Vinson et al., *supra* note 177.

218. Vidmar & Rice, *supra* note 217, at 895.

219. *Id.*

220. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519 (1996); Shari Seidman Diamond, Mary R. Rose, Beth Murphy & John Meixner, *Damage Anchors on Real Juries*, 8 J. EMPIRICAL LEGAL STUD. 148 (2011); Hastie et al., *supra* note 211; Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the*

The Gowan and Zimmerman project described earlier, which found that women were more likely to find liability in sexual harassment cases, did not find that participants' recommended damage awards differed by juror gender. Instead, participants who said they had experienced sexual harassment, irrespective of their gender, had a greater likelihood of proposing higher damage awards, compared to those who did not have prior experience.<sup>221</sup>

Damage award research in wrongful death cases has demonstrated that plaintiffs' gender and their lost income amounts were more impactful in shaping damage awards than a juror's gender. This common finding makes sense given the average income differences for men and women. For example, in their analysis of ninety-eight wrongful death lawsuits in the state of Washington in 1989, Goodman and her colleagues found that the median, average, and range of damage awards granted to plaintiffs of male decedents were all greater than that of female decedents.<sup>222</sup> Additionally, across two different studies, Goodman and colleagues collected experimental data of mock jurors' proposed damage awards in response to different types of wrongful death cases.<sup>223</sup> Overall, across both studies, both male and female mock jurors' median damage awards were lower for plaintiffs of female compared to male decedents.<sup>224</sup> In particular, in their second study, they asked mock jurors to provide both a total damage award and indicate what portion of the total award would be attributable to lost income.<sup>225</sup> They found that for plaintiffs of male decedents, lost income awards were greater than the median proposed damage award, while lost income awards for plaintiffs of female decedents fell below the median proposed total damage award.<sup>226</sup> Other work published by the RAND Corporation<sup>227</sup> and by the Washington State Task Force on Gender and Justice in the Courts<sup>228</sup> also found that in wrong-

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*Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353 (1999).

221. Gowan & Zimmerman, *supra* note 193.

222. Jane Goodman, Elizabeth F. Loftus, Marian Miller & Edith Greene, *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 LAW & SOC'Y REV. 263 (1991).

223. *Id.*

224. *Id.*

225. *Id.* at 277.

226. *Id.*

227. ELIZABETH M. KING & JAMES P. SMITH, ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS (1988), *cited in* Sherri R. Lamb, *Toward Gender-Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective*, 72 CHI.-KENT L. REV. 299 (1996).

228. Sherri R. Lamb, *Toward Gender-Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective*, 72 CHI.-KENT L. REV. 299 (1996).



ful death cases, survivors of male decedents were granted much more, on average, than survivors of female decedents, and that this consistent difference was significantly driven by real-life gender discrepancies in income.<sup>229</sup>

Assessing the role of juror gender in damage award decisions, we are led to conclude that the influence of juror gender on damage awards is modest at best, and likely varies from case to case. About the role of gender and other demographic characteristics, jury scholars Edie Greene and Brian Bornstein write:

If they matter at all, individual demographic differences exert a small and inconsistent influence on award values and probably account for a tiny fraction of the variance in assessed damages. Even then, the effect is likely to be case specific. Jurors' decisions about compensation—like their judgments of a criminal defendant's guilt—apparently cross gender, political, and economic lines.<sup>230</sup>

Although the research is not systematic enough to examine this possibility, we suspect that cases in which gender is salient—and in which men and women might have special insights about the significance and severity of the plaintiff's injuries and thus the damages that are appropriate to compensate for these injuries—will be ones in which a juror's gender, in interaction with other personal characteristics and experiences, will matter.

## VI. JUROR GENDER AND JURY DELIBERATION

### A. *Gender Roles in Jury Deliberation*

Thus far we have focused on individual differences between men and women jurors in particular criminal and civil case types. To understand the impact of juror gender more completely, we need to consider whether and how any distinctive responses between men and women are affected by the group nature of jury decision-making. Do men and women take different roles and express distinctive preferences in their jury deliberation, or are gender differences erased or altered during group deliberation?

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229. *Id.*; KING & SMITH, *supra* note 227.

230. GREENE & BORNSTEIN, *supra* note 210, at 87.

In Maccoby and Jacklin's 1974 summary of gender differences, they observed that in mixed-sex groups, "formal leadership tends to go to males in the initial phases of the interaction, but the direction of influence becomes more sex-equal the longer the relationship lasts, with 'division of authority' occurring along lines of individual competencies and division of labor."<sup>231</sup> A meta-analysis of studies examining traditional leadership stereotypes confirmed that such stereotypes are associated with masculinity, although the researchers of this work also reported that the association of leadership with agentic and masculine qualities appears to be stronger among men than women, and has declined over time.<sup>232</sup> Even so, this body of research leads us to expect that men and women on the jury will perform their roles somewhat differently.

Gender differences in economic negotiations have some potential implications for jury deliberations in civil cases. A meta-analysis of fifty-one studies found that men were more successful than women in achieving their desired economic outcomes during a negotiation, though this effect was moderated by previous experience with negotiating.<sup>233</sup> The authors argue that this gender difference could be driven by men and women conforming to stereotypical gender roles; men, for example, might be more likely than women to initiate a negotiation with an aggressive offer (an act which, in the context of a jury deliberation, would be akin to being the first juror to propose a damage award amount), while women might refrain from doing so.<sup>234</sup> Civil jurors' discussions of damage awards involve proposing and negotiating different damage award amounts. Thus, this work on economic negotiations suggests the possibility of gender differences in civil jury deliberations.

We first consider the selection of the jury foreperson and the participation of men and women in the jury deliberation. We then turn to how the gender composition of juries affects group judgments.

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231. MACCOBY & JACKLIN, *supra* note 105, at 353.

232. Ann M. Koenig, Alice H. Eagly, Abigail A. Mitchell & Tiina Ristikari, *Are Leader Stereotypes Masculine? A Meta-Analysis of Three Research Paradigms*, 137 PSYCH. BULL. 616 (2011).

233. Jens Mazei, Joachim Hüffmeier, Phillipp A. Freund, Alice Stuhlmacher, Lena Bilke & Guido Hertel, *A Meta-analysis on Gender Differences in Negotiation Outcomes and their Moderators*, 141 PSYCH. BULL. 85 (2015).

234. Edward W. Miles, *Gender Differences in Distributive Negotiation: When in the Negotiation Process do the Differences Occur?*, 40 EUR. J. SOC. PSYCH. 1200 (2010); Alice F. Stuhlmacher & Eileen Linnabery, *Gender and Negotiation: A Social Role Analysis*, in HANDBOOK OF RESEARCH ON NEGOTIATION 221 (2013), as cited in Mazei et al., *supra* note 233; Eagly & Wood, *supra* note 119.

### B. *Gender Differences in Foreperson Selection and Participation in Jury Deliberations*

In the 1950s, as women began to join juries, albeit in small numbers, men were much more likely to be chosen to lead the jury as the jury foreperson.<sup>235</sup> The Chicago Jury Project conducted significant research with mock juries in the 1950s and 1960s, soliciting participants from local jury pools, presenting them with legal cases, and recording and analyzing their mock jury deliberations.<sup>236</sup> The selection of jury forepersons in these mock juries often occurred quickly, but nonetheless was strongly affected by the external social status of the jurors. Along with other social status characteristics such as occupational prestige and formal education, men were more likely than women to serve as jury forepersons.<sup>237</sup> That pattern has been confirmed multiple times, even as women joined juries in greater numbers and women's occupational roles expanded. An examination of Texas juries from 1971 to 1974 found that just 14 of 155 juries (9%) had women forepersons, although 46% would have been expected based on chance.<sup>238</sup> Another archival study of 179 jury trials tried in 1975 also found that women were underrepresented as forepersons.<sup>239</sup>

The numbers have improved over time, although even in the past few decades there is still some evidence that women are not selected to lead juries as often as would be expected based on their numerical representation on juries. For example, in an analysis of 206 King County, Washington juries who served in 2004, it was found that, compared to their female counterparts, male jurors were disproportionately likely to serve as forepersons.<sup>240</sup> Dennis Devine and colleagues reported in their

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235. Fred L. Strodbeck, Rita M. James & Charles Hawkins, *Social Status in Jury Deliberations*, 22 AM. SOCIO. REV. 713, 715 (1957); Fred L. Strodbeck & Richard D. Mann, *Sex Role Differentiation in Jury Deliberations*, 19 SOCIOMETRY 3 (1956).

236. Strodbeck et al., *supra* note 235, Strodbeck & Mann, *supra* note 235.

237. Strodbeck et al., *supra* note 235, at 715 (finding that proprietors were three and a half times more likely to serve as laborers, and that "only one-fifth as many women were made foreman as would be expected by chance").

238. B. Beckham & H. Aronson, *Selection of Jury Foreman as a Measure of the Social Status of Women*, 43 PSYCH. REPS. 475 (1978).

239. Norbert L. Kerr, Douglas L. Harmon & James K. Graves, *Independence of Multiple Verdicts by Jurors and Juries*, 12 J. APPLIED SOC. PSYCH. 12 (1982).

240. Leah Sprain, Laura W. Black & John Gastil, *First Among Strangers: The Selection of Forepersons and Their Experience as Leaders in Civil and Criminal Juries*, ACADEMIA.EDU, [https://www.academia.edu/12151938/First\\_among\\_Strangers\\_The\\_Selection\\_of\\_Forepersons\\_and\\_Their\\_Experience\\_as\\_Leaders\\_in\\_Civil\\_and\\_Criminal\\_Juries](https://www.academia.edu/12151938/First_among_Strangers_The_Selection_of_Forepersons_and_Their_Experience_as_Leaders_in_Civil_and_Criminal_Juries) (last visited Nov. 2, 2022).

2007 article that 127 of 179 (71%) of juries they studied had male forepersons.<sup>241</sup> The gendered foreperson selection patterns identified in these studies of actual juries have also been found in many mock jury studies.<sup>242</sup> Of course, gender interacts with other individual characteristics: jurors with more years of formal education, higher status, and previous jury experience are also more likely to be selected as forepersons, as are those who sit at the head of the table and those who speak first.<sup>243</sup>

The gender differential in foreperson selection is significant. Forepersons are “first among equals;” jury research confirms that forepersons participate more actively than other members on the jury.<sup>244</sup> They are seen as more influential, and evidence suggests that the foreperson in fact has more influence.<sup>245</sup> Several mock civil jury studies have compared the associations between individual jurors’ initial preferences and the final group damage award amounts and have found a closer relationship between the foreperson’s initial preferences and the final damage award.<sup>246</sup>

Another important consideration is the extent to which men and women participate in the jury deliberation. The very purpose of diversity on the jury is to ensure that multiple perspectives are represented in the jury room.<sup>247</sup> A substantial amount of participation from jury members is essential in factfinding, especially when jurors have different life experiences, attitudes, and insights. Here, in contrast to the foreperson selection findings, the systematic studies of juror participation present a more mixed picture.<sup>248</sup> Some summaries of the research report that men tend to speak more than women during jury deliberations, offer more evidence-based ideas and suggestions on average, tend to interrupt females more frequently when speaking, are more likely to choose a seat at the head of the deliberating table, and are more likely to be perceived by

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241. Dennis Devine, Jennifer Buddenbaum, Stephanie Houp, Dennis P. Stolle & Nathan Studebaker, *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. EMPIRICAL LEGAL STUD. 273 (2007).

242. See Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH., PUB. POL’Y & L. 622, 696 (2001); Garold Stasser, Norbert L. Kerr & Robert M. Bray, *The Social Psychology of Jury Deliberations: Structure, Process, and Product*, in THE PSYCHOLOGY OF THE COURTROOM 221, 223 (Norbert L. Kerr & Robert M. Bray eds., 1982).

243. Devine et al., *supra* note 241, at 696.

244. *Id.*

245. *Id.*

246. *Id.*

247. Diamond & Hans, *supra* note 50.

248. Erin York Cornwell & Valerie P. Hans, *Representation through Participation: A Multi-level Analysis of Jury Deliberations*, 45 LAW & SOC’Y REV. 667 (2011).

their fellow jurors as being independent, strong, influential, and a leader.<sup>249</sup> Some of the earliest studies, however, did not control for the fact that men were also more likely to serve as jury foreperson, so it was unknown whether men and women jurors who were not jury leaders also differed in their contributions to the jury deliberation.<sup>250</sup> A large study of felony jury trials conducted in four U.S. jurisdictions during 2000-2001 provides a more comprehensive picture of juror participation by gender and other individual and case characteristics.<sup>251</sup> The researchers analyzed responses to self-reported participation in the jury deliberation, examining the possible effects of individual-level and contextual factors. The question asked, “how much did you participate in the jury deliberations?” and jurors answered on a seven-point scale labeled on one end “[n]ot at all” and the other end “[a] great deal.” Close to 85% of the jurors who responded chose one of the three highest scale values, and about 33% picked the highest.<sup>252</sup> The juror’s gender did not have an overall effect on self-reported participation, and men and women generally responded similarly.<sup>253</sup> However, juror gender did interact with the juror’s race and the jurisdiction in which the jury trial was held: Asian-American female jurors in the Los Angeles courts reported less participation than others, underscoring the value of examining gender in interaction with other characteristics.<sup>254</sup>

### C. *Gender and Conformity Effects in Jury Deliberations*

Group polarization during deliberations, whether in a legal setting or not, tends to move opinions to a more extreme point than they were pre-deliberation and is accentuated among like-minded individuals.<sup>255</sup> Moreover, the process of group polarization can be driven by social conformity pressure, and relatedly, through normative influence: the notion of publicly shifting one’s expressed viewpoints to conform with a group simply to maintain the group’s approval, without actually generating a

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249. Fowler, *supra* note 24; Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987); Charlan Nemeth, Jeffrey Endicott & Joel Wachtler, *From the '50s to the '70s: Women in Jury Deliberations*, 39 SOCIOMETRY 293 (1976).

250. See Stasser et al., *supra* note 242, at 226-27.

251. Cornwell & Hans, *supra* note 248.

252. *Id.* at 680 Tbl. 2.

253. *Id.* at 682 Tbl. 3.

254. *Id.* at 685 Fig. 1.

255. Cass R. Sunstein & Reid Hastie, *Four Failures of Deliberating Groups* 1-32 (Univ. of Chi. L. & Econ., Olin Working Paper No. 401, Univ. of Chi., Pub. L. Working Paper No. 215, 2008), [<https://perma.cc/93RR-ZBEG>].

cognitive change in viewpoints or being swayed by concrete information presented during the deliberation.<sup>256</sup> Informational influence, in contrast, changes deliberation content; jurors who support a particular opinion will, for example, express more views in alignment with this opinion and bring up evidence supporting this opinion with a greater frequency.<sup>257</sup>

Conformity pressures in a jury can restrict the expression of minority opinions, or at times silence them altogether.<sup>258</sup> Individuals' hesitation to express minority opinions is thus driven by normative influence.<sup>259</sup> Gender and race differences have also been found in perceptions of mock jurors who express minority opinions. In their research, Jessica Salerno and colleagues found that when women, compared to men, and Black participants, compared to white participants, were holdout jurors in a mock jury experiment and expressed anger in voicing their minority opinions, they were perceived by the other mock jurors as less influential and less effective in their communication.<sup>260</sup>

In the context of rape and child sexual abuse cases, Jonathan Golding and colleagues illustrated how gender differences in deliberation behavior can shape juror conformity, by examining the persistence of female jurors' pro-victim and anti-defendant attitudinal tendencies throughout a jury deliberation.<sup>261</sup> In their analysis of 300 mock jurors placed into six-person juries, it was found that pre-deliberation, women were more likely to render guilty verdicts than men.<sup>262</sup> Moreover, during deliberation, men tended to make more pro-defense statements;

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256. Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955); Michael A. Hogg, *Social Psychology of Group Processes*, 21 INTL. ENCYCLOPEDIA SOC. & BEHAV. SCI. 6417 (2001); Sunstein & Hastie, *supra* note 255.

257. K.L. Hansen, E.G. Schaefer & J.J. Lawless, *Temporal Patterns of Normative, Informational, and Procedural-Legal Discussion in Jury Deliberations*, 14 BASIC & APPLIED SOC. PSYCH. 33 (1993); Sarah Tanford & Steven Penrod, *Jury Deliberations: Discussion Content and Influence Processes in Jury Decision Making*, 16 J. APPLIED SOC. PSYCH. 322 (1986).

258. Sunstein & Hastie, *supra* note 255; Jonathan M. Golding, Gregory S. Bradshaw, Emily E. Dunlap & Emily C. Hodell, *The Impact of Mock Jury Gender Composition on Deliberations and Conviction Rates in a Child Sexual Assault Trial*, 12 CHILD MALTREATMENT 182 (2007).

259. Kimberly Rios & Zhuoren Chen, *Experimental Evidence for Minorities' Hesitancy in Reporting Their Opinions: The Roles of Optimal Distinctiveness Needs and Normative Influence*, 40 PERSONALITY & SOC. PSYCH. BULL. 872 (2014).

260. Jessica M. Salerno, Liana C. Peter-Hagene & Alexander C. V. Jay, *Women and African Americans Are Less Influential When They Express Anger During Group Decision Making*, 22 GRP. PROCESSES & INTERGROUP REL. 57 (2017).

261. Golding et al., *supra* note 258.

262. *Id.* at 185.

while a female-majority jury attenuated that tendency, a clear preference for the defense or prosecution did not emerge from women's statements.<sup>263</sup> Additionally, women switched their votes during deliberation more than men did.<sup>264</sup> However, the presence or absence of a female-majority jury affected the malleability of all jurors' attitudes. That is, jurors in a female-majority jury were more likely to change their verdicts from not-guilty to guilty compared to those jurors in a non-female majority jury.<sup>265</sup> This also resulted in female-majority juries yielding a greater number of guilty verdicts than non-female majority juries.<sup>266</sup> In a non-majority female jury, jurors were more likely to change their attitudes from guilty to not guilty.<sup>267</sup> Within non-female majority juries, female jurors' lack of a clearly vocalized preference towards the prosecution or defense during deliberation—though their pre-deliberation verdicts clearly sided towards the prosecution—could be attributable to gender differences in group negotiation and communication.<sup>268</sup>

## VII. CONCLUSION

This Article began by describing the changes over time in women's jury participation, from a starting point of complete exclusion. As women slowly began taking their places in jury boxes around the nation, special provisions for women and gender-based peremptory challenges founded on stereotypes impeded their progress. Over time, full gender parity has nearly been achieved, although deliberation room experiences can at times contribute to a diminution of women's voices.

Women and men's full and equitable participation on juries is paramount, as they bring distinctive life experiences and sets of attitudes to the task of deciding criminal and civil cases. To be sure, in both criminal and civil cases, we found much overlap in the decisions that men and women jurors reach. Yet we also uncovered pockets of difference. In criminal cases, men and women hold different attitudes about criminal punishment that are reflected in, among other things, their decisions in capital cases; they also respond differently to gender-salient cases such as sexual assault and child sexual abuse. With respect to civil cases, men and women have generally similar attitudes toward civil litigation. Alt-

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263. *Id.* at 185-86.

264. *Id.* at 186.

265. *Id.* at 186-87.

266. *Id.*

267. *Id.*

268. *Id.* at 187-88 (discussion of potential reasons for gender differences).

though a juror's gender is associated with civil case outcomes in some instances, in others it is not. Most personal injury cases do not appear to be strongly gendered in nature; and as a result, men and women are apparently not motivated to "do gender." The most reliable differences come, again, in civil cases where gender is salient, such as sexual harassment cases. Throughout this Article, we have suggested several reasons why men and women might have different damage award preferences, including a juror's household income level and level of numeracy, both of which tend to be different for men and women. However, our review of the research did not reveal consistent damage award differences along gender lines.

Highlighting the different voices men and women bring to the jury room, and considering the understudied contributions that gender-diverse individuals may bring, underscores the value of selecting and seating a fair and impartial jury. With respect to jury selection, the well-documented limitations of *Batson* and *J.E.B.* suggest that modifying the procedure for handling biased peremptory challenges is long overdue. A few states have moved toward implementing an "objective observer" standard for evaluating whether peremptory strikes have been used based on race, gender, or another protected class characteristic.<sup>269</sup> Under such a mechanism, rather than a judge ruling that an attorney has shown purposeful discrimination in exercising a peremptory strike, the court instead determines whether an objective observer would view the prohibited factor as a basis for the peremptory challenge. Employing such a standard avoids the difficult situation in which a judge must label an attorney as biased; it also allows for the recognition and consideration of implicit, unconscious biases at play during jury selection.

The possibility that gender bias will infect the conduct of jury trials, and that jurors might be influenced consciously or unconsciously by gender stereotypes as they evaluate attorneys, witnesses, trial evidence, and even their fellow jurors, leads us to recommend that judges consider giving anti-bias instructions in jury trials. Some courts are developing and promoting such instructions, although to date there is not yet convincing evidence about their effectiveness in decreasing explicit or implicit bias in jury decision-making.<sup>270</sup>

As for the gender dynamics in jury deliberations, although men and women are technically on equal footing in the jury room, contem-

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269. California and Washington State have modified their approach to *Batson* challenges to replace the finding of purposeful discrimination with an objective observer approach. CAL. CIV. PROC. CODE § 231.7 (West 2020); WASH. GEN. R. 37 (West 2018).

270. Jennifer K. Elek & Andrea L. Miller, *The Evolving Science on Implicit Bias*, NAT'L CTR. STATE CTS. REP. (March 2021).



porary research suggests that at times women still face obstacles in expressing their views without interruption, and that women continue to be less likely than men to serve as the forepersons of their juries. These inequities suggest that we need to examine the structure and context of the jury jury for mechanisms that instead foster egalitarian participation. One such mechanism may be the jury's decision rule—that is, whether jurors are required to come to a unanimous as opposed to a majority verdict. One research project showed that the rate of interruptions that women experienced during jury deliberation was significantly reduced when the group deliberated under a unanimous rather than majority rule.<sup>271</sup> Thus, the 2020 Supreme Court decision in *Ramos v. Louisiana*, holding that unanimity is required in serious criminal cases in both state and federal courts, was a welcome development, although many states continue to use a majority decision rule in their civil trials.<sup>272</sup>

To close, we reiterate *Ballard's* memorable observation that “[t]he truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of one on the other is among the imponderables.”<sup>273</sup> Our survey of gender and the jury has been an attempt to unpack those imponderables and identify the ways in which a juror's gender influences jury decision-making. The differences we have documented in perspectives of men and women underscore the value of full and equitable participation of the gentlewomen of the jury.

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271. Tali Mendelberg, Christopher F. Karpowitz & J. Baxter Oliphant, *Gender Inequality in Deliberation: Unpacking the Black Box of Interaction*, 12 PERSPS. POLIT. 18, 18 (2014) (“With majority rule and few women, women experience a negative balance of interruptions when speaking, and these women then lose influence in their own eyes and in others’. But when the group is assigned to unanimous rule, or when women are many, women experience a positive balance of interruptions, mitigating the deleterious effect of small numbers.”).

272. *Ramos v. Louisiana*, 140 U.S. 1390 (2020); Shari S. Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006) (documenting problems with non-unanimous decision rule juries).

273. *Ballard*, 329 U.S. at 193-94 (1946).