

Final Report on New Jersey's Empirical
Study of Jury Selection Practices and
Jury Representativeness

Prepared for the New Jersey Supreme Court

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AUTHOR'S PREFACE

In this report, I use data from 95 trials across 14 counties to examine the representativeness of juries in New Jersey and to explore potential sources of attrition from jury service that are systemic (system-wide) and/or systematic (attributable to processes). Significantly, and surprisingly, the profile of people selected for juries in most – but not all – New Jersey counties reasonably represented the profile of people *who appear at court* (there is, however, systemic minority attrition among the group who appears at courthouses). Precisely because results were surprising, I use this preface to ensure clarity on which conclusions can and cannot be drawn from these data.

Supported Conclusions

As outlined in more detail in the report, the data support the following conclusions:

*The data support the conclusion that people who appear for jury service do not fully represent their communities.

*The report finds that, sporadically, final juries fail to represent the panels from which they were drawn, and in some instances, all members of a minority group failed to be seated on a jury. The latter was particularly likely when there were few minority-group members in the venire and in civil cases.

*The data support the conclusion that criminal juries do a better job representing communities than do civil juries, likely because criminal juries are larger in size (12 vs. 6 jurors).

*The data support the conclusion that the challenge for cause is the most common way for people to be removed from jury service in criminal cases, and it is the second-leading source of attrition from civil cases. The data do *not* suggest that attorneys must routinely use their peremptory challenges to compensate for judges who are highly conservative about granting challenges for cause.

*The report finds that New Jersey forms large panels for jury selection in routine trials, larger than is typical in most other areas of the country. High proportions of jurors are “not used” (i.e., neither dismissed through a challenge for cause or peremptory challenge, nor selected), and this is especially true in civil trials.

*The report finds that attorneys almost never use their full complement of peremptory challenges.

*The report finds that although peremptory challenges can be linked sporadically to minority-group attrition patterns, peremptory challenges are not the primary reason why African American, Latino, or Asian jurors fail to make it on to a jury.

Unsupported/Unwarranted Conclusions

At the same time, these data CANNOT be used to conclude any of the following:

**The report does NOT conclude that New Jersey courts should be unconcerned about racial or ethnic underrepresentation in jury selection. In contrast, the findings indicate that the processes that determine who appears at the courthouse constitute a systemic source of minority-group attrition because concerning levels underrepresentation appeared in nearly all areas studied, a finding consistent with many studies of other areas and courts.ⁱ Determining which systematic processes account for this common pattern is beyond the scope of this report, but nothing in this report should suggest that New Jersey need not consider this important question.*

Excepting that the size of civil juries likely impedes better representation, most practices occurring at the courthouse did not produce systemic race- or ethnicity-based attrition. There were either no relationships between

ⁱ See, e.g., Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries*, 39 JOURNAL OF CRIME AND JUSTICE 75 (2016); Mary R. Rose, Raul S. Casarez, and Carmen M. Gutierrez, *Jury Representation in the Modern Era: Evidence from Federal Courts*, 15 JOURNAL OF EMPIRICAL LEGAL STUDIES 378 (2018).

race/ethnicity and selection processes, or instances of underrepresentation were sporadic and county-specific. Significantly, whether these sporadic instances of underrepresentation reflect recurrent, systematic problems in those specific counties cannot be determined from these data. These data represent a snapshot of one, roughly six-week point in time, and some areas contributed only a few trials to the dataset in that time.

Rather than being dismissed or minimized, the instances of underrepresentation described in this report offer an opportunity for counties to consider why minority groups failed to make it onto some juries at all or did so in lower proportions than their representation in the venire. Consistent with their constitutional obligations, courts in all areas, even those with little minority attrition in these data, should continue to look for concerning patterns of underrepresentation in their jury pools and juries.

**The data do NOT support a conclusion that the number of peremptory challenges allocated to attorneys does no harm to jury selection practices and outcomes.* Compared to other states, New Jersey has an unusually high number of peremptory challenges allotted to attorneys; it also has unusually large panels called up for jury selection in a given case. As suggested in Section VII of this report, conceivably these two factors are related because panel sizes may need to

be large to accommodate the possibility of both sides using all of their strikes. If true, this would constitute one way that peremptory challenge practices negatively affect other aspects of jury selection. New Jersey courts should rightly be concerned if prospective jurors feel that their time is wasted when they are “not used,” an outcome the data reveals to be commonplace. Nonetheless, I did not have access to the type of data (e.g., interviews with jury clerks) that would confirm the connection between panel size planning and the expected exercise of peremptory challenges, nor did I speak to New Jersey jurors about their reactions to their experiences.

More importantly, the ability to observe a relationship between attorneys’ use of large numbers of peremptory challenges and levels of minority representation was limited. This is because attorneys almost never used their full allotment of challenges. In criminal cases, prosecutors used about four challenges on average, and defendants used about six, far below the large number allotted. Studies in other areas, such as capital cases in other jurisdictions, suggest that using large numbers of peremptory challenges *can* negatively affect representation and have other negative effects. For example, counsel in capital cases often have a sizeable number of challenges. According to one study of Philadelphia, in more than half of the cases in which young African American men

appeared in the venire for capital cases, prosecutors were able to remove all of them.ⁱⁱ They were able to remove all young Black women in 41% of the cases that contained at least one person from this group.ⁱⁱⁱ Because prosecutors in criminal cases are disproportionately likely to use peremptory challenges on minority-group members, particularly African Americans, they hold a structural advantage in the process. As researchers in the Philadelphia study concluded: “The Commonwealth was more successful than defense counsel at eliminating its prime targets [young Black men, young Black women, and middle-aged Black women] from jury service, an outcome that reflects the different size pools of each side’s prime target groups.”^{iv}

Beyond representativeness, aggressive use of peremptory challenges also risks harm to jurors’ perceptions of the jury selection process. In a rare study of post-jury selection interviews with over 100 people excused through the peremptory challenge, I found that prospective jurors who said that they were

ⁱⁱ E.g., Baldus, David C., George Woodworth, David Zuckerman, and Neil Alan Weiner. *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 3, 98 (2001).

ⁱⁱⁱ *Id at 99.*

^{iv} *Id at 98.*

excused because of some personal characteristic (e.g., gender, age, race, occupation) were more likely to view the decision as unfair and to believe that the attorney did not accurately assess their abilities to be impartial, compared to people who believed they were struck for other reasons.^v Although most people excused from service are accepting – and sometimes relieved – at the outcome, some prospective jurors can be offended when they have appeared for service but end up excused with no explanation, particularly if they believe they have been crassly stereotyped. As one person in my study said: “All they say is ‘See you next year.’ You won’t see me.”^{vi} The greater the number of challenges used, the more likely it is that jurors will be confused about the reasons and assume decisions were based on irrelevant characteristics.

Therefore, in sum, studies from other areas strongly suggest that an aggressive use of available peremptories in a case can distort representativeness

^v Those attributing their dismissal to a personal characteristic were compared to those who suspected they were excused because they had experiences with crime/the legal system, or because they behaved in ways during jury selection that might raise concerns about their abilities to be fair (e.g., they were hesitant in their answers). See Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors’ Views Regarding the Peremptory Challenge*, 78 CHICAGO-KENT L. REV 1061, 1086 (2003).

^{vi} *Id* at 1095.

and harm perceptions of the process. A key reason that this study cannot conclude that the current large allotment of peremptory challenges does no harm to jury selection in New Jersey is simply because this study could not test for this possibility: the data revealed almost no instance of attorneys using close to their allotted amount.

**The data do NOT support the conclusion that attorneys ignore race when using peremptory challenges.* Multiple studies of jury selection from other regions find that attorneys demonstrate adversarial, race-based patterns in how they exercise peremptory challenges (e.g., the state disproportionately dismisses African Americans in criminal cases, and the defense disproportionately dismisses White prospective jurors).^{vii} Consistent with this broader academic literature, this report finds statistical evidence that defense attorneys in criminal cases were disproportionately likely to dismiss White jurors rather than African American jurors. (Other parties in other trial types did not exercise enough peremptory

^{vii} E.g., Baldus et al., *supra*, note ii; Shari Seidman Diamond, Destiny Peery, Francis J. Dolan, and Emily Dolan, *Achieving Diversity on the Jury: Jury Size and Peremptory Challenges*, 6 JOURNAL OF EMPIRICAL LEGAL STUDIES 425 (2010); Gau, *supra*, note i; Catherine M. Grosso and Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012). Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUMAN BEHAVIOR 695 (1999).

challenges on minority group members for findings to emerge as statistically significant.) Further, there were sporadic instances of peremptory challenges' removing either all members of one minority group or removing 25% or more of a group, the standard I adopted for "concerning" levels of underrepresentation/attrition. In short, even though attorney behavior did not stand out as the key systematic explanation for levels of representation on juries, evidence for some amount of racial patterning of strikes did emerge.

**The data do NOT support the notion that judges grant "too many" challenges for cause.* As noted in Section VI, a high proportion of jurors, particularly in criminal cases, exit jury service through the challenge for cause. Data about challenges for cause in other states and regions are limited; hence, it is not possible to determine with certainty whether or how New Jersey's practices surrounding challenges for cause may be unusual.^{viii} Yet even if New Jersey's judges are out of step with other areas, it bears mentioning that scholarly work

^{viii} Results from the few existing studies on how much attrition stems from cause challenges are mixed. In the study by Rose, *id*, peremptory challenges were the more common means for jurors to be excused; in data from Gau, *supra*, note i, challenges for cause removed roughly as many people as peremptory challenges.

typically finds judges to be overly cautious about removing jurors for cause,^{ix} aiming to “rehabilitate” people whose ability to be fair presents grave to concerns to parties or other court observers.^x The “right” amount of challenges for cause can be assessed in a number of different ways, but this report does not conclude that judges exercise them unnecessarily, nor that they harm racial representation.

As this preface and report make clear, this study’s initial analysis answers some questions while inviting additional work to explore others. Therefore, New Jersey will likely want to continue its self-study. I strongly encourage New Jersey to do so, including through additional data it may collect in the future. New Jersey and the Administrative Office of the Courts are to be commended for commissioning this critical look at its practices and for inviting and trusting the perspective of the scholarly community. I hope I and other outside experts can and will assist the Courts in any future efforts to improve its jury trials.

^{ix} See, e.g., Mary R. Rose, and Shari Seidman Diamond. *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOCIETY REVIEW 513 (2008).

^x Christopher A. Crocker, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GEORGIA LAW REVIEW 1471 (2003); Caroline B. Crocker, and Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 LAW & HUMAN BEHAVIOR 212 (2010).

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EXECUTIVE SUMMARY

Section I. A Study to Observe Race, Latino Ethnicity, and Gender in New Jersey Courts

This report presents results and recommendations based on a study of the race, Latino ethnicity, and gender of the people who appeared for jury service during a several-week period in September and October of 2018 in fourteen counties in New Jersey, counties that cover 84% of the state's population.¹ Producing the data, which was done by personnel in each courthouse and at the Administrative Office of the Courts, and analyzing and writing up the results – done by me, in conjunction with Dr. Marc Musick of the University of Texas, an expert on large datasets – was incredibly labor-intensive. This massive effort demonstrates New Jersey's commitment to meeting both its constitutional obligations and its own policy values concerning jury representativeness, thus making New Jersey a leader among states in this arena.

However, given the work it took to produce a one-time study such as this, and given the important constitutional and policy aims at stake, my first recommendation to New Jersey is that it develop a system to routinely measure, at minimum, the race, ethnicity, and gender of all persons appearing for service.

¹ The study gathered data from 15 counties. Due to high levels of nonresponse to fielded questionnaires, one county had to be eliminated from study.

Courts should collect information on cognizable groups in a fashion that permits regular in-house analyses to more quickly and inexpensively check for problems in patterns of representativeness. Such a system should be appropriate for how New Jersey summons and interacts with people at the courthouse, should make it simple for prospective jurors to report their background characteristics to courts, and allow New Jersey to store and review these data (see Recommendations 2a – 2c for suggestions on how to best measure race/ethnicity).

Consistent with Supreme Court rulings, parties should have access to de-identified data to pursue or defend claims about the representativeness of “cognizable groups” in jury pools. The complexity of this study shows that current means of obtaining race data are cumbersome, and it is unfair to burden parties with trying to collect comparable racial or ethnic data themselves. Ideally, a new system could also make de-identified data available to scholars or other members of the public who make reasonable requests. Such transparency increases public trust. But just as importantly, as the findings of this report reveal, there is much that New Jersey does well in securing racially representative juries. A reliable and usable system for collecting and analyzing, at minimum, the race, ethnicity, and gender of all who appear for jury service constitutes the best way to ensure that the state continues its successes, and it would educate others about the strengths and weak spots in New Jersey’s system.

Recommendation #1: New Jersey courts should develop a means of asking all people who appear at the courthouse to identify how they categorize themselves in terms of their race, Latino/a ethnicity, and gender. This should be incorporated into any existing questionnaires prospective jurors may fill out, or New Jersey should explore a new means of getting this information from all individuals. Such data should be used for in-house analyses of the effect of court practices on jury representativeness, and de-identified data (or detailed reports based on the data) should be available to parties pursuing claims about levels of jury representativeness. New Jersey Courts should also consider making data available to scholars or members of the public seeking to understand the effect of court practices on representation.

Section II. Response Rates, Determining Usable Data, and Measurement

Issues

In this study, approximately 85% of all people appearing at courthouses during the study period provided questionnaire data, although this rate varied across the 14 counties that contributed usable data. Some trials in the dataset had to be omitted because they commenced before the study period, or they continued after the study period concluded. Following omission of these cases, or instances in which survey nonresponse was excessive, the final dataset contained 7,407 observations involving a civil or criminal voir dire/trial experience, together with the 5,055 people across the 14 counties who were “pool only” (no voir dire experience); this constitutes the dataset that produced the findings in this report. Some experienced more than one voir dire. Hence, these 12,462 observations

represent 12,263 unique people, of whom 10,358 also had questionnaire data about race, Latino ethnicity, and gender.

In Appendix A, “Handling Missing Questionnaire Responses and Missing Questionnaires,” I describe choices I made when analyzing the data, given that some observations lacked survey data, and given that some people skipped questions about Latino identity, about race, or, as permitted, they selected multiple categories in the race question. Should this study be replicated, or, as Recommendation #1 advocates, should New Jersey design a system to routinely measure race and ethnicity, Appendix A offers a technical primer on questionnaire design, providing the bases for a series of recommendations to improve measurement of race and ethnicity, particularly in light of the law’s demand that representation concern a “cognizable group.”

Specifically, Recommendations, #2a, #2b, and #2c advise New Jersey, respectively, to:

(a) avoid encouraging people to treat questionnaire responses as optional in order to limit the number of people who fail to provide data; to encourage responses and engender trust, the form can include an explanation of the need to ask about race/ethnicity or gender;

(b) New Jersey should encourage people to select a single category that best describes their racial identity, given that representativeness claims depend upon

being able to identify a “cognizable group” that is underrepresented; one category can be “Multiracial”; and

(c) a question about Latino/Hispanic identity should always precede rather than follow a question about race, as people tend to treat questions about Latino identity as a second question about race, making non-Latinos disproportionately likely to skip the Latino question.

Section III. County Racial/Ethnic Demographic Profiles

Consistent with recommendations in the scholarship on jury representativeness, this study adopts a standard of a 25% or greater comparative disparity to signal concerning levels of jury representativeness; that is, I note instances in which at least 25% of a group have experienced attrition across a given phase of the jury selection process, and I label these “substantial” or “concerning.”

A comparison of the jury pools in this study to the communities from which they were drawn reveals that substantial underrepresentation of African Americans is commonplace. Just four counties having comparative disparities of African Americans in their pools of less than 25%. Unlike patterns for other racial/ethnic groups, no county saw even slight overrepresentation of African Americans among those appearing at court. By contrast, for Latinos, a few specific areas exhibited at

least a 25% comparative disparity in their pools, but underrepresentation was not as consistent as it was for African Americans. Asian Americans were consistently overrepresented in jury pools in these areas.

Results for African Americans are consistent with other studies of representation, and are challenging for courts to address. The reasons why people may not make it to a courthouse after being summoned are multiple and not fully under courts' control to change. In addition, greater summons enforcement can be costly and risk negative consequences associated with increasing levels of law enforcement and surveillance on communities that may already be alienated from police and sheriff officers. Nonetheless, if New Jersey's goal is to create juries that better represent their communities, then it must better understand and address sources of attrition in who makes it to the courthouse. Such investigation may identify the need to reach out to people in some manner to ensure respect for the courts' orders to appear for service, either through greater use of reminders about a service date or some form of enforcement. Changes to procedures at the courthouse will yield only so much success in improving the representativeness of juries if the basic disparities between pools and the broader community are not addressed.

Recommendation #3: New Jersey's next intensive study of jury representativeness should be aimed at understanding the source(s) of why jury pools – the groups of people who appear at the courthouse for service – consistently and substantially underrepresent African Americans. New Jersey should consider how to improve summons response in ways that are appropriate for a given community and that

actually generate yields in participation, but which minimize costs to the court and to the underrepresented communities. New Jersey may need to enhance its system for reminding people about their assigned service date and explore reasonable methods of summons enforcement.

Section IV. Race, Ethnicity and Serving on a Jury in New Jersey Courts

The heart of this intensive research effort is the study of the outcomes of the 7,407 people who experienced voir dire during the study period, and whether people's race or ethnicity predicted their selection to a jury. The first conclusion from analyses of minority representation across fourteen counties is a surprising one: In many ways, New Jersey courts are doing an admirable job ensuring that minority-groups participate on criminal and civil juries, based on their venire composition. In the majority of counties, representation levels of African Americans, Latinos, and Asian Americans on juries resembled or exceeded the group's prevalence in the venires, and when all types of trials were combined together, typically only two or three counties exhibited at least a 25% comparative disparity. Underrepresentation of Asian Americans was more commonplace across counties, but several of these instances reflect the low proportions of this group in venires. In analyses described and reported in Appendix B, New Jersey courts do not produce any statistically significant findings that non-Hispanic Whites are more likely to appear on juries than other groups (although Appendix B explains why this is a very conservative test of underrepresentation).

In analyses that separated results by trial type, criminal versus civil, I found that, typically, groups were not underrepresented on both civil and criminal cases. Just one county underrepresented African Americans on both criminal and civil cases, and a different county had concerning levels of underrepresentation for Latinos on both civil and criminal cases. I observed little evidence that African Americans are particularly likely to be underrepresented on criminal cases. By contrast, multiple indicators suggest that civil cases are more likely to underrepresent groups compared to criminal cases. In two counties, for example, despite non-trivial proportions of African Americans in their venires, African Americans were overrepresented on each county's lone criminal trial, whereas multiple civil cases seated no African Americans. In addition, civil juries were more likely than larger-sized criminal juries to fail to have any African American or Latino members.

Following these analyses, I make the following recommendations:

Recommendation #4: New Jersey courts should continue their analysis of the practices that contribute to representative juries being drawn from venires. Precisely because the juries in these fourteen areas commonly profiled well on indicators of representativeness, New Jersey should better understand what exactly contributes to this result in multiple counties. As the study also points to particular areas that have more consistent underrepresentation patterns, either across case type or within case type, these areas should conduct a self-study to assess what may be happening in these cases. (Sections V, VI, and VII begin some of this work.) This is particularly important in the areas in which no African Americans appeared on the mass of civil cases.

Recommendation #5: One way for New Jersey to show its commitment to seating more representative juries would be to increase the size of civil juries to 12 members, rather than six. A recent article by Federal judges argues for the superiority of the 12-person jury, and the data in this study amply demonstrate why larger-sized groups do a better job than smaller-sized groups of achieving stable levels of representativeness and avoiding the wholesale elimination of minority-group members.

Section V. Peremptory Challenges

Given the sizeable allotment of peremptory challenges New Jersey grants to parties, particularly to the defense in criminal cases, this study revealed a series of surprising, counterintuitive findings. First attorneys' use of peremptory strikes on minority group members played only a case-specific and generally attenuated role in explaining patterns of underrepresentation on juries. Attorneys rarely exercised more than one strike against an African American venireperson in a trial, and peremptory challenges failed to explain outcomes in cases in which African Americans were wholly eliminated from juries. Patterns of peremptory challenges did not explain many of the examples of concerning levels of underrepresentation presented in Section IV. Latinos were somewhat more likely than African Americans to be struck by a peremptory challenge, but again, peremptory use did not have much purchase in explaining why some juries failed to have any Latinos (or Asians), nor did they regularly account for the instances of underrepresentation described in Section IV.

Analyses that examined whether peremptories disproportionately affect non-Hispanic Whites found that criminal defense attorneys were about one-quarter as likely to use a strike on an African American prospective juror as on a White prospective juror. However, that was the sole statistically significant effect. In general, the data show that attorneys do not use a substantial number of challenges, and only rarely use all or close to their full complement of strikes. As an empirical matter, the data indicate that prosecutors in all but the rarest of cases needed 8 strikes, and likewise the vast majority of criminal defendants used but 10; on the civil side, six strikes in total would have covered all but a handful of parties in these trials.

Nonetheless, as New Jersey works on deciding the “right” number of peremptory challenges to permit, I do *not* recommend relying solely on the empirical account of how attorneys used their strikes. Understanding peremptory use in these trials requires a careful look at another source of attrition from jury service – judges’ generous use of challenges for cause – because, very likely, peremptory use is responsive to judges’ behavior. Results in Section VII, which review the remarkably large venire sizes in New Jersey trials – particularly in criminal cases – provide a stronger empirical justification for reducing peremptory challenges compared to concerns about the peremptory’s effect on levels of representativeness.

Section VI. Challenges for Cause

In New Jersey criminal trials, challenges for cause are the primary means of attrition from a venire, removing over half of all venirepersons. In civil cases, cause challenges are second, just behind the “not used” category, in ending service for people, and they account for just under 40% of the exits from jury service. No evidence in this study indicates that attorneys need a large number of peremptory strikes because judges are reluctant to grant reasonable cause challenges. Were this claim plausible, one would expect to see a “negative association” between peremptory strikes and cause challenges; that is, attorneys would use more peremptory challenges as judges excused smaller proportions of the venire through cause challenges. Far from using more strikes to offset judges’ conservative use of challenges, there was in fact a positive association between cause challenges and peremptory challenges. Thus, both tend to increase or decrease in tandem across cases, likely in response to venire characteristics. The significance of this finding for understanding peremptory use in New Jersey cannot be overstated. The liberal use of challenges likely explains why attorneys do not often use their full complement of challenges.

Although judges’ challenges for cause account for substantial proportions of jury selection outcomes, these challenges are not statistically related to juror race and ethnicity. By and large, judges grant cause challenges to members of different

racial/ethnic groups at comparable rates. Finally, I examined whether active use of cause challenges affects jury diversity. In criminal cases, there was no statistically significant relationship between cause challenges and the proportion of non-Hispanic Whites on the final jury – a rough but plausible measure of jury diversity. In civil cases, there was a surprising, negative statistical association: the higher the proportion of people dismissed through challenges for cause, the *lower* the proportion of Whites on resulting juries. In all likelihood, other factors not measured in this study explain the effect, but it is further evidence that judges can liberally grant challenges for cause without concern that doing so undermines jury diversity.

Recommendation #6. Judges in New Jersey courts should continue their current practices in granting challenges for cause when they deem them to be appropriate. The rate at which New Jersey judges grant challenges for cause, while high, arguably allows attorneys to be conservative in their use of peremptory challenges, and their use does nothing to undermine jury diversity.

Section VII. The Size of Jury Venires

The current study reveals a number of positive aspects of the jury selection process in New Jersey: Most basically, New Jersey took the initiative to study its practices by fielding the study that produced these data. Second, although New Jersey resembles most jurisdictions by substantially underrepresenting minorities (particularly African Americans) in the pools of people who appear for jury

service, and although there were pockets of concerning levels of minority underrepresentation on juries, in the main I find that New Jersey does an admirable job producing juries that mirror their venires. Third, despite statutes that grant attorneys the opportunity to use a large number of peremptory challenges (especially in criminal cases), the data showed a fairly constrained use of these strikes, and only limited evidence that attorneys' peremptories negatively affect the representativeness of the final juries. Finally, New Jersey's judges appear to liberally grant challenges for cause, and no evidence suggests that these strikes have a disparate impact on any racial/ethnic group. Judges' approach to these strikes may explain attorneys' constrained use of challenges, and additionally, judges' challenges do nothing to undermine jury diversity.

Nonetheless, one aspect of jury selection practice in New Jersey is less commendable. In criminal cases, the second-most common way that people ended their voir dire experience was by being "not used," and this was the most common way that people in civil cases ended their appearance at a voir dire. In a few counties, the not-used group accounted for more than 50% of outcomes in the venires, and in one of these areas, "not used" made up more than 60% of venires. Venires in criminal cases averaged 144 people, which is substantially higher than reported sizes from other jurisdictions. Although the "right" size for a venire will vary by the needs of cases and an understanding of a jurisdiction, in these data the

general picture is that venires pull together more prospective jurors than is necessary to intelligently exercise challenges for cause, exercise peremptory challenges, and seat a jury, particularly in criminal cases. The excess number of jurors who do not fall into any of these categories – that is, who wind up being not used – does nothing to enhance the diversity of final juries and risks making citizens feel their time is wasted, which undermines the legitimacy of courts.

The size of venires likely contributes to the high proportions of challenges for cause reviewed in Section VI. Indeed, in criminal cases, the size of the venire was strongly and positively associated with the rate of cause challenges – the bigger the venire, the higher the rate of people excused for cause. In civil cases, in which the range of venire sizes is more attenuated, the association was less strong and only marginally significant but was still positive in direction. Thus, the aim should be to reduce the size of the venire without reducing judges' comfort with dismissing people the judge believes cannot be fair and impartial in a case.

Of note, in both civil and criminal cases, the absolute size of a venire was uncorrelated with the diversity of the final panel. Therefore, large venires, by themselves, do not accomplish diversity goals. Instead, the best correlate of a diverse jury is a diverse venire, yet another reason why New Jersey should do all it can to improve the representativeness of those who appear at court, particularly African Americans, but certainly all groups (see Section III and Recommendation

#3). But for the sake of the resources of both courts and of people who already appear for service, New Jersey should critically examine why so many people are called to a voir dire only to wind up “not used.” If planning for attorneys’ using large numbers of peremptory challenges contributed to the large panel sizes in these trials, then this is a strong, empirically supported reason to reduce the number of challenges allotted, particularly in criminal cases. Alternatively, or in addition, if judges’ willingness to support challenges for cause depends on having large panels to avoid “running out” of prospective jurors, then New Jersey should investigate the minimum amount of surplus necessary to permit judges to be comfortable granting cause challenges they deem appropriate. The latter would achieve the goal of lowering venire sizes while preserving a practice that appears to constrain peremptory challenge use and does not harm jury diversity. Thus, my final recommendation to New Jersey is to focus scrutiny on the size of venires.

Recommendation #7: New Jersey should determine ways to reduce the number of people who are called to voir dire only to be “not used.” Possible mechanisms include reducing the number of peremptory challenges, particularly in criminal trials, or convening judges to consider by how much venire panels might be reduced while still allowing judges to be comfortable during cause challenge determinations.

Further details on all the elements of this summary follow. Throughout, findings I regard as particularly notable appear in bolded text.

SECTION I. A STUDY TO OBSERVE RACE, ETHNICITY, AND GENDER IN NEW JERSEY COURTS

Prior reports have detailed the process that the New Jersey Courts Office developed to study the race, Hispanic/Latino ethnicity, and gender of people who appear for jury service.² In brief, during a several-week period in September and October of 2018, fifteen counties disseminated one-page questionnaires to all persons appearing for jury service. Through the questionnaire, people could voluntarily indicate their race,³ Hispanic/Latino ethnicity,⁴ and gender (male or female). Each questionnaire was affixed with a person-specific bar code number, and this matched the person's number on his/her juror badge. This permitted

² See “Memorandum re: Study Design and Implementation Plan Proposal,” from Jessica Lewis Kelly and Lisa R. Burke, April 23, 2018; and “Final Report on the Combined Jury Studies on Jury Representativeness and the Impact of Peremptory Challenges on the Racial and Ethnic Composition of Petit Juries (September 2018 – October 2018),” by Brian J. McLaughlin and Lisa R. Burke.

³ Categories presented to respondents (with descriptions of areas of origin) were: White or Caucasian, African-American or Black, American Indian or Alaskan Native, Asian, Native Hawaiian or Pacific Islander, Other, and Multi-Racial. A respondent was permitted to check more than one category (“check all applicable categories”), and a note at the top of the page indicated that answers to all questions were voluntary (“Your voluntary participation is requested”).

⁴ Categories: “Hispanic or Latin American” (with description of types of origins) and “Not Hispanic or Latin American.” The questionnaire indicated that these were based on “U.S. Census Bureau definitions.”

tracking and matching questionnaires to information on outcomes stored in the Jury Management System (JMS) software.

Thus, for those who filled out a survey and had it collected at the courthouse, New Jersey obtained de-identifiable information on these persons' race, Latino ethnicity,⁵ and gender, as well as their outcome at the close of their appearance. These outcomes included whether they were part of a pool only vs. going to voir dire and, among the latter group, whether they were selected as juror, excused for cause, peremptory challenged by the plaintiff (civil) or prosecutor (criminal), peremptory challenged by the defendant (civil or criminal), or not reached during voir dire (coded in the data as "not used"). For those not filling out a questionnaire, we know only their outcome through the JMS system.

As an expert in jury representativeness issues, the New Jersey Supreme Court appointed me to analyze the de-identified data to examine, at minimum, the

⁵ People who self-identify in the "Hispanic or Latin American" category use a wide variety of terms to describe themselves. Common are: Hispanic, Latino, Latinx, Chicano, Mestizo, or any country-specific identifications (e.g., Cuban-American, Mexican American, etc.). Many terms are regional (e.g., Chicano tends to be more common in West-Coast/Southwestern areas), or may be used to match governmental usage (e.g., the Census Bureau uses "Hispanic Origins" or "Hispanic or Latino"). Recognizing that people vary a great deal in what term they prefer, this report generally uses the term "Latino" or "Latino/a" (which is more inclusive of gender). Although a newer, related term, "Latinx," has emerged, currently few people self-report using this term (see <https://www.theatlantic.com/ideas/archive/2019/12/why-latinx-cant-catch-on/603943/>, citing poll results indicating that just 2% of Hispanic/Latino respondents embraced the term "Latinx"). In this report, I use "Black" and "African American" interchangeably, and "Asian" and "Asian American" interchangeably.

following questions: (1) how racially and ethnically diverse are the jury pools in the participating counties in this study? (2) what patterns of attrition are observed for those people who undergo voir dire for a civil or criminal case? and (3) do patterns of attrition exist that correlate with a person's race, ethnicity, or gender? The Court indicated a particular interest in whether the existing system of peremptory challenges, and their use in trials, substantially altered the likelihood that members of various racial or ethnic groups were seated on juries.

A. Cleaning data. After I, and my colleague, Marc A. Musick, Ph.D., who has extensive experience working with large datasets, signed appropriate paperwork to serve the State of New Jersey and to maintain the confidentiality of the data, we received access to a de-identified dataset. All data we used identified each observation by only their bar code, and we had no other identifying information on people in the dataset beyond their responses to the questionnaires and their jury service outcome. We were first provided an FTP link to a Microsoft Access file prepared, as we understand it, by information technology (IT) personnel who oversaw the process of getting all the bar-coded forms into the dataset. Upon downloading the data, checking for duplicate records, and arranging the entries into unique county/trial numbers, we identified problem cases and reported these to Brian McLaughlin, who together with Lisa Burke, served as our primary contact on study issues. After they researched the cases, we learned of

clear discrepancies between the data downloaded through the Access file and information in the larger JMS records the counties kept (e.g., a study-eligible trial would be listed in the Access file as having 11 jurors, despite the JMS records indicating there were 14 jurors).

To remedy this, we began again with a new set of data files: all the raw survey-data files from each county and all the JMS files from each county. Dr. Musick worked intensively with each file to merge survey and JMS records, to clean the data, and then to combine all county-level files into one master dataset. The data-cleaning process involved identifying which observations were out of the study's date range, which JMS records did and did not have surveys to match, which observations reflected the same person but two different outcomes (e.g., a person went to voir dire for two different trials during his or her time at the courthouse),⁶ and which observations were wholly redundant and needed to be deleted (e.g., a single person filled out a survey on more than one occasion but did not experience two different outcomes). Purged of true redundancies (but not instances of the same person having multiple outcomes) and entries that fell out of the date range of the study (e.g., trials from December of 2020), the cleaned dataset included 18,668 total observations, representing 149 unique trial numbers together

⁶ This is evident in the data when the same bar-code number is associated with two different trial numbers.

with 15 sets of people who had no trial number because they served only in the “pool” and never underwent voir dire.

Because in some counties the same person could encounter more than one trial during an appearance at court, there were more observations than individual people in the dataset. This initial cleaned dataset reflected 15,529 unique individuals: 81% of whom, or 12,525, had just one trial- or pool-only experience; 2,870, or 18% had two different trial encounters; and 134, or 1%, of people had three different trial experiences. Other issues further reduced the size of the dataset (described in Section II and in detail in Appendix A), but the cleaned dataset of 18,668 observations and 15,529 people represents the baseline dataset of persons who, according to JMS records, appeared at the courthouses studied during the dates of the study. Within that database are the subset of people who filled out questionnaires that the courthouses collected.

B. Conclusion and Recommendation #1. As the above description reveals, the first – and exceedingly clear – conclusion is that this study was incredibly labor-intensive. Consider all the demands this project placed on various types of personnel: the work that went into designing a creative and confidential way to collect the data; pre-testing the procedures; the need to enlist county-level jury offices and jury clerks to run the study when they were likely to be busy with a number of other tasks; the time it took for IT personnel to transform raw survey

data into usable files; initial in-house examinations of the data and report-writing; and the roughly 25 hours two Ph.D.-level social scientists spent solely on transforming and cleaning the data to make it trustworthy for analysis,⁷ apart from additional statistical analysis and writing.

This massive effort demonstrates New Jersey’s commitment to meeting both its constitutional obligations and its own policy values concerning jury representativeness,⁸ thus making New Jersey a leader among states in this arena. However, New Jersey could meet its obligations and policy values in a far more efficient manner and should develop a system to routinely measure, at minimum, the race, ethnicity, and gender of all persons appearing for service. These categories represent the types of “cognizable groups” recognized in jurisprudence on representativeness;⁹ however, questionnaires could be modified as needed to also measure any other characteristic the Judiciary believes contributes to healthy diversity on juries.

⁷ The hours attending to problems with the data consumed the majority of the 36 hours initially allotted for expert examination of the data. Although an additional 20 hours were approved, the work necessary to complete this report went well beyond the total allotted, amounting to approximately 100 additional hours.

⁸ See, e.g., “Memorandum re: Study Design and Implementation Plan Proposal,” from Jessica Lewis Kelly and Lisa R. Burke, April 23, 2018, at page 1.

⁹ See, e.g., *Duren v. Missouri*, 439 U.S. 357 (1979); *Berghuis v. Smith*, 559 U.S. 314 (2010).

Courts should collect information on cognizable groups in a fashion that permits regular in-house analysis to quickly and reliably check for problems in representativeness. This would avoid fielding a complex study that disrupts normal jury operations, and if the system were designed correctly, New Jersey would not have to rely on substantial and costly outside assistance in order to ask basic questions about the racial identity of people who appear at court for jury service. New Jersey is not alone among states in failing to collect jurors' demographic data;¹⁰ however, this failing should not and need not continue. New Jersey should develop a process that is appropriate for its own summoning system,¹¹ identifying ways to make it easy for prospective jurors to report their background characteristics to courts and easy for New Jersey to store and review these data.

Further, consistent with Supreme Court rulings that permit parties to have access to data in order to pursue or defend claims in challenges to jury representation,¹² data on cognizable groups should be stored in a way that allows parties to access either de-identified data or reports based on such data for purposes

¹⁰ See, e.g., Nina Chernoff, *No Records, No Right: Discovery and the Fair Cross-Section Guarantee*, 101 Iowa Law Rev. 1719 (2016).

¹¹ Federal courts, for example, use a two-step jury selection process, and, at the first stage, send qualification questionnaires to people on its jury wheels that include questions about race and Latino ethnicity on these forms.

¹² *Test v. U.S.*, 420 U.S. 28, 30 (1975); see generally, Chernoff, *supra*, note 10.

of considering or pursuing a claim about the representativeness of jury pools.

Given the complexity of the above study, it is unfair to burden parties with trying to collect racial or ethnic data themselves.

Speaking as a scholar in this area, ideally de-identified data could also be made publicly available for those making reasonable requests in the public interest. This transparency ensures public trust in the courts and promotes scholarly understanding of the effects of court practices on jury representation levels. **As this report will reveal, there is much that New Jersey does well in securing racially representative juries. A reliable and usable system for collecting and analyzing, at minimum, the race, ethnicity, and gender of all who appear for jury service constitutes the best way to ensure that the state continues its successes, and it would allow the state to regularly examine practices that are not working as well.** A system that easily permits New Jersey to regularly monitor and improve its practices is superior to a one-time, challenging study in conveying New Jersey's commitment to securing racially representative juries. By disseminating such data (again, de-identified), an in-house system would also permit the state to regularly publicly communicate that commitment and to disseminate its findings for the benefit of the public in New Jersey and other areas.

Recommendation #1: New Jersey courts should develop a means of asking all people who appear at the courthouse to identify how they categorize themselves in terms of their race, Latino/a ethnicity, and gender. This should be incorporated into any existing questionnaires

prospective jurors may fill out, or New Jersey should explore a new means of getting this information from all individuals. Such data should be used for in-house analyses of the effect of court practices on jury representativeness, and de-identified data (or detailed reports based on the data) should be available to parties pursuing claims about levels of jury representativeness. New Jersey Courts should also consider making data available to scholars or members of the public seeking to understand the effect of court practices on representation.

SECTION II. RESPONSE RATES, DETERMINING USABLE DATA, AND MEASUREMENT ISSUES

In the dataset, trial numbers indicated a unique trial event.¹³ As we cleaned the data, we noted that several trials commenced voir dire before the survey period began; in addition, some trials continued after the survey period ended.

Information on these trials was incomplete (e.g., the file might list just 9 jurors for a criminal case, or 4 jurors for a civil case). After confirming with the Administrative Office that no additional information from these 31 trials would be forthcoming, we omitted all of these trials as incomplete.

A. Response rates. Among usable trials, other forms of missing data were present. First, counties varied in the rate at which they were able to produce survey data from prospective jurors. I calculated the response rate as the number of observations with survey responses on the race/ethnicity/or gender questions (including responses in which people refused to answer a question) divided by the total number of observations in the JMS data files (i.e., total persons recorded as present at the courthouse for the same trials or time periods). Table II.1 presents the response rates for each county.

¹³ Individuals who appeared at court but were only part of pool and never experienced voir dire also had entries in the trial numbers field, but these were easily distinguished from actual trial numbers.

The overall response rate to the study was 76.8%, indicating that on average about three-quarters of participants filled out and returned questionnaires. Most counties produced high response rates, or, at minimum, provided a sample that constituted a clear majority of all observations from the county: Bergen, Cumberland, Gloucester, Morris, Passaic, Somerset, and Union all had response rates to the survey above 90%; Camden, Mercer, Middlesex, and Ocean counties also had rates above 80%. Burlington, Essex and Monmouth had response rates of two-thirds to 71%. However, for reasons that are not well understood, Hudson County was an outlier, with a response rate of just 33%, which was half the rate of counties with the next-lowest response (see Table II.1). I therefore had to omit Hudson because any analysis of the demographic composition of pools, venires,¹⁴ or juries would be subject to high levels of error given the levels of missing data. (Without Hudson County included, the overall survey response rate is 84.7%).

Even within the remaining counties, the number of observations that had no surveys varied. One civil trial from Burlington County had unusually high levels of missing data: 83% of those in the jury pool had no survey, and 86% of seated

¹⁴ Terminology regarding jury selection varies a good deal. Chernoff, *supra*, note 10, for example, calls “venires” the group of people who appear at a courthouse at all in a given period; in this report, I refer to that group as a “pool.” I use “venire” to refer to the people who go to a particular courtroom for voir dire. By contrast, Professor Chernoff terms this group a “panel,” which I use interchangeably with “venire.”

Table II.1: Response Rates, and Responses to Race/Ethnicity Questions, Across Counties of Study.

County	Total Records	Total with Surveys	Response Rate	Missing on Race		Missing on Ethnicity	
				N	Percent*	N	Percent*
Bergen	1,413	1,319	93.4	48	3.4/ 3.6	146	10.3/ 11.1
Burlington	1,095	744	67.9	13	1.2/ 1.7	110	10.0/ 14.8
Camden	958	900	84.0	11	1.2/ 1.2	73	7.6/ 8.1
Cumberland	256	249	97.3	18	7.0/ 7.2	36	14.1/ 14.5
Essex	2,038	1,449	71.1	34	1.7/ 2.3	171	8.4/ 11.8
Gloucester	387	362	93.8	4	1.0/1.1	50	12.9/ 13.8
Hudson	2,382	796	33.4	36	1.5/ 4.5	82	3.4/ 10.3
Mercer	903	805	89.2	14	1.6/ 1.7	113	12.5/ 14.0
Middlesex	1,374	1,133	82.5	38	2.8/ 3.4	173	12.6/ 15.3
Monmouth	1,016	689	67.8	9	0.9/ 1.3	72	7.1/ 10.4
Morris	766	742	96.9	18	2.3/ 2.4	65	8.5/ 8.8
Ocean	676	577	85.4	8	1.2/ 1.4	68	10.1/ 11.8
Passaic	1,161	1,119	96.4	46	4.0/ 4.1	114	9.8/ 10.2
Somerset	387	376	97.2	6	1.6/ 1.6	19	4.9/ 5.1
Union	717	668	93.2	52	7.3/ 7.8	98	13.7/ 14.7
Total in Data	15,529	11,928	76.8 ⁺	355	2.3/ 3.0	1,390	9.0/ 11.7
Totals after Omissions ⁺	12,462	11,132	84.7	--	--	--	--

⁺See text for explanation of omitting Hudson County and trials with incomplete information.

*Value before the slash is the percent of total records, value following the slash is the percent of those who filled out surveys. See Appendix A for information on how missing data were managed.

jurors had no survey. It also indicated that no cause challenges and no peremptory strikes occurred, rendering this case unusable in several types of analyses; I therefore omitted it. This rate of missing data was an outlier case within Burlington, but for Essex and Monmouth Counties – again for reasons that are not

clear – substantial levels of missing data appeared across most trials. In Essex, 30.3% of members of all the venires for trials had no survey (range: 23 – 41%), as did 34% of all seated jurors (range: 13 - 67%); in Monmouth, comparable figures were 34% (range: 19 – 46%) for venires and 39% (range: 14 - 71%) for juries. Because these trials typically provided data on peremptory and cause challenge usage, I did not eliminate them. Appendix A describes why I believe that race/ethnicity values are still plausible for these counties, despite the presence of missing data.

Following the elimination of trials with incomplete data, trials from Hudson, and the outlier trial from Burlington, there remained 95 trial numbers across 14 counties. Of these, 26 (27%) were criminal, and 69 (73%) were civil. Thus, during the study period, counties produced far more civil than criminal trials. Nonetheless, owing to far larger jury pools in criminal trials, the group of criminal trials generated slightly more individual-level observations in the data (3,753) than did the civil cases (3,654).

B. Final dataset. This set of 7,407 observations involving a civil or criminal voir dire/trial experience, together with the 5,055 people across the 14 counties who were “pool only” (no voir dire experience), constitute the dataset that produced the findings in this report. These 12,462 observations represent 12,263

unique people, of whom 10,358 also had questionnaire data about race, Latino ethnicity, and gender.

C. Recommendations #2a., #2b, and #2c regarding future measurement efforts. Appendix A, “Handling Missing Questionnaire Responses and Missing Questionnaires,” describes additional choices I made when analyzing the data, given that some observations lacked survey data, and as Table II.1 describes, some people skipped questions about Latino identity or about race. In addition, people were invited to select multiple categories in the race question, and some did. Should New Jersey replicate this study or, as Recommendation #1 advocates, should it design a system to routinely measure race and ethnicity, Appendix A offers a technical primer for this area of study. It provides the bases for a series of recommendations regarding optimal questionnaire design and measurement of race and ethnicity, particularly in light of the law’s demand that representation concern a “cognizable group.” For simplicity, I restate them here:

Recommendation #2a: Because of the policy and legal importance of understanding the demographic patterns in a jury selection system, people should not be specifically invited to consider questions about race, ethnicity, or gender to be voluntary. This will lower the likelihood that people fail to turn in a survey at all or that they skip questions (e.g., by indicating that the question is optional). New Jersey may take a position that such questions *should be* voluntary. If so, court personnel can treat the survey that way by not admonishing people who fail to turn one in, not returning questionnaires to people who have skipped questions, and by programming any online questionnaires so that people can skip a question. But neither the text of the questionnaire itself nor the race/ethnicity questions should

invite people to fail to answer. Instead, people should be informed about the reasons why the questions are necessary to ask, with a brief explanation accompanying any questions about race, ethnicity or gender.

Recommendation #2b: Because the concept of a “cognizable group” is one requirement for proving that underrepresentation has occurred in the jury summoning, qualification, or selection process, questions about race should not invite people to select multiple categories. Instead, respondents should be asked to select the category that “best describes” their race. Options appearing on the form can include a “Multiracial” category so that people who feel that this designation best describes them can select it. However, a “best-describes” design would increase the likelihood of identifying those people who may be multiracial but who tend to identify with and experience their race primarily through one aspect of their background more than another; it also reduces instances in which people are part of a group that is too small in size to reliably analyze.

Recommendation #2c: To minimize the tendency to skip a question about Latino ethnicity whenever it follows rather than precedes a question about race, respondents should be asked about whether or not they are Latino/a before they are asked to identify the racial group that best describes them.

SECTION III. COUNTY RACIAL AND ETHNIC DEMOGRAPHIC PROFILES.

A. Absolute and comparative disparities across counties. Although this report devotes most of its attention to patterns of jury participation and attrition once people appear at court, a key question ahead of that is how well groups appearing at court represent the areas from which they are drawn. This section reports on the racial and ethnic composition of the people in the dataset compared to each county's actual demographic composition. The American Community Survey (ACS) constitutes the best source of information on the jury-eligible adult population for each of the 14 areas that produced data for the study.¹⁵

¹⁵ Beginning in the mid-2000s, the ACS sampled areas in the years between each decennial census. The ACS is advantageous because it keeps current with changes in the population between decennial censuses, and it also includes a question on citizenship. This provides a strong estimate of the jury-eligible population in an area (i. e., citizens who are 18 and over). I used the five-year estimates, which are the most precise and widely available values. They are precise because they combine samples across years, which reduces the size of sampling error for any one year. They are the most widely available because, for smaller areas or areas with fewer minorities, the five-year estimates are the only information reported (i.e., to have enough people to develop plausible estimates of small sub-groups). Because it merges across previous years, results represent a conservative estimate for the population profile of groups specifically in 2018 (e.g., the size of the group may have increased in a given area across the five-year period). These estimates are available from the Census Bureau website (Table B05003; see <https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/>).

Table III.1: Racial/Ethnic Profile of Counties in Study, American Community Survey Data, 2014 – 2018, Table B05003 (Adult Native-Born and Naturalized Citizens)

County	Total in Area	Percentage who are:			
		Black	Latino/a	Asian	White ^a
Bergen	635,116	6.3	16.1	12.4	64.5
Burlington	336,960	16.4	6.3	3.6	71.7
Camden	369,232	19.2	11.7	4.6	63.5
Cumberland	107,262	20.9	20.4	1.3	55.6
Essex	517,433	41.3	17.3	4.6	36.0
Gloucester	221,039	10.2	4.4	2.4	81.9
Mercer	250,516	20.8	10.3	8.1	59.8
Middlesex	537,502	11.0	15.9	17.3	54.8
Monmouth	457,917	6.8	6.6	4.6	81.1
Morris	353,867	3.5	9.3	7.7	78.7
Ocean	433,901	3.1	5.8	1.5	88.9
Passaic	324,989	12.6	31.4	4.8	50.5
Somerset	225,865	10	10.2	12.8	66.3
Union	350,104	23.6	21.6	4.6	48.8
Total in Data	5,121,703	795,176	687,568	366,692	3,276,797
Overall Proportion		15.5	13.4	7.2	64.0

Notes: ^aNumbers are based on the “White/Non-Hispanic” category in the data.

The areas with the largest racial/ethnic minority populations are Essex, Union, Cumberland, Mercer, Camden, and Burlington Counties, all of which have African American populations that exceed 15% of the community. For Latinos, Passaic, Union, Cumberland, Essex, Bergen, and Middlesex Counties exceed 15%. For Asians, Middlesex, Somerset, and Bergen have populations that exceed 10% of the area. Of all counties, only Union and Essex are not majority-White/non-

Hispanic. Using ACS data, Table III.1 shows how the counties break down along racial and ethnic lines.¹⁶

Table III.2 on the next page reports the demographic profile of those persons who provided questionnaire responses in the 14 counties in this study. Comparing overall percentages listed in the bottom row of Table III.1 to those at the bottom of III.2, African Americans are underrepresented in the aggregate of New Jersey jury pools; they are 15.5% of these areas but just 12.1% of jury pools. This “absolute disparity” of 3.4% (15.5 – 12.1), divided by the size of the population in the community (15.5%), yields a “comparative disparity” of nearly 22%. In other words, about one in five members of the African American population of New Jersey is “missing” from jury pools. Latinos demonstrate a smaller absolute disparity of 1% (just a 7% comparative disparity). Asians and Whites (non-Hispanic) are overrepresented in the aggregate.

¹⁶ In addition to providing information on racial and ethnic profiles of each area, Table III.A indicates that the 14 counties included in the study represent an excellent sample of the entire state. According to the ACS, there are 6,117,615 citizens who are 18 and older in New Jersey. The 14 counties studied have populations that together amount to over five million people and constitute 84% of all adult citizens in New Jersey (that coverage increases to 90% had we been able to use Hudson County’s data).

Table III.2: Racial/Ethnic Profile, Overall and by County, Based on Respondents to the Survey

County	Total in Data	Percentage who are:			
		Black	Latino/a	Asian	White ^a
Bergen	1,224	4.5	16.1	13.5	63.9
Burlington	744	15.5	4.4	3.9	73.5
Camden	788	12.8	9	3.5	73.6
Cumberland	249	14.9	17.8	1.6	62.3
Essex	1,391	32.9	15.9	7.5	42.3
Gloucester	271	6.3	2.2	2.6	87.1
Mercer	748	12.2	7.9	11.8	66.0
Middlesex	937	9.4	14.3	20	55.4
Monmouth	689	2.9	6.5	7.4	80.1
Morris	742	3.1	9.4	9.8	76.0
Ocean	543	2.0	7.9	1.0	87.7
Passaic	1,064	9.6	22.3	7.7	58.9
Somerset	376	4.8	9.0	17.0	68.6
Union	592	19.3	16.9	7.8	49.7
Total in Data	10,358	1,249	1,308	933	6,673
Overall Percentage		12.1	12.6	9.0	64.4

Notes: ^a In order to match Census bureau figures, numbers are based on people in the data who said they were “White” but not “Hispanic.”

See Appendix A for how analyses managed instances in which people did not answer the race or ethnicity question.

These aggregate-level disparities are not constant across counties. Table III.3 next summarizes the comparison of Tables III.1 and III.2 and reports both the absolute and comparative disparities for each county and for each racial/ethnic group.

Table III.3: Absolute and Comparative Disparities: All People Appearing for Service Who Filled Out Surveys.

County	Absolute Disparities				Comparative Disparities			
	Black	Latino/a	Asian	White	Black	Latino/a	Asian	White
Bergen	(1.8)	0.0	<i>1.1</i>	0.6	(28.6)	0.0	8.9	0.9
Burlington	0.9	(1.9)	<i>0.3</i>	<i>1.8</i>	5.5	(30.2)	8.3	2.5
Camden	(6.4)	2.7	1.1	<i>10.1</i>	(33.3)	23.1	23.9	15.9
Cumberland	(6.0)	2.6	<i>0.3</i>	6.7	(28.7)	12.7	23.1	12.1
Essex	8.4	1.4	2.9	6.3	20.3	8.1	63.0	17.5
Gloucester	(3.9)	(2.2)	<i>0.2</i>	5.2	(38.2)	(50.0)	8.3	6.3
Mercer	(8.6)	2.4	3.7	6.2	(41.3)	23.3	45.7	10.4
Middlesex	1.6	1.6	2.7	<i>0.6</i>	14.5	10.1	15.6	1.1
Monmouth	(3.9)	0.1	2.8	1.0	(57.4)	1.5	60.9	1.2
Morris	0.4	<i>0.1</i>	<i>2.1</i>	2.7	11.4	<i>1.1</i>	27.3	3.4
Ocean	(1.1)	<i>2.1</i>	(0.5)	1.2	(35.5)	36.2	(33.3)	1.3
Passaic	(3.0)	(9.1)	2.9	8.4	(23.8)	(29.0)	60.4	16.6
Somerset	(5.2)	1.2	4.2	2.3	(52.0)	11.8	32.8	3.5
Union	4.3	4.7	3.2	<i>0.9</i>	18.2	21.8	69.6	1.8

Notes: Values in parenthesis reflect instances in which a group is underrepresented in jury pools, compared to that group's proportion in the community, by at least a 25% comparative disparity (see Table III.1 for data on each county's population profile and Table III.2 for jury pool results). Values in italics indicate overrepresentation.

The first clear pattern in Table III.3 is that **African Americans are underrepresented in the jury pools to some degree in each one of the 14 counties studied**. For some counties the level of underrepresentation of African Americans is quite low, particularly Burlington, Middlesex, and Morris, all of which have absolute disparities of less than 2% and comparative disparities below 15%. How might one decide whether a county has “a lot” or “a little”

underrepresentation? Some scholars have argued that a 15% comparative disparity should signal “not fair and reasonable” underrepresentation, a component of the requirements of proving underrepresentation in *Duren*.¹⁷ Burlington, Middlesex, and Morris are the only counties that fall below this standard.

However, this particular standard is not only quite liberal,¹⁸ but also complicated given that the standard’s advocates also suggest that communities with smaller proportions of minority group members – that is, groups that make up less than 10% of a community – should be held to a less strict standard, with comparative disparities of 25% or more regarded as “not fair and reasonable.”¹⁹ Because the population prevalence of minority populations in this study varies so much across the fourteen counties, I opted for a single standard to signal concerning levels of underrepresentation: at least a 25% comparative disparity between the population and the jury pools in that county. In Table III.3 I have

¹⁷ *Duren v. Missouri*, 439 U.S. 357 (1979). For scholars advocating a 15% comparative disparity standard, see, e.g., Kairys, David, Joseph B. Kadane, and John P. Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 *California Law Rev.* 776 (1977); “Brief for Social Scientists, Statisticians, and Law Professors,” Jeffrey Fagan, et al., as Amici Curiae Supporting Respondent (2009), Filed in *Berghuis v. Smith*, 559 U.S. 314 (2010).

¹⁸ See Mary R. Rose, Raul S. Casarez, and Carmen M. Gutierrez, *Jury Representation in the Modern Era: Evidence from Federal Courts*, 15 *JOURNAL OF EMPIRICAL LEGAL STUDIES* 378 (2018) (finding that nearly all instances of underrepresentation in federal districts had at least a 15% comparative disparity).

¹⁹ Kairys, et al., *supra*, note 17.

placed parentheses around those instances in which levels of underrepresentation are associated with at least a 25% comparative disparity.²⁰ (I will later use this same standard for other analyses, such as the difference between venire and juries; see Section IV.)

In addition to the three counties with low absolute disparities, Union County is the only other area that has a comparative disparity below 25%, although just barely (see right side of Table III.3). Gloucester, Mercer, Monmouth, and Somerset have the largest comparative disparities, and for most of these areas, this cannot be

²⁰ Scholars favor the comparative disparity because, of all indicators, it is not only simple to calculate but also considers underrepresentation in light of a group's proportion in the population. Values indicate the proportion of that group's population that are "missing" from jury pools due an absolute disparity (see, e.g., "Brief for Social Scientists, Statisticians, and Law Professors," *supra*, note 17). By contrast, the absolute disparity conveys less information. For example, a 5% absolute disparity could mean that the entirety of a small (5%) population has been eliminated from jury pools, or it could indicate that a group that makes up 55% of the population is only 50% of an area's jury pool, and therefore, that group's presence in jury panels is only minimally reduced. Nonetheless, the Supreme Court indicated in *Berghuis* that jurisdictions should examine all tests of underrepresentation when assessing underrepresentation. Thus a 25% comparative disparity may not be concerning when the absolute disparity is very low (e.g., Asians are underrepresented in Ocean County by less than 1%, but this generates a comparative disparity of 33%; see Table III.3). A different test of underrepresentation examines the statistical significance of these disparities – known as the "SDT" test (see *Berghuis v. Smith*, 559 U.S. 314, 2010). I do not apply that test in this section because it is highly sensitive to sample size, and most jurisdictions have surveys from hundreds of people (see Table III.2). This tends to make even small differences "significant" (see, e.g., Rose et al., *supra*, note 18). I use statistical significance tests for venire outcomes, but as I describe in Appendix B, statistical tests of venire outcomes tend to be conservative because both selection to a jury and other outcomes, such being subject to a peremptory challenge, happen to only small proportions of a venire (see Appendix B for more detail).

attributed to the fact that they have particularly small African American populations in their counties, which can lead to exaggerated comparative disparity figures: all but Monmouth have African American populations of at least 10% (see Table III.1). In sum, **although a few counties had low levels of underrepresentation of African Americans among those appearing at courthouses for jury service, rates were at concerning levels in fully 10 of the 14 areas studied.**

The underrepresentation of Latinos had more county-specific patterns.

Just three areas had comparative disparities above 25%, and only one of these (Passaic) also had a very sizeable absolute disparity (9.1). The other high comparative disparities in Gloucester and Burlington owe to small absolute disparities in areas with a low prevalence of Latinos. Two areas (Ocean and Morris) had an overrepresentation of Latinos in their jury pools (indicated in Table III.3 through italic text). As was the case in analyses of African American representation levels, Union County's underrepresentation of Latinos was just shy of a 25% threshold (a 20% comparative disparity).

There is little evidence that Asians are systematically underrepresented in jury pools in these data; only Camden and Ocean exhibited underrepresentation, and both have Asian populations of less than 5%.²¹

B. Conclusions and Recommendation #3. The data make clear that **underrepresentation of African Americans is commonplace**, with just three to four counties demonstrating rates of African Americans in their pools that were close to proportions in their communities. Unlike patterns for other racial/ethnic groups, no county saw even slight overrepresentation of African Americans among those appearing at court. By contrast, for Latinos, although a few specific areas can do more to improve rates of this community's appearances in its jury pools, the general pattern of underrepresentation was not as consistent as it was for African Americans.

Given that the data I analyzed concerned only those people who appeared at the courthouse, I have no empirical tools to explain why African Americans are frequently and substantially underrepresented in jury pools across counties,

²¹ This report focuses on racial and ethnic diversity. I looked for indications that women or men are underrepresented in New Jersey's jury pools and found little evidence. Women are 52% of the population across these counties, with the percent of females in the population ranging from 49% (Cumberland) to 53% (Essex). By comparison the prevalence of women in the jury pools ranged from 47% (Morris) to 55% (Monmouth), with no comparative disparity coming even close to a 25% standard. According to statistical tests similar to those described in Appendix B, gender was also unrelated to venire outcomes.

although this result is consistent with other studies of representation.²² This form of attrition is an exceedingly difficult issue for courts to address. It is, for example, multiply determined, traceable to potential biases in source lists, undelivered or lost mail, summons non-response, and the fact that sometimes people forget that they must appear.²³ Apart from investigating the adequacy of source lists and developing a means for reminding people about their appearance, most pre-courthouse issues can be far from courts' power to control (e.g., people moving without updating their address with the Postal Service, thereby creating undeliverable mail that cannot be easily updated in the system).

Further, one source of attrition can be costly to address. Courts could, for example, more actively enforce a summons and follow-up with those who do not appear. Greater oversight of summons nonresponse would not only be resource-intensive but would also unleash more law enforcement into communities that, in the current era, may already feel over-policed. At the same time, if New Jersey's goal is to create juries that better represent their communities, then it must better understand and address sources of attrition in who makes it to the courthouse for

²² See review in Mary R. Rose, & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911 (2011).

²³ Bowler, Shaun, Kevin Esterling, and Dallas Holmes, *GOTJ: Get out the Juror*, 36 POLITICAL BEHAVIOR 515 (2014).

jury service, which may include the need to reach out to people in some manner to ensure respect for the courts' orders to appear for service, either through greater use of reminders about a service date,²⁴ or some form of enforcement. Changes to procedures at the courthouse will yield only so much success in improving the representativeness of juries if the basic disparities between pools and the broader community are not addressed.

Recommendation #3: New Jersey's next intensive study of jury representativeness should be aimed at understanding the source(s) of why jury pools – the groups of people who appear at the courthouse for service – consistently and substantially underrepresent African Americans. New Jersey should consider how to improve summons response in ways that are appropriate for a given community and that actually generate yields in participation, but which minimize costs to the court and to the underrepresented communities. New Jersey may need to enhance its system for reminding people about their assigned service date and explore reasonable methods of summons enforcement.

²⁴ *Id.*

SECTION IV. RACE, ETHNICITY AND SERVING ON A JURY IN NEW JERSEY COURTS

This section presents results that bear on the key question that motivated New Jersey's study: When people undergo voir dire, what is the likelihood that service on a petit jury depends upon their racial or ethnic identity? The sample for these analyses includes the 7,407 observations associated with those who underwent voir dire for at least one trial – called the “venire” to distinguish it from the “pools” discussed in Section III. Of venire-members in this study, 6,435 (87%) also had questionnaire data on race or Latino ethnicity.²⁵

A. Jury composition. Table IV.1 presents the proportions of each racial/ethnic group in the venires compared to that group's proportion on juries for each county. This table combines information across both civil and criminal trials because doing so provides a larger, and therefore more reliable, sample. (Tables IV.2 and IV.3, reviewed below, present the same comparisons separately for criminal versus civil trials.)

²⁵ As Appendix A describes, those without questionnaires were not included in calculations of the racial/ethnic composition of venires and juries because there is little evidence that questionnaire response correlated with outcome types. However, I nonetheless examined the data with and without the inclusion of those who had questionnaire data, and patterns of underrepresentation (e.g., whether a group met a threshold of a 25% comparative disparity) were the same.

Following the convention used in Section III, parentheses in Table IV.1 indicate instances in which a group was underrepresented on juries, compared to its proportion on the venire, by a comparative disparity of as much as 25%.²⁶ For African Americans, **three counties had sizeable differences between representation levels on juries compared to venires: Burlington, Camden, and Somerset.** Subtracting the percentage on juries compared to venires, the absolute disparities were -6.4%, -6.8%, and -4.9% for these three counties respectively (the associated comparative disparities are -39.8%, -54%, and 100%).²⁷ These levels of underrepresentation are substantial (in absolute and comparative terms), and are additionally concerning because, at least for Camden and Somerset, substantial disparities also exist between jury pools with the broader community. In other words, the drop-off between the venire and the jury compounds a pre-existing problem in African Americans' levels of representativeness for these two areas.²⁸

²⁶ Of note, the comparative disparities appearing in parentheses are not the same as statistical tests. As I explain in Appendix B, because jury service is a fairly low-probability event for anyone, differences in participation rates must be very large to test as statistically significant, which renders it a highly conservative test. Appendix B reviews what statistical testing entails conceptually, which statistical models I used, and results from those tests.

²⁷ Additionally, Morris County had no African American jurors, but it also began with venires that were just 1% African American, and this was fairly representative of the true Morris County population (see Table III.1).

²⁸ It bears mentioning that the Somerset jury vs. venire comparison is based on just one trial, which could have been atypical or had idiosyncratic practices that contributed to the disparity in African American participation.

Table IV.1: Comparison of Venire and Jury Composition, For All Juries, by County.

	N Trials	% in venire				% on juries			
County	All	Whites	Blacks	Latinos	Asians	Whites	Blacks	Latinos	Asians
Bergen	13	70.7	4.8	15.2	12.9	77.0	7.0	(10.0)	(7.0)
Burlington	8	76.3	16.1	4.0	3.0	82.3	(9.7)	8.1	(0)
Camden	8	76.4	12.6	9.1	4.0	84.6	(5.8)	9.6	(1.9)
Cumberland	2	68.0	14.0	18.6	1.7	65.3	23.1	15.4	3.9
Essex	12	48.2	31.7	16.8	7.5	41.3	38.7	17.3	6.7
Gloucester	3	88.3	5.9	2.3	2.0	76.9	7.7	3.9	3.9
Mercer	5	67.4	12.0	6.8	13.8	61.2	18.4	6.1	12.2
Middlesex	9	60.9	9.4	15.0	21.3	63.3	10.0	16.7	21.7
Monmouth	9	84.0	2.7	9.6	8.0	84.1	4.6	13.6	6.8
Morris	3	81.7	1.0	8.9	11.2	71.4	(0)	28.6	(4.8)
Ocean	5	89.7	3.2	9.3	1.0	90.9	6.1	(3.0)	(0)
Passaic	9	65.8	9.7	23.1	7.3	67.4	11.6	19.8	5.8
Somerset	1	73.0	4.9	5.7	17.2	85.7	(0)	14.3	(7.1)
Union	8	54.9	18.4	17.8	8.0	53.4	19.2	15.1	8.2

Note: Values in parenthesis indicate an underrepresentation of a given group on juries compared to its percentage on the venire by at least a 25% comparative disparity.

At the same time, **the starkest and most counter-intuitive finding in Table IV.1 is that the majority of counties *did not* underrepresent Blacks on juries.** Fully ten of the fourteen counties studied represented or over-represented African Americans on juries.

Turning to results for Latinos, six counties exhibited some level of underrepresentation on juries, but Bergen and Ocean Counties saw the most sizeable amounts: -5.2% and -6.3% respectively, which reflect substantial

comparative disparities (-34% and -68%). Four counties (Cumberland, Mercer, Passaic, and Union) exhibited underrepresentation with disparities of 3.8% or less, with low comparative disparities that ranged from about 10 – 17%. The other areas saw no underrepresentation of Latinos on juries compared to venire. Six counties also had underrepresentation of Asians, but for three of these (Burlington, Camden, and Ocean), the area had few Asian Americans in its venires (less than 3%). By contrast, Bergen, Morris, and the single trial in Somerset greatly underrepresented Asians both in terms of absolute disparities (-5.9%, -7.8%, and -10.1%, respectively) and comparative disparities (-46%, -70%, and -59%, respectively).

Hence, for Latinos and Asians, as for African Americans, underrepresentation was sizeable and concerning in two or three counties; however, in the majority of all areas studied, these groups were not starkly underrepresented.

B. Criminal vs. civil juries. Although the overall analysis presented above, which ignored case type, has the benefit of examining a large number of trials, there are two reasons to look at patterns of underrepresentation across criminal versus civil trials. First, because African Americans, in general, have a fraught relationship with law enforcement, it would be particularly concerning if they were reliably underrepresented on criminal cases in particular.

Table IV.2: Comparison of Venire and Jury Composition, For Criminal Cases, by County.

	N Trials	% in Criminal Trial Venires				% on Criminal Juries			
County	Criminal	Whites	Blacks	Latinos	Asians	Whites	Blacks	Latinos	Asians
Bergen	2	70.9	4.3	17.7	11.2	81.5	3.7	14.8	(0)
Burlington	2	74.8	17.2	4.0	3.0	78.3	(13.0)*	8.7	(0)
Camden	1	76.5	15.0	8.0	2.7	55.6	33.3	11.1	(0)
Cumberland	2	68.0	14.0	18.6	1.7	65.4	23.1	15.4	3.9
Essex	5	46.0	33.4	17.4	7.8	38.1	40.5	19.1	7.1
Gloucester	1	89.0	4.9	1.2	1.8	69.2	15.4	(0)	(0)
Mercer	3	67.5	12.1	7.6	12.8	63.6	18.2	9.1	(6.1)
Middlesex	1	60.0	6.0	16.0	20.0	58.3	16.7	(8.3)	25.0
Monmouth	1	86.3	4.1	6.9	5.5	81.8	(0)	18.2	9.1
Morris	0	--	--	--	--	--	--	--	--
Ocean	1	84.6	4.6	10.0	1.8	88.9	11.1	(0)	(0)
Passaic	3	64.5	8.9	23.4	8.1	69.8	(4.7)	20.9	7.0
Somerset	1	73.0	4.9	5.7	17.2	85.7	(0)	14.3	(7.1)
Union	3	53.2	21.8	17.8	8.2	53.7	19.5	17.1	7.3

Note: Values in parenthesis indicate an underrepresentation of a given group on juries compared to its percentage on the venire by at least a 25% comparative disparity. (*This disparity is 24%.)

The second reason hypothesizes an opposite pattern. In New Jersey criminal juries are larger in size than civil juries. Thus, criminal juries should be more likely achieve greater diversity, and there should be lower levels of underrepresentation on criminal rather than civil juries. Table IV.2 presents patterns of representation in the 26 criminal trials in the data, whereas results for the 69 civil trials are in Table IV.3. In reviewing criminal trial results, it is important to note that several areas contributed just one criminal trial to the study, which can lead to results –

both in terms of levels of overrepresentation or underrepresentation – that may have been idiosyncratic to a particular case.

Compared to the overall analysis, a few more counties profile as having substantial underrepresentation when data are split by trial-type (criminal vs. civil). **Thus, patterns of underrepresentation described in the overall analysis are not typically constant across the two types of trials.** For African Americans, Monmouth and Passaic had comparative disparities that exceeded 25% for criminal cases, although Monmouth's result stemmed from just one trial; Burlington (discussed in the combined analysis) had a comparative disparity just shy of 25%. On the civil side, in addition to Burlington underrepresenting African Americans, two particular results in Table IV.3 bear mentioning. Two civil trials in Gloucester during the study period seated no African Americans on juries despite Blacks being, on average, over 11% of venirees; in Camden, *not a single one of this county's seven civil cases seated an African American juror*. In both of these counties, African Americans were overrepresented in each areas' lone criminal case. **These are clear examples of criminal juries doing a substantially better job representing African Americans than civil cases.**

Table IV.3: Comparison of Venire and Jury Composition, For Civil Cases, by County.

	N	% in Civil Trial Venires				% on Civil Juries			
County	Civil	Whites	Blacks	Latinos	Asians	Whites	Blacks	Latinos	Asians
Bergen	11	70.4	5.2	12.6	14.6	75.3	8.2	(8.2)	(9.6)
Burlington	6	77.1	15.6	3.9	2.9	84.6	(7.7)	7.7	(0)
Camden	7	76.4	11.4	9.6	4.7	90.7	(0)	9.3	(2.3)
Cumberland	0	--	--	--	--	--	--	--	--
Essex	7	51.7	28.9	15.8	7.1	45.5	36.3	15.2	6.1
Gloucester	2	87.1	7.5	4.3	2.2	84.6	(0)	7.7	7.7
Mercer	2	66.1	11.3	1.6	21.0	56.3	18.8	(0)	25.0
Middlesex	8	61.1	9.9	14.9	21.6	64.6	8.3	18.9	20.8
Monmouth	8	83.6	2.4	10.1	8.5	84.6	6.1	12.1	(6.1)
Morris	3	81.7	1.0	8.9	11.2	71.4	(0)	28.6	(4.8)
Ocean	4	93.0	2.3	8.8	1.0	91.7	4.2	(4.2)	(0)
Passaic	6	68.3	11.4	22.5	5.5	65.1	18.6	18.6	4.7
Somerset	0	--	--	--	--	--	--	--	--
Union	5	57.1	13.8	18.0	7.8	53.3	18.8	(12.5)	9.4

Note: Values in parenthesis indicate an underrepresentation of a given group on juries compared to its percentage on the venire by at least a 25% comparative disparity.

Latinos also had somewhat better representation on criminal rather than civil juries; however, patterns were more mixed and never as clear-cut as the instance just described. On the one hand, some counties had better representation on civil rather than criminal cases. Middlesex County's single criminal trial underrepresented Latinos by 7.7% (comparative disparity of 48%), and Gloucester's lone criminal case seated no Latino member; however, in this latter instance, Latinos made up less than 2% of the venire. By contrast, a few counties

saw superior representation on criminal juries. In the overall analysis, Union County did not reach a 25% comparative disparity threshold, but when cases were limited to just civil trials, the underrepresentation level (-5.5%) generated a comparative disparity of 31%. In Bergen and Mercer Counties, there was more substantial underrepresentation on Latinos in civil trials than in criminal cases, but, again, Mercer had a low prevalence of Latinos in the venire. Only Ocean County had concerning underrepresentation in both civil and criminal trials.

Looking at results for Asian-American jurors, four counties saw underrepresentation in both criminal and civil cases: Bergen, Burlington, Camden, and Ocean. However, consistent with the discussion of the overall results, this is linked to Asian-American's limited presence in the venire. Of the four counties with 25% comparative disparities across both trial types, in only Bergen County were Asian Americans represented in venires at a non-trivial level (i.e., about 11 – 15% across the two trial types). Mercer and Gloucester had underrepresentation in criminal but not civil trials, whereas the reverse occurred in Monmouth.

Zero group members? In advocating for larger-sized juries (e.g., 12 instead of 6), jury scholars have said that the larger groups improve representation not only or even necessarily by changing the average representation levels.²⁹ They suggest

²⁹ See, e.g., Shari Seidman Diamond, Destiny Peery, Francis J. Dolan, and Emily Dolan, *Achieving diversity on the jury: Jury size and peremptory challenges*, 6 JOURNAL OF EMPIRICAL LEGAL STUDIES 425 (2010); Michael J. Saks, JURY VERDICTS (1977).

that smaller groups are particularly prone to wider swings in participation rates of minority group members – smaller groups are more likely, for example, to have none or a lot of a given group. This reflects the statistical reality that the smaller the group, the more variability the group exhibits, including variability in the profile of the people selected for a smaller-sized group.³⁰ I therefore supplemented the above analysis of rates of participation across civil and criminal juries with a basic count: For each of the three groups examined, how often did jury selection end with no members of that group on a jury? For this analysis, I counted only instances in which there was at least one member of the group in a venire.

Jury size is linked with the likelihood that a jury will contain no members of a racial/ethnic group. For African Americans, there were 33 instances of zero African Americans on a jury across 85 trials that included at least one Black venire-member; that is, 39% of cases that could have seated a Black juror had none. The rate of juries without any African American members was, however, significantly lower on criminal cases, 5 of 26 or 19%, compared to civil cases, 28 of 59 or 47%.³¹ The pattern is the same for Latinos. There were 36

³⁰ *Id.*

³¹ This result comes from a statistical test called a “chi-square test of association.” This test produced a chi-square value of 6.05 (df = 1, N = 85), $p < .05$. Results are nearly identical and significant if I remove the three counties that had only one type of trial or another.

instances of juries lacking a Latino/a member across 91 trials with at least one Latino/a venire-member, a rate of 40%. This outcome was more likely to occur on civil trials (48%) than criminal trials (29%).³² Unlike the other two groups, it was more common than not for a jury to have no Asian-American members (58% of trials), and the difference between criminal cases (50%) and civil cases (61%) did not test as statistically significant.³³

To sum up this sub-section on representation levels on criminal versus civil cases: except for analyses of Asians, a group that had low prevalence in several areas, **typically groups were *not* underrepresented on both civil and criminal cases.** Such consistency was true only for Burlington County and African Americans, and Ocean County with respect to Latinos. **I observed little evidence that African Americans are particularly likely to be underrepresented on criminal cases. By contrast there was some evidence that civil cases are more likely to underrepresent a group compared to criminal cases.** In three counties Latinos enjoyed greater representation on criminal rather than civil juries, whereas two counties showed the reverse. The most striking pattern occurred for African

³² This is again a statistically significant difference: chi-square = 6.29 (df = 1, N = 91), $p < .05$, and results do not change markedly if I eliminate the three counties that had just one type of trial or the other.

³³ Chi-square = 0.91 (df = 1, N = 90), $p < .35$.

Americans in two counties, each with non-trivial proportions of African Americans in their venires: African Americans were overrepresented on each county's lone criminal trial, whereas multiple civil cases seated no African Americans. This result was particularly dramatic in one county, which held fully seven separate civil cases with the same pattern. Finally, analyses indicate that civil juries are more likely than larger-sized criminal juries to fail to have any African American or Latino members.

C. Conclusions and Recommendations #4 and #5. The first conclusion from analysis of minority representation across fourteen counties is a surprising one: **In many ways, New Jersey courts are doing an admirable job ensuring that minority group members in a venire participate on criminal and civil juries.** In the majority of counties, representation levels of African Americans, Latinos, and Asian Americans on juries resembled or exceeded the group's prevalence in the venires. As detailed in Appendix B, there were also few statistical differences in rates of participation on juries for minority-group members compared to White/non-Hispanic venire-members. Underrepresentation was not wholly absent, but only two or three counties exceeded a 25% threshold of underrepresentation within analyses of each minority group, and these were typically not the same counties (i.e., counties did not typically underrepresent all groups).

Further, **patterns were not typically fixed across type of case.** Among counties with underrepresentation of either Blacks or Latinos, just a single county exhibited substantial underrepresentation in both civil and criminal trials (Burlington for African Americans, Ocean for Latinos). Consistency in underrepresentation across case types was a more common pattern in analyses of Asian Americans; however, low prevalence in many counties appeared to account for some, but not all, of this. Instead it was more common for a county to have some underrepresentation in one type of case but not another.

Finally, there are several indicators that **criminal juries, which are larger in size, do a better job of representing minority group members than smaller-sized civil juries.** In two counties, Gloucester and Camden, no African Americans appeared on any civil juries. I more formally tested whether civil juries were disproportionately likely to have extreme participation patterns, specifically the total absence of group members, compared to criminal trials. Results for Latinos and African Americans supported findings from prior jury research studies: civil cases were statistically more likely than criminal cases to have juries that failed to seat any African Americans or any Latinos.

Recommendation #4: New Jersey courts should continue their analysis of the practices that contribute to representative juries being drawn from venire. Precisely because the juries in these fourteen areas commonly profiled well on indicators of representativeness, New Jersey should better understand what exactly contributed to this result in multiple counties. As the study also points to particular areas

that have more consistent underrepresentation patterns, either across case type or within case type, these areas should conduct a self-study to assess what may be happening in these cases. (Sections V, VI, and VII begin some of this work.) This is particularly important in the areas in which no African Americans appeared on the mass of civil cases.

Recommendation #5: One way for New Jersey to show its commitment to seating more representative juries would be to increase the size of civil juries to 12 members, rather than six. A recent article by Federal judges argues for the superiority of the 12-person jury,³⁴ and the data in this study amply demonstrate why larger-sized groups do a better job than smaller-sized groups of achieving stable levels of representativeness and avoiding the wholesale elimination of minority-group members.

³⁴ Patrick Higginbotham, Lee Rosenthal, and Steven Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 JUDICATURE 46 (2020).

SECTION V: PEREMPTORY CHALLENGES

The previous section described the subset of concerning patterns of underrepresentation across counties and observed that, particularly in civil cases, minority group members are sometimes wholly eliminated from jury participation. This section focuses on one way that people are excluded from jury participation: the exercise of peremptory challenges.

A. Peremptory challenges and minority underrepresentation. Because New Jersey grants parties a large number of peremptory challenges,³⁵ a natural question arises about what role peremptory challenges play in instances of minority underrepresentation in New Jersey courts. According to the survey data collected, **peremptory challenges play a small role in explaining jury selection patterns for minority groups; its minimal effect on underrepresentation stems from its constrained use**. Table V.1 presents results on the average number of peremptory challenges used in these trials on African Americans, the variability in use – called the “standard deviation” of the mean, which appears in parentheses next to the

³⁵ According to N.J.S.A. § 2B:23-13: parties have six strikes per party in civil cases; as many as 20 peremptories for the defense for categories of serious felonies described in the statute when a defendant is tried alone (10 if tried jointly), whereas the State gets 12 challenges in these cases for a defendant tried alone, but 6 for each 10 the defense receives when defendants are tried jointly; and 10 per side in other types of criminal indictments (fewer if the case is “to be tried by a jury from another county”). The large number of peremptories, particularly in criminal cases, is atypical among states (see, e.g., “State of the States Survey,” http://www.ncsc-jurystudies.org/_data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf, at 8).

average³⁶ – as well as the maximum number of strikes used by each side on African Americans in any trial. Results are presented separately for criminal and civil trials and include only trials in which there was at least one African American in the venire. Tables V.2 and V.3 present these same results for Latinos and Asian Americans, respectively.

1. African Americans. According to Table V.1, peremptory challenges offer some, but only minimal, purchase in explaining instances of underrepresentation of African Americans. These challenges were, quite simply, not exercised very often on this group. Looking broadly, across the 85 trials with at least one African American in the venire, peremptory challenges by either side removed just 52 of the 761 African Americans in these cases, or 7%. According to Table V.1 **in no instance did the overall *average* level of peremptory use per trial exceed one; within each county, across both trial types, it was unusual for the even the *maximum* number of strikes used on African Americans to exceed one.** In the single instance in which the maximum value was as high as 3 peremptory

³⁶ The standard deviation is a useful descriptive statistic because it summarizes how much the use of peremptories varied across multiple trials. One standard deviation added or subtracted from the average value represents the range of fully two-thirds of the distribution of peremptory usage (although in several instances, there were so few trials that the word “distribution” is somewhat inapt). When peremptory use is highly variable, the standard deviation will be larger relative to the mean. Note that when counties held only one trial, no standard deviation is reported because there was no variability in usage.

challenges (used by the State in a criminal trial in Essex County), I reviewed the circumstances. There were 57 African Americans in the venire, and the proportion of African Americans on the final jury mimicked their representation in the venire. In the data, by far the most common number of strikes against African Americans (i.e., the “modal value”) was zero.

Table V.1: Use of Peremptory Challenges on African Americans Across Fourteen Counties: Means, Standard Deviations, and Maximum Number Used, for Criminal and Civil Cases.

County	Trials	Criminal Trials				Trials	Civil Trials			
		State	Max	Defense	Max		Plaintiff	Max	Defense	Max
Bergen	2	0	0	0	0	8	0.1 (0.4)	1	0.3 (0.5)	1
Burlington	2	1.0 (0.0)	1	1.0 (1.4)	2	6	0.2 (0.4)	1	0.7 (0.5)	1
Camden	1	1.0 (--)	1	0	0	7	0.1 (0.4)	1	0.1 (0.4)	1
Cumberland	2	0.5 (0.7)	1	0.5 (0.7)	1	0	--	--	--	--
Essex	5	0.6 (1.3)	3	0.2 (0.4)	1	7	0.1 (0.4)	1	0.4 (0.5)	1
Gloucester	1	0	0	0	0	2	0.5 (0.7)	1	1.0 (1.4)	2
Mercer	3	0.7 (0.6)	1	0	0	2	0	0	0	0
Middlesex	1	0	0	0	0	7	1.0 (0.8)	2	0.1 (0.4)	1
Monmouth	1	1.0 (--)	1	0	0	6	0.2 (0.4)	1	0	0
Morris	0	--	--	--	--	1	0	0	0	0
Ocean	1	0	0	0	0	2	0	0	0	0
Passaic	3	0.3 (0.6)	1	0	0	6	0.3 (0.8)	2	0.5 (0.5)	1
Somerset	1	0	0	0	0	0	--	--	--	--
Union	3	0.3 (0.6)	1	0.7 (0.6)	1	5	0.4 (0.5)	1	0.2 (0.4)	1
Overall	26	0.5 (0.7)	3	0.2 (0.5)	2	59	0.3 (0.6)	2	0.3 (0.5)	2

Note: “(--)” indicates instances of just one trial which does not permit a standard deviation estimate. Results based on the 85 trials that had at least one African American in the venire.

Of course, even infrequent use of peremptories can have effects. A significant concern about peremptories is that they will “pick off” members of communities that have a small presence in a venire – removing, for example, the only two African Americans in a venire with just two peremptory strikes; studies find even this level of elimination can have an effect on trial outcomes.³⁷ I looked for evidence of this type of problematic result in three ways. First, I looked for any instance of this precise pattern. For African Americans, there was no instance in which peremptories removed all available Black venire-members.

Second, using the same threshold I have employed throughout this report, I counted the number of times that the combined use of peremptory challenges by both sides removed at least 25% of the members present in the venire. For African Americans, I counted 13 trials, across eight different counties, that met this threshold. Across these trials, a total of 23 peremptories removed African Americans, and these venires had a total of 59 African American venire-members; thus, in this subset of 13 cases with high-impact peremptory use, peremptories removed fully 39% of African Americans in those venires. This is a concerning result, but it bears repeating that it is unusual across all trials: these 13 trials constituted just 15% of the 85 cases that had at least one African American in the

³⁷ See, e.g., Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson, *The Impact of Race in Criminal Trials*, 127 QUARTERLY JOURNAL OF ECONOMICS 1017 (2012).

venire. Further, of the eight counties demonstrating this pattern of removing at least 25% of African Americans in any one trial, only four (Burlington, Camden, Gloucester, and Monmouth) were mentioned at all in Section IV as having concerning levels of representation in either their civil or criminal juries. The remaining counties did not exhibit underrepresentation on the trials studied,³⁸ or had underrepresentation but peremptories removed fewer than 25% of the African Americans in the venires.

The final way I looked for potentially problematic use of peremptories was to pull out the 33 cases, discussed in Section IV, in which no African American made it onto the jury, even though there was at least one African American in the venire. I looked at attrition in these cases and examined in how many instances the peremptory contributed to the outcome of zero Black jurors. Of these 33 cases, just under half (n = 16, 48%) involved an attorney using even one peremptory challenge on African American venire-members.³⁹ In cases in which no African Americans made it to the jury and attorneys used a peremptory, peremptories

³⁸ Passaic also had one instance in which peremptories removed at least 25% of the Black venire-members, but this occurred in a civil case, whereas the underrepresentation described in Section IV was on a criminal trial.

³⁹ The remaining 17 cases seated no African American jurors because of heavy use of challenges for cause or because the African American venire-members were listed as “not used.” These sources of attrition are discussed in more detail below in Sections VI and VII.

removed just over one quarter of the 83 African Americans in the venire from jury service ($n = 22$, 27%). This result again demonstrates that peremptories played a role in the wholesale removal of African Americans from these juries; however, these strikes were by no means the primary culprit. For the majority of African Americans, and in the majority of trials examined, attrition came through other mechanisms. This conclusion is particularly apt for the unusual instance of Camden, in which all seven of its civil trials failed to seat even one African American. Across those seven cases, just 2 peremptory strikes in total were used against African Americans (in two trials, one in each); thus, peremptories do not explain patterns for this county.

2. *Latinos*. Analysis of Latinos produced similar broad patterns of peremptory use as for African Americans, but attorneys used peremptories to strike Latinos a bit more frequently than was true for Blacks. For example, as with African Americans, the modal value for peremptory usage on Latinos in both civil and criminal trials was zero, and as Table V.2 shows, the most common average value for peremptory use was 1.0 or lower. At the same time, the proportion of Latinos removed via the peremptory was somewhat higher: attorneys struck a total 88 Latino individuals, or 10% of the 879 Latinos in venires. Further, Table V.2 shows higher maximum values occurred somewhat more frequently. There were five cases in which attorneys for one side or the other used as many as 3

peremptories on Latino venire-members, and in one unusual case, the defense used 8 (this was an outlier case from Passaic, in which the defense in a civil case used a total of 29 peremptory strikes; no other case had as many as twenty strikes used by a side, and in this instance, Latinos still made up 25% of the jury).

Table V.2: Use of Peremptory Challenges on Latinos Across Fourteen Counties: Means, Standard Deviations, and Maximum Number Used, for Criminal and Civil Cases.

County	Trials	Criminal Trials				Trials	Civil Trials			
		State	Max	Defense	Max		Plaintiff	Max	Defense	Max
Bergen	2	1.0 (1.4)	2	0	0	11	0.3 (0.6)	2	0.3 (0.5)	1
Burlington	2	0	0	0	0	5	0	0	0.4 (0.5)	1
Camden	1	0	0	0	0	7	0.1 (0.4)	1	0.1 (0.4)	1
Cumberland	2	1.0 (0.0)	1	2.0 (1.4)	3	0	--	--	--	--
Essex	5	0.6 (0.9)	2	0.2 (0.4)	1	7	0	0	0.3 (0.8)	2
Gloucester	1	0	0	0	0	2	0	0	0	0
Mercer	3	0	0	1.0 (0.0)	1	1	0	0	0	0
Middlesex	1	1.0 (0.0)	1	0	0	7	0.7 (0.8)	2	0.4 (0.5)	1
Monmouth	1	1.0 (--)	1	0	0	7	0.1 (0.4)	1	0.4 (0.8)	2
Morris	0	--	--	--	--	3	0.3 (0.6)	1	0.7 (0.6)	1
Ocean	1	3.0 (--)	3	1.0 (--)	1	4	0.3 (0.5)	1	0.5 (0.6)	1
Passaic	3	1.7 (1.5)	3	2.0 (1.7)	3	6	0.7 (1.2)	3	2.3 (3.1)	8
Somerset	1	0	0	0	0	0	--	--	--	--
Union	3	0.3 (0.6)	1	0.7 (0.6)	1	5	0.4 (0.9)	2	0.4 (0.5)	1
Overall	26	0.7 (1.0)	3	0.7 (1.0)	3	65	0.3 (0.7)	3	0.5 (1.2)	8

Note: "(--)" indicates instances of just one trial which does not permit a standard deviation estimate. Results based on the 91 trials that had at least one Latino/a in the venire.

Taking a more granular look at all the trials, I again investigated whether even a small number of peremptories undermined the representation of Latinos on

New Jersey juries. Findings are consistent with the gist of the broader look: although peremptories played a mostly small role in contributing to underrepresentation, effects of the peremptory on Latinos were a bit stronger than for African Americans. First, there was one instance of a civil trial in Burlington in which one peremptory challenge eliminated the only Latino from the venire. Second, there were more ($n = 18$) instances in which peremptories removed at least 25% of Latinos in the venire.⁴⁰ Those 18 cases represent 20% of the 91 trials with at least one Latino/a venire-member, a somewhat higher level than that observed for African Americans; it also occurred in more counties ($n = 11$ compared to 8 for African Americans.)

The link to final underrepresentation on juries through these practices nonetheless remains tenuous: just three of the 11 counties in which peremptories eliminated at least 25% of the Latino members of the venire also profiled in Section IV as having concerning underrepresentation on juries (Bergen, Ocean, and Union). Finally, I carefully examined the 36 cases in which no Latino/a ended up on the jury. Here the pattern was very similar to that for African Americans: in only 16 cases (44%) were any peremptories used; they removed 20% of the 127

⁴⁰ Interestingly, only one of these cases was the same trial in which attorneys used peremptories against African Americans in ways that removed at least one-quarter of their numbers on the venire.

Latinos in these venires, a non-negligible amount but by no means constituting a majority.

3. *Asian Americans*. Given that Asian Americans were frequently just a small portion of venires (<5% - see Tables IV.1 to IV.3), peremptories would seem to pose a substantial risk to the presence of this group on juries. However, according to Table V.3, as was with other groups, peremptory strikes were used infrequently on this group. A total of 567 Asians appeared in the venires of these trials, and attorneys exercised 44 peremptories against this group (8%). In just one case was the lone Asian American venireperson eliminated through a peremptory. In 13 trials from seven counties, peremptories removed at least 25% of the Asian Americans in the venire; however, just three of these counties – Bergen, Camden, and Gloucester – exhibited concerning levels of underrepresentation in the analysis presented in Section IV, again pointing to the likelihood that other factors determine how representative the jury will be. Among the 52 cases in which no Asian Americans served on juries despite there being at least one Asian American in the venire, peremptories played no role in in fully 35 of them (67%) because no peremptories were exercised on Asian Americans during these trials. In the remaining 17 trials, a bare majority (9 of 17) saw the loss of Asian Americans in the venire exceed 25%.

Table V.3: Use of Peremptory Challenges on Asian Americans Across Fourteen Counties: Means, Standard Deviations, and Maximum Number Used, for Criminal and Civil Cases.

County	Trials	Criminal Trials				Trials	Civil Trials			
		State	Max	Defense	Max		Plaintiff	Max	Defense	Max
Bergen	2	0.5 (0.7)	1	1.5 (2.1)	3	11	0.3 (0.6)	2	0.3 (0.5)	2
Burlington	2	0	0	0	0	3	0	0	0	0
Camden	1	0	0	0	0	7	0.3 (0.5)	1	0.1 (0.4)	1
Cumberland	2	0	0	0	0	0	--	--	--	--
Essex	5	0	0	0	0	7	0.1 (0.4)	1	0.1 (0.4)	1
Gloucester	1	0	0	1.0 (--)	1	2	0	0	0	0
Mercer	3	0	0	0.3 (0.6)	1	2	0	0	0.5 (0.7)	1
Middlesex	1	1.0 (--)	1	0	0	8	0.6 (0.7)	2	0.8 (0.9)	2
Monmouth	1	0	0	1.0 (--)	1	8	0.1(0.4)	1	0.1 (0.4)	1
Morris	0	--	--	--	--	3	1.0 (0.0)	1	0	0
Ocean	1	0	0	0	0	3	0	0	0	0
Passaic	3	1.0 (1.0)	2	0.3 (0.6)	1	5	0.2 (0.4)	1	0.2 (0.4)	1
Somerset	1	0	0	0	0	0	--	--	--	--
Union	3	0.3 (0.6)	1	0	0	5	0	0	0.2 (0.4)	1
Overall	26	0.2 (0.5)	2	0.3 (0.7)	3	64	0.3 (0.5)	2	0.2 (.5)	2

Note: "(--)" indicates instances of just one trial which does not permit a standard deviation estimate. Results based on the 90 trials that had at least one Latino/a in the venire.

4. *Summary.* Although there were small variations in patterns across analyses of African Americans, Latinos, and Asian Americans, **a fair conclusion for all groups is that peremptories play a role in underrepresenting these groups on some juries, but only an attenuated one. According to a variety of measures, peremptory challenges are rarely the primary way that minority groups experience attrition from jury participation.**

B. Peremptory use overall. The infrequent use of peremptory challenges on the groups analyzed above is noteworthy given how many challenges New Jersey allots to parties. Is such infrequency specific to minority group members? Perhaps, contrary to most scholarship in this domain, all parties are disproportionately aiming strikes at the non-Hispanic White members of a venire, leaving few available to exercise on minority group members. One way to consider this possibility is to run statistical tests that ask whether White/non-Hispanic venirepersons are actually *more likely* to be dismissed through a peremptory challenge than are members of the three groups I examined above. I did so, testing for effects due to race/ethnicity while also accounting for variability in peremptory use across trials (see Appendix B for more discussion of this approach as applied to jury participation). I tested models for criminal and civil trials separately, and also separately for each side (i.e., for the state/plaintiff's peremptory challenges and for the defense's use of strikes).⁴¹

⁴¹ It is particularly important to separate out case type because research has shown that although it is the plaintiff (the State) in criminal trials who is more likely to dismiss African Americans than to dismiss Whites, it is the defendant in civil trials who disproportionately dismisses African Americans rather than White venirepersons (cf. Diamond et al., *supra*, note 29; Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUMAN BEHAVIOR 695, 1999).

Only one model produced a significant effect: Criminal defense attorneys were about one-fourth less likely to dismiss African Americans through a peremptory than they were to use a peremptory strike on non-Hispanic Whites ($p < .01$). Of the 135 peremptory challenges exercised by criminal defense attorneys, just six were against African American venirepersons, whereas 114 were against Whites. Otherwise, rates in peremptory use on non-Hispanic Whites versus the other groups in all other tests were statistically comparable.⁴²

How often do attorneys exercise strikes on anyone? Table V.4 on the next page presents data on the average number, standard deviation, and maximum value of peremptory challenges used on any venireperson across all counties, by county and by attorney type. In the bottom rows, I present additional information about the distribution of peremptory challenges in New Jersey by indicating the number of peremptories used by each side when that side was at the 75th and 90th percentile of the distribution. Put another way, these figures indicate what amount of

⁴² As Appendix B describes, statistical testing is a conservative approach to identifying differences in peremptory use across racial/ethnic groups because being dismissed by a peremptory in these data is a rare event for everyone: fewer than 10% of venirepersons were eliminated through the peremptory. In such situations, effects will not test as significant unless the differences are sizeable, as was the finding for defense attorneys' use of peremptories on Black versus White venirepersons. Thus, results indicate no other instance of a difference this extreme.

peremptory strikes occurred in the top 25% and 10%, respectively, of cases that used peremptories.

Table V.4: Use of Peremptory Challenges Across Fourteen Counties: Means, Standard Deviations, and Maximum Number Used, for Criminal and Civil Cases.

County	Trials	Criminal Trials				Trials	Civil Trials			
		State	Max	Defense	Max		Plaintiff	Max	Defense	Max
Bergen	2	3.5 (4.9)	7	4.5 (6.4)	9	11	1.8 (1.8)	5	2.4 (3.2)	11
Burlington	2	1.5 (0.7)	2	3.0 (0.0)	3	6	2.8 (1.8)	5	2.5 (1.9)	6
Camden	1	2.0 (--)	2	2.0 (--)	2	7	3.0 (0.8)	4	2.6 (1.8)	6
Cumberland	2	3.0 (1.4)	4	11.5 (11)	19	0	--	--	--	--
Essex	5	3.2 (3.6)	9	4.6 (4.9)	12	7	2.3 (1.8)	5	1.7 (1.4)	4
Gloucester	1	7.0 (--)	7	13.0 (--)	13	2	3.5 (0.7)	4	4.5 (0.7)	5
Mercer	3	4.3 (2.1)	5	4.3 (1.2)	5	2	1.5 (2.1)	3	1.0 (1.4)	2
Middlesex	1	3.0 (--)	3	2.0 (--)	2	8	3.8 (1.7)	6	3.1 (2.2)	6
Monmouth	1	7.0 (--)	7	12.0 (--)	12	8	1.9 (1.4)	4	3.3 (3.3)	11
Morris	0	--	--	--	--	3	4.3 (1.5)	6	2.3 (0.6)	3
Ocean	1	8.0 (--)	8	5.0 (--)	5	4	3.5 (1.3)	5	3.5 (1.7)	5
Passaic	3	6.3 (0.6)	7	9.3 (4.0)	13	6	3.5 (5.7)	15	8.0 (10.8)	29
Somerset	1	4.0 (--)	4	6.0 (--)	6	0	--	--	--	--
Union	3	2.7 (2.1)	5	3.7 (2.3)	5	5	2.4 (1.1)	4	2.0 (1.2)	3
Overall	26	3.8 (2.6)	9	5.9 (4.8)	19	69	2.7 (2.2)	15	3.1 (3.9)	29
75 th percentile	--	6		9		--	4		4	
90 th percentile	--	7		13		--	5		6	

Note: "(--)" indicates instances of just one trial which does not permit a standard deviation estimate.

Table V.4 makes clear that **attorneys rarely use the full complement of strikes allotted to them under statute**. In criminal cases, the prosecution used, on average, just under four strikes; those in the top 25% of the distribution used six, and those in the top 10% used seven. Stated in terms of number of cases, in all but

six of the 26 criminal trials, prosecutors used fewer than seven peremptory challenges (all but one used eight or fewer). For criminal defense attorneys, who have more peremptory challenges allotted to them and therefore used more on average, they nonetheless also did not use all their strikes. The top 75% of the distribution across cases used nine or more strikes; the top 10% used 13. Stated in terms of cases, all but seven cases used 8 or fewer peremptory strikes and all but five trials used 10 or fewer.

In civil cases, each side had six strikes per party; clearly some trials had multiple plaintiffs or defendants,⁴³ since the maximum value in a few cases was above ten and reached as high as 29. Despite these unusual values, the bottom of Table V.4 shows that, on average, each side used around three strikes. The top 25% of attorneys on each side used four strikes, and the top 10% of civil plaintiffs used five, whereas civil defendants used six. Stating results in terms of the raw number of the 69 civil cases examined in this study, civil plaintiffs in all but four cases used 5 or fewer peremptory strikes, and all but one used 6 or fewer. For civil defendants, all but four used 6 or fewer. In other words, among civil cases, parties in 65 of the 69 trials did not use even the six strikes allotted to them.

⁴³ The data provided did not give information about number of parties, or any other case-related information.

C. Conclusions. This section presented a series of surprising, counterintuitive findings. First attorneys' use of peremptory strikes on minority group members played a case-specific and generally attenuated role in explaining patterns of underrepresentation on juries. For example, in just under half of the cases in which either African Americans or Latinos were wholly eliminated from juries did attorneys use any peremptory challenges, and just a few of the counties that profiled as having concerning levels of underrepresentation on civil or criminal cases (see Section IV) also had concerning levels of peremptory usage. Second, with one exception regarding criminal defendants' use of peremptories on African American compared to non-Hispanic White jurors, there is little strong statistical evidence that peremptory challenge outcomes differed substantially by race or ethnicity in these trials. Finally, an examination of peremptory challenge use – both within each of the minority groups and across the entire sample – shows that attorneys do not use a substantial number of challenges, and only rarely use all or close to their full complement of strikes.

Given the largely restrained use of peremptory strikes in a state with such a generous allotment, it is tempting to look at the data and conclude that attorneys, particularly attorneys in criminal cases, do not need as many strikes as they have. As an empirical matter, the data indicate that prosecutors in all but the rarest of cases would need 8 strikes, and likewise the vast majority of criminal defendants

would need but 10; on the civil side, six strikes in total would have covered all but a handful of parties in these trials. Because I conclude that peremptories have some role, albeit a small one, in affecting jury selection outcomes, New Jersey may wish to further limit the number of challenges attorneys use. However, the peremptory's effect on representativeness is, in these data, a fairly weak ground on which to argue for limiting the number of peremptories. **I present evidence for a more clearly problematic effect of having so many peremptory challenges in Section VII, which reviews the large venire sizes in New Jersey trials, particularly in criminal cases.**

As New Jersey works on deciding the “right” number of peremptory challenges to permit, I do *not* recommend relying solely on the empirical account of how attorneys used their strikes as presented in this Section. As I next discuss, understanding peremptory use in these cases requires a careful look at another source of attrition from jury service: judges' generous use of challenges for cause.

SECTION VI. CHALLENGES FOR CAUSE

In the trials I studied, a total of 7,407 individuals underwent a voir dire experience in either a criminal or civil trial. **In criminal cases, the most common way for individuals to conclude their voir dire experience was through a challenge for cause; in civil cases, challenges for cause were a close second to the group that was “not used.”** In criminal cases, in which the slight majority of the sample (3,753, or 51%) participated, the JMS database lists fully 57% of people as having been dismissed for cause, which dwarfed the frequency of all other categories, including the 26.7% of criminal venirepersons who were listed as “not used.” By contrast, in civil cases, which had smaller venires on average and included 3,654 venirepersons, the “not used” category was slightly larger (39.5%) than the cause-challenge category (36.5%). Across all cases, nearly 47% of people ended jury selection by being dismissed through a challenge for cause. The bottom row of Table VI.1 presents these figures, with the bulk of the table depicting specific patterns across counties. Given the high rates of people being dismissed through challenges for cause, this section explores two questions: What relationship do challenges for cause have with the use of peremptory challenges, and is their use negatively affecting jury diversity?

Table VI.1: Voir Dire Outcomes by County and Trial Type.

	All	Type of Outcome for All Venirepersons (%)						Type of Outcome for All Criminal Venirepersons (%)						Type of Outcome for Civil Venirepersons (%)				
County	N People	Jurors	Cause	Pros/ Pltf	Def P	Not Used	N	Juro rs	Caus e	Pros/ Pltf	Def P	Not Used	N	Juror s	Caus e	Pros/ Pltf	Def P	Not Used
Bergen	1,092	9.5	51.6	2.3	3.2	33.2	551	5.3	70.6	1.3	1.6	21.2	541	13.9	32.2	3.7	4.8	45.5
Burlington	333	20.4	21.3	6.0	6.3	45.9	123	22.8	26.8	2.4	4.9	43.1	210	19.0	18.1	8.1	7.1	47.6
Camden	598	9.7	18.9	3.8	3.3	64.2	194	6.7	23.7	1.0	1.0	67.5	404	11.1	16.6	5.2	4.4	62.6
Cumberland	177	15.3	49.2	3.4	13.0	19.2	177	15.3	49.2	3.4	13.0	19.2	0	--	--	--	--	--
Essex	1,092	10.4	54.6	2.9	3.2	28.8	654	10.1	51.7	2.4	3.5	32.3	438	11.0	58.9	3.7	2.7	23.7
Gloucester	277	10.1	41.9	5.1	7.9	35.0	175	8.0	52.6	4.0	7.4	28.0	102	13.7	23.5	6.9	8.8	47.1
Mercer	545	10.3	67.5	2.4	2.8	17.1	478	8.4	68.2	2.1	2.7	18.6	67	23.9	62.7	4.5	3.0	6.0
Middlesex	433	15.7	47.3	7.6	6.2	23.1	60	23.3	51.7	5.0	3.3	16.7	373	14.5	46.6	8.0	6.7	24.1
Monmouth	665	10.5	50.2	3.3	5.7	30.2	91	14.3	42.9	7.7	13.2	22.0	574	9.9	51.4	2.6	4.5	31.5
Morris	175	12.0	22.9	7.4	4.0	53.7	0	--	--	--	--	--	175	12.0	22.9	7.4	4.0	53.7
Ocean	330	12.4	19.4	6.7	5.8	55.8	133	10.5	18.8	6.0	3.8	60.9	197	13.7	19.8	7.1	7.1	52.3
Passaic	1,016	8.7	56.8	3.9	7.5	23.1	678	6.5	70.2	2.8	4.1	16.4	338	13.0	29.9	6.2	14.2	36.7
Somerset	125	11.2	44.0	3.2	4.8	36.8	125	11.2	44.0	3.2	4.8	36.8	0	--	--	--	--	--
Union	549	14.4	51.4	3.6	3.8	26.8	314	14.0	64.0	2.5	3.5	15.9	235	14.9	34.5	5.1	4.3	41.3
Overall	7,407	11.3	46.9	3.9	4.9	33.0	3,753	9.6	57.0	2.7	4.1	26.7	3,654	13.0	36.5	5.2	5.8	39.5

A. Cause challenges and peremptory challenges. A typical argument that attorneys and scholars, including this author,⁵⁴ give for the necessity of peremptory challenges is their role in offsetting judges' unwillingness to dismiss people who exhibit bias, particularly when prospective jurors verbally insist that they can be fair. Under this argument, one would expect to see greater use of peremptory challenges when judges excuse people for cause at lower rates. Statistically, this is called a "negative relationship" or a "negative correlation:" as one variable (cause challenge use) decreases, the other variable (peremptory challenge use) increases. Given that cause challenges play such a common – indeed, often the predominant – role in jury selection in New Jersey courts, the notion of "stingy" judges who refuse challenges for cause seemed unlikely. But the question nonetheless demands empirical testing.

To examine whether there is a negative relationship between for-cause and peremptory challenges, I calculated the proportion of cause challenges used on each venire – that is, the type of proportion depicted in Table VI.1, but at the trial-level instead of the county-level. I also calculated the raw number of challenges used by each side in each case and then tested for correlations between rates of

⁵⁴ Mary R. Rose, and Shari Seidman Diamond. *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOCIETY REVIEW 513 (2008).

cause challenge grants in a venire and use of peremptories, examining civil and criminal trials separately.

In New Jersey trials in this study, the purported negative relationship between cause challenges and peremptory challenges does not exist. Instead, in criminal cases, the higher the proportion of people who are dismissed through a challenge for cause, the more challenges a defense attorney and a prosecutor exercise. The correlation coefficients were .40 for the defense, and .41 for the state,⁵⁵ both of which were statistically significant at $p < .05$. The correlation coefficients for the civil cases did not test as statistically significant; however, they were also not negative: .10 for the defendant's use of peremptories and a coefficient of zero for the plaintiff's use. In short, there is no evidence that attorneys use more strikes in reaction to judges' being more conservative on granting challenges for cause. **The positive relationship between for-cause and peremptory strikes signals that both judges and attorneys exercise challenges in ways that are responsive the level of bias in the venire – as more people are**

⁵⁵ Correlations are bounded by -1.0 (two variables vary completely in tandem with one another, but in a negative direction) to +1.0 (two variables vary completely in tandem with one another, but in a positive direction, meaning that as one increases so does the other). In between these two poles, a correlation coefficient of zero would indicate that two variables are completely unrelated to one another.

excused for cause, attorneys also exercise more peremptory strikes, at least in criminal cases.

I cannot overstate the importance of this finding for assessing whether or not New Jersey has “too many” peremptory challenges, particularly if such assessments are based on the observed (in)frequency of peremptory usage described in Section V. **Although attorneys rarely use their full complement of peremptory challenges, in all likelihood, judges’ willingness to be generous in excusing people for cause facilitates this outcome.** Although I do not have any data to prove why for-cause and peremptory strikes have a positive relationship with one another in criminal cases, I would expect that attorneys are able to be restrained in peremptory use when they do not have to use their strikes on egregious cases of bias or on jurors who are, for example, deeply unhappy about having to serve. They can instead be more selective in which people to strike. This is advantageous given that a subset of excused jurors do take offense at being excused through the peremptory challenge,⁵⁶ and are less likely to feel that way when excused by a judge. **If New Jersey were to reduce the number of strikes it makes available to attorneys, judges should not likewise pull back on granting**

⁵⁶ See, e.g., Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors’ Views Regarding the Peremptory Challenge*, 78 CHICAGO-KENT LAW REVIEW 1061 (2003) (reporting on interviews with excused prospective jurors).

challenges for cause. In all likelihood, the observed rates of peremptory use in criminal trials depend upon judges' willingness to use for-cause challenges.

B. Cause challenges and jury diversity. An understandable concern about the high proportion of cause challenges in New Jersey venires is that liberal use will negatively affect jury diversity. One might expect, for example, that economic and other barriers to jury service are more common among non-Whites than among Whites due to differences in personal resources that can address the burdens of service (e.g., better-resourced people, who are more likely to be White, will have advantages in absorbing childcare costs, reduced wages, and transportation costs getting to and from service). Thus, to the extent that cause challenges are granted on the basis of people expressing unwillingness to serve, or if minority-group members are more alienated from courts or less willing to serve, then one would expect cause challenges to disproportionately eliminate minorities from venires.

To assess whether there is a relationship between judges' use of cause challenges and jury outcomes, the first question to ask is whether the use of challenges for cause is correlated with race or ethnicity. To investigate this, I ran the same statistical models used to predict selection to a jury (Appendix B) and use of peremptory challenges (see Section V). Specifically, I tested whether the likelihood of being excused for cause was different for Blacks, Latinos, and Asians than it was for non-Hispanic Whites. I ran models using both the aggregated data

(i.e., all areas combined) and also within each county. **There was effectively no relationship between a juror's racial or ethnic background and the likelihood that that person would be dismissed through a challenge for cause.** The sole exception was that Asian Americans were about one-and-a-half times more likely to be dismissed by a cause challenge than Whites, but only in Bergen County – hardly compelling evidence that judges are making decisions on the basis of factors that disproportionately affect one racial or ethnic group more than others.

Given that judges do not disproportionately remove members of one group or another, it seems unlikely that cause challenges are linked to jury composition. But, to be certain, I tested for the presence of a statistically significant correlation between the use of challenges for cause in a venire and that venire's jury composition outcome. To do this analysis, I again used the measure (discussed above) that captures the proportion of challenges for cause used in a trial. I also developed a measure of jury diversity, which I define as the proportion of non-Hispanic Whites on each jury. To be sure, the latter is only a rough proxy for jury diversity, since truly diverse juries are not defined by the how many members are White, but rather by how well a jury matches the demographic diversity in the venire. However, given that New Jersey venires are quite diverse, and given the

negative connotation of an “all-White jury,” the proportion of Whites on a jury seemed a reasonable gauge for jury diversity.⁵⁷

According to these data, there is a negative relationship between judges’ use of cause challenges and the extent to which a jury contains non-Hispanic Whites: **the higher the proportion of cause challenges exercised in civil venires, the lower the proportion of non-Hispanic Whites seated on a jury.** Across the 95 trials, the correlation coefficient was $-.29$, which tested as statistically significant at $p < .01$. However, when I divided the data by trial type, I found that the effect existed significantly only among the 69 civil cases ($r = -.30$, $p < .01$); in the 26 criminal trials, the correlation was negative but non-significant ($r = -.07$, $p < .71$), meaning that for criminal trials there was no significant relationship between the

⁵⁷ Capturing jury diversity with these data is additionally challenging because a number of people, including about 2% of jurors, did not provide a questionnaire that identified their racial or Latino background (see Appendix A). In the absence of any other way to estimate a person’s race, one must make various wholesale assumptions about the entire category of people who did not provide a questionnaire. One can assume either that none of them are White, all of them are White, or that the proportion of Whites who are lacking questionnaires is similar to the proportion who did provide questionnaires. For this section, I examined jury diversity by making all three assumptions and seeing how/whether the different assumptions change results. As might be expected, the first assumption underestimates the proportion of Whites on a jury, whereas the second overestimates it. I therefore report results based on assuming that people with and without missing data are comparable. Typically, this produced results that were in the middle of results for the other two assumptions, and, further, as I describe in Appendix A, there are sound reasons for assuming that those with and without surveys are comparable. Therefore, the jury diversity measure described in this section reflects the proportion of non-Hispanic Whites on a “jury” made up only of those who had questionnaire data.

proportion of cause challenges given and jury-composition outcomes. Nonetheless, even the absence of an effect in criminal cases is noteworthy: Although use of cause challenges does not improve jury diversity, neither does their use undermine it.⁵⁸

It is not clear why active use of challenges for cause should be associated with more jury diversity and why the effect should emerge in civil rather than criminal cases. Because I have only limited information about each trial in this dataset, quite likely some third factor explains the relationship between cause challenges and jury-composition outcomes. I conducted an analysis that controlled for other characteristics of the venires, particularly the proportion of African Americans, Latinos, and Asians in the venire – since, logically, more diverse juries come from more diverse venires – as well as a control for the size of the venire. The effect weakened but was nonetheless still negative.⁵⁹

⁵⁸ Consistent with results of Section V, in neither criminal nor civil cases did peremptory challenges have any statistically significant relationship with jury diversity.

⁵⁹ A multiple regression model permits several predictors to be entered at the same time to predict the proportion of Whites on a jury, which allows the effect for one factor (cause challenge use) to be assessed while controlling for other factors. According to this model, on civil juries, size was unrelated to jury diversity, but the presence of higher proportions of all three groups uniquely and negatively predicted the proportion of Whites on the jury (the more diverse the venire, the lower the proportion of Whites on the jury). Net of these factors, the percent of challenges for cause granted continued to be negatively related to the proportion of Whites on the jury, but the effect fell to under conventional levels of statistical significance ($p < .08$). In a similar regression on the criminal trials, only the proportion of Blacks in the venire strongly and negatively predicted the proportion of Whites on the jury ($p < .0001$).

Determining the basis for the effect would require a different study and a better understanding of each county's jury selection practices. It is noteworthy, for example, that in Table VI.1, the counties with some of the lowest proportions of cause challenge use in civil trials – Burlington, Camden, Gloucester, and Ocean – are those counties reviewed in Section IV that were outliers in other ways: either they were the lone areas that had consistent issues with minority representation across both civil and criminal cases (Burlington and Ocean) or they consistently seated no African American jurors in civil cases (Camden and Gloucester).

Although this offers an intriguing pattern, available data do not suggest that these four counties fully drive the correlation. In most areas, the correlation was negative (although there are too few trials within each county to reliably test for which are significant); hence, the negative association between cause challenges and the proportion of Whites on the jury was not restricted to just those four areas.

In sum, although I cannot fully explain the effect, I can conclude that **judges who more liberally grant challenges for cause should not fear that doing so undermines jury diversity**. Instead, actively dismissing people who raise concerns about bias does not negatively affect diversity in criminal or civil cases.

C. Conclusions and Recommendation #6. Judges in New Jersey trials use cause challenges with remarkable frequency. In criminal cases, challenges for cause are the primary means of attrition from a venire, removing over half of all

venirepersons. In civil cases, cause challenges are second, just behind the “not used” category, in ending jury service for people, and they account for just under 40% of the exits from jury service. Such substantial frequencies likely explain why attorneys’ use of peremptory challenges and cause challenges are positively, not negatively, related. Far from using more strikes to offset judges’ conservative use of challenges, both tend to increase or decrease in tandem across cases, likely in response to the level of concern about juror impartiality in the venire and other factors. Juror race and ethnicity do not predict cause challenges: by and large, judges grant cause challenges to the members of different racial/ethnic group at comparable rates. Finally, active use of cause challenges does not harm jury diversity in criminal cases, and particularly not in civil cases.

Recommendation #6. Judges in New Jersey courts should continue their current practices in granting challenges for cause when they deem them to be appropriate. The rate at which New Jersey judges grant challenges for cause, while high, arguably allows attorneys to be conservative in their use of peremptory challenges, and their use does nothing to undermine jury diversity.

SECTION VII. THE SIZE OF JURY VENIRES

This report has uncovered a number of positive aspects of the jury selection process in New Jersey: Most basically, New Jersey took the initiative to study its practices by fielding the study that produced these data. Second, although New Jersey resembles most jurisdictions by having pools of people appearing for jury service that substantially underrepresent minorities (particularly African Americans), and although there were pockets of concerning levels of minority underrepresentation on juries, in the main I find that New Jersey does an admirable job producing juries that mirror the venires. Third, despite statutes that grant attorneys the opportunity to use a large number of peremptory challenges (especially in criminal cases), the data showed a fairly constrained use of these strikes, and only limited evidence that attorneys' peremptories negatively affect the representativeness of the final juries. Finally, New Jersey's judges appear to liberally grant challenges for cause, and no evidence suggests that these strikes have a disparate impact on any racial/ethnic group. Judges' approach to these strikes may explain attorneys' constrained use of challenges, and additionally, judges' challenges do nothing to undermine jury diversity.

A. The "not used" category. There remains one aspect of jury selection practice in New Jersey that is less commendable. **In criminal cases, the second-most common way that people ended their voir dire experience was to be**

labeled in the JMS database as “not used,” and this was the most common way that people in civil cases ended their appearance at voir dire. According to Table VI.1 above, in a few counties – Camden, Morris, and Ocean – the not-used group accounted for more than 50% of the outcomes in venires, and in one of these areas, “not used” made up more than 60% on venires.

The “right” number of people to call for voir dire will vary by a number of factors and by local custom. However, other jurisdictions typically have more modest-sized venires. For example, in a study of Federal courts I conducted, I reported on interviews and other published figures regarding venire sizes:

A clerk from a Texas district court said that they typically bring in 45 people for voir dire in a routine, noncapital case; an attorney from a California district said it was similar in her area, perhaps a little lower. An attorney from a district near Chicago said that because their judges tend to be generous with hardship excuses, they pull together panels of about 60 Examples from a manual on federal selection procedures indicate these are consistent with, if slightly larger than, venires in some areas ([http://www.fjc.gov/public/pdf.nsf/lookup/jurselpro.pdf/\\$file/jurselpro.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/jurselpro.pdf/$file/jurselpro.pdf)). These estimates are also somewhat higher than, but broadly consistent with, venire sizes in [some] routine state courts (e.g., Rose 1999, reporting venires of between 30 and 40).⁶⁰

Federal courts, the focus of the above quotation, differ from state courts in a number of ways (e.g., judges tend to be highly restrictive about voir dire; trials are

⁶⁰ Rose et al., *supra*, note 18 at 389.

rarer; and pools are comparatively less diverse). Yet Table VII.1 shows that venire sizes in this study, particularly in criminal cases, were dramatically far from 50 – 60: venires in criminal trials averaged 144 people (range: 60 – 275).

Table VII.1: Average Venire Size, by County and Overall, for All Cases and By Case Type.

County	N Criminal Trials	N Civil Trials	Average Venire Size (All Cases)	Average Venire Size (Criminal)	Average Venire Size (Civil)
Bergen	2	11	84.0	275.5	49.2
Burlington	2	6	41.6	61.5	35.0
Camden	1	7	74.8	194.0	57.7
Cumberland	2	0	88.5	88.5	--
Essex	5	7	91.0	130.8	62.6
Gloucester	1	2	92.3	175.0	51.0
Mercer	3	2	109.0	159.3	33.5
Middlesex	1	8	48.1	60.0	46.6
Monmouth	1	8	73.9	91.0	71.8
Morris	0	3	58.3	--	58.3
Ocean	1	4	66.0	133.0	49.3
Passaic	3	6	112.9	226.0	56.3
Somerset	1	0	125.0	125.0	--
Union	3	5	68.6	104.7	47.0
Overall	26	69	78.0	144.3	53.0

The general picture the data paint is of venires that pull together more jurors than is necessary to intelligently exercise challenges for cause, exercise peremptory challenges, and seat a jury. The excess number of jurors who do not fall into any of these categories – that is, who wind up being not used –

does nothing to enhance the diversity of final juries and risks making citizens feel that their time is wasted.

After advocating in Section VI that judges should continue to be generous in granting cause challenges, I do not argue here that New Jersey should drastically reduce its jury sizes. The plethora of jurors in criminal venires likely helps to account for why judges feel comfortable granting cause challenges. Indeed, in criminal cases, the size of the venire is strongly and positively associated with the rate of cause challenges ($r = .54, p < .01$). In civil cases, in which the range of venire sizes is more attenuated, the association is less strong and only marginally significant, but still positive ($r = .21, p < .09$).

At the same time, there are negative consequences associated with having large numbers of people fall into the “not used” category. Although those “not used” may report that they are happy to avoid having to serve further, research suggests that people resent courts’ wasting their time.⁶¹ Beyond perception, many of those who appear at court have made actual sacrifices to appear, in terms of both time and money. Anything that can lessen the likelihood that people must take time to appear for service if they are not, in fact, needed will tend to boost the

⁶¹ See, e.g., William R. Pabst, Jr., G. Thomas Munsterman, and Chester A. Mount. The Myth of the Unwilling Juror, 60 *Judicature* 164 (1976); Rose, *supra*, note 46; see generally, Marika Litras, and John R. Golman, *A Comparative Study of Juror Utilization in U.S. District Courts*, 3 *JOURNAL OF EMPIRICAL LEGAL STUDIES* 99 (2006).

legitimacy of New Jersey courts in people's mind. Lowering the rate of the "not used" category would further that aim.

It is perhaps axiomatic to assume that bringing in more people to a venire and creating larger groups will enhance jury diversity. However, in both civil and criminal cases, the absolute size of a venire was uncorrelated with the diversity of the final panel ($r = -.01$ in both civil and criminal cases). Therefore, large venires, by themselves, do not accomplish diversity goals. Instead, **the best correlate of a diverse jury is a diverse venire**. As described above (see Footnote 49), in criminal cases the sole significant predictor of higher levels of non-Whites on a jury in criminal cases was the percentage of African Americans in the venire. In civil cases, increases in the proportions of Blacks, Latinos, and Asian Americans all significantly predicted greater jury diversity. This is another reason why New Jersey should do all it can to improve the representativeness of those who appear at court, particularly African Americans, but certainly all groups (see Section III and Recommendation #3).

But even with the current groups of people who come to jury service, large numbers of "not used" persons indicate that the resources of both courts and people are being squandered. New Jersey should therefore critically examine why so many people called to a voir dire wind up "not used." Although there will always be uncertainty over the right number of people to call to a courtroom for a specific

case, in civil cases close to 40% of individuals called up are not used; with average venire size in the mid-fifties, this amounts to over 20 people who go to voir dire unnecessarily in a typical case. In criminal cases, the proportion of not used is smaller – at just over one-quarter of venires – but given the large venire sizes, the expected number of people who will be not used is larger in absolute terms (e.g., using the average values in Table VII.1, $.267 \times 143 = 40$).

Although I do not have data to fully explain the large venire sizes, two sources are likely. Particularly in criminal cases, judges may plan for all peremptory challenges being used; as noted, this does not typically occur, but it remains a risk. **If planning for attorneys’ using large numbers of peremptory challenges contributes to the large panel sizes described in Table VII.1, then this is a strong, empirically-supported reason to consider reducing the number of challenges allotted, particularly in criminal cases.** This rationale is stronger, in my assessment, than the peremptory’s potential impact on jury diversity, which, as Section V showed, the data support only weakly. The data make clear that large numbers of people called up for cases are, literally, not needed; to the extent that peremptory challenge allotments account for this, then that allotment should be reconsidered.

Second, judges’ willingness to support challenges for cause may depend upon having large panels to avoid “running out” of prospective jurors. If so, **it may**

be necessary to convene judges statewide to discuss explicitly what amount of “surplus” is necessary to permit them to be comfortable granting cause challenges they deem appropriate. The latter would achieve the goal of lowering venire sizes while preserving a practice that appears to constrain peremptory challenge use and that does not harm to jury diversity. Thus, my final recommendation to New Jersey is to focus scrutiny on the size of venires.

Recommendation #7: New Jersey should determine ways to reduce the number of people who are called to voir dire only to be “not used.” Possible mechanisms include reducing the number of peremptory challenges, particularly in criminal trials, or convening judges to consider by how much venire panels might be reduced while still allowing judges to be comfortable during cause challenge determinations.

APPENDIX A: HANDLING MISSING QUESTIONNAIRE RESPONSES AND MISSING QUESTIONNAIRES.

The pattern that appears in Table II.1 is clear: Although only about 3% of people who filled out a questionnaire failed to indicate their race, that figure was nearly four times as high for the Latino/a ethnicity question. This pattern is typical whenever questionnaires are designed the way New Jersey's was, which asked first about race and then about Latino/a ethnicity.⁶² Although the Census Bureau makes a distinction between race and Hispanic ethnicity – recognizing that people might be White and Hispanic (e.g., they are from Spain) or Black and Hispanic (e.g., they are from the Dominican Republic) – a substantial number of people treat Latino/a ethnicity as a racial category.⁶³ Hence, when people first report their race and are then asked about their Hispanic/Latino ethnicity, some tend to mistakenly view the second question as redundant with the first (i.e., they have already reported their race), which leads to higher levels of missing data for the Latino/a question than the race question. For this reason, the Census Bureau re-ordered how they asked

⁶² See, e.g., Mary R. Rose, & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911 (2011).

⁶³ See, e.g., Ann Morning, *Keywords: Race*, 4 CONTEXTS 44, 44 (2005).

about these two issues on their questionnaires, first asking about Hispanic/Latino ethnicity and then asking about race.⁶⁴

These non-response missing values compound the problem of data missing because of response rates to the questionnaire at all, but regardless of source, all forms of missing data are challenging to address in studies such as this one. There are, for example, no other pieces of information in the file that might permit one to make an educated guess about the person's likely race or ethnicity, at least for purposes of generating informed estimates of a group's likely racial/ethnic composition. For example, in communities with high levels of racial segregation in housing, a street address can be a fairly reliable marker of an individual's likely race or ethnicity. For Latino/a ethnicity, sometimes a person's name may signal their likely background.

Absent these types of additional information, the analyst must instead make a blanket decision about whether to include missing cases in analyses or not. If the analyst *excludes* all missing data, she does so on the assumption that retained cases and the group of people with missing values are functionally the same (social scientists call this data that is "missing at random") – that is, those with non-

⁶⁴ E.g., Nancy Bates, Elizabeth A. Martin, Theresa J. DeMaio & Manuel de la Puente, *Questionnaire Effects on Measurement of Race and Spanish Origin*, 11 J. OFFICIAL STAT. 433, 433 (1995).

missing data are a representative sub-sample of all those in the study, and analyzing only their data will yield the same results as the full set. Whether it is plausible to assume that data are missing at random depends on the source of the missing data. In the New Jersey study, there were multiple sources of missing data, and the plausibility of randomness differs across these sources.

A. Skipping the Hispanic/Latino or the race question. For people who filled out a survey but skipped the Hispanic/Latino question, the notion that the data are missing at random is not empirically supported and is therefore implausible. For example, of all those filling out surveys, 12% self-described themselves as “African American”; among those with missing data on the Latino/a ethnicity question, fully 24% were African American; likewise, Asians were 9% of all survey respondents but 13% of those missing on the Latino question. Both of these results signal that those who skipped the Latino/a question are not simply a random subset – i.e., the same as – the group who answered it. As noted above, in all likelihood they believed they had already answered the race question. In this situation, if an analyst were to simply remove all missing data due to skipping this question, those removed are likely to be disproportionately non-Latino. One has lowered the overall denominator that generates the proportions of each group (e.g., the percent in the sample who is Latino/a), and has removed from that denominator more non-Latinos than Latinos, artificially inflating the number of Latinos in the

sample. That is, it will appear that Latinos are better represented in jury pools than they actually are. For purposes of examining racial representativeness, a more careful and conservative approach is to retain all missing cases and code them all as non-Hispanic/Latino, which is the approach I took in this study.⁶⁵

Likewise, it does not appear that people who skipped the race question (n = 302 people) are a random subset of the whole sample. Instead, fully 57% of those who skipped the race question (n = 171 people) answered that they were Hispanic/Latino. Plausibly, these respondents did not “see” their group in the race question and instead indicated it in the Hispanic/Latino question. Of the remaining non-respondents, most (n = 114 people) failed to answer both the race and the ethnicity question; only 17 people skipped the race question and also said they were not Latino. Therefore, for cases that are missing on race because a respondent skipped the race question, the most conservative approach is to code that person into the “Other” group. This is because “Other” is the most common category

⁶⁵ I recognize that this may tend to underreport how many Latino/a persons appeared at the courthouses, since undoubtedly some of the people who skipped the question were Latino. But because New Jersey seeks to understand the racial and ethnic representativeness of its pools, my approach of retaining missing cases and assuming they are non-Latino offers the most conservative estimate.

selected by Latinos (34%).⁶⁶ Of those who selected this category on the questionnaire, 90% were Latino.

B. Missing whole surveys. In contrast to those instances in which someone skipped a particular question, the missing-at-random assumption is far more plausible when data are missing because someone did not take the survey (or took it, but it was not collected by the court). Among those who made it to voir dire, for example, there is no statistically significant relationship between lacking a survey and type of outcome.⁶⁷ For this reason, I omit those with missing surveys when conducting analysis of the composition of jury pools/venires. In other words, the absolute and comparative disparities described in Section III are based only on those individuals who provided the court with a survey. For statistical analyses of outcomes among the group who made it to voir dire (see Section IV), I ran models both with and without those who lacked a survey, and results did not differ.

C. Handling multiple answers on race. A final complexity in measurement of race in this study stems from the fact that the questionnaire instructed people

⁶⁶ The next-most commonly selected category among Latinos is “White” (32%), which is one reason to remove people who mark both “White” and “Latino” from the “White” category when making comparisons between Latinos and Whites, i.e., to avoid having people in both categories. When I have done this in the report, I refer to Whites as “non-Hispanic White” or “White/non-Hispanic.”

⁶⁷ Chi-square test of association = 8.48, df = 4, N = 7,407 (p < .08). Across most categories of results, about 12 – 14% had missing surveys.

that they could mark more than one category for race (the parenthetical next to the word “Race” said: “check all applicable categories”). This approach has the advantage of being highly inclusive and respectful of the fact that many people in the United States have a rich and complex heritage that includes ancestors – or even just birth parents – from different racial groups. Indeed, the Census Bureau allows people to describe themselves through multiple categories.⁶⁸

For the types of analyses undertaken here, however, this more inclusive approach has some notable limitations. According to U.S. Supreme Court jurisprudence, proving underrepresentation first requires that a party prove that those underrepresented on the jury form a “cognizable group.”⁶⁹ Such groups are typically understood to be made up of a single racial identity that reflects a group with a shared history and set of experiences (e.g., African Americans, Latinos, Asian Americans, Native Americans, and women). I expect it would be challenging to show that a group described as “Multiracial” constitutes a cognizable group, at least without additional information about which groups make up this category specifically.⁷⁰ Although this report is not intended to support

⁶⁸ See, e.g., <https://2020census.gov/en/about-questions/2020-census-questions-race.html>.

⁶⁹ *Duren v. Missouri*, 439 U.S. 357 (1979).

⁷⁰ I know of no attempts to pursue a Fair Cross Section claim on the basis of the underrepresentation of “Multiracial” people, and I suspect it would be hard to win on any such claim. By way of analogy, empirical research on discrimination claims shows that

litigation on representation, the concept of a cognizable category has resonance for a study of representativeness.

Second, even though multiracial persons may identify with multiple racial backgrounds, they may also present to other people— including to attorneys, judges, or fellow jurors interacting with and making assessments about them – as members of but one category in their background. A clear example is Tiger Woods, who is both Asian and African American but is typically identified as “the first African American” to obtain a particular milestone in golf.⁷¹ Likewise former President Barak Obama is often described as the first African American to become president, even though he also has a White parent. A question that permits people to put themselves into multiple racial categories elides the issue of whether or not the individual believes his or her own lived experience is closer to one racial identity more than another.

Finally, although the number of people who identify as “Multiracial” may be growing in the U.S., they typically form a small proportion of people in most

cases in which people claim discrimination on the basis of multiple identities – called “intersectionality” – lowers the likelihood that the plaintiff will win. See: Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger, and Scott R. Eliason. *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOCIETY REVIEW 991 (2011).

⁷¹ See, e.g., <https://www.pga.com/story/timeline-of-african-american-achievements-in-golf>.

studies. In this study, just 1.5% of people selected “Multiracial” (although others selected it in combination with other designations). In conducting statistical analyses, small-sized categories are problematic because one cannot form reliable, plausible estimates on a group that is comparatively much smaller than other groups. In that situation, members of the group are either combined with some other group (e.g., “Multiracial/Other,” which I did in this study), or in the worst case, the category must be omitted all together – wholly undermining the intended purpose of being more inclusive when asking about race. Asking people to indicate the “best describes” racial category would limit the number of people who must be recoded into/combined with another group to increase statistical power, or limit the number who are omitted from analyses.

As a practical matter, I had to decide how to code people who checked more than one box on the race question for purposes of analyzing the racial representativeness of New Jersey’s jury pools, venires, and juries. In one way, this was not a particularly challenging task: just 5% of respondents to the survey marked more than one category, whereas 95% singly marked either Black, Asian, Multiracial, Other, or White. However, given that 15% of people in the dataset were entirely missing on race (due to non-response) and another nearly 3% opted not to answer the race question at all, I did not want to lose more people from single, cognizable racial categories than was necessary.

In New Jersey, the most populous racial categories are White, Asian, and African American. Given its long history of exclusion from jury participation in the United States, the latter group seemed especially important to capture with as much reasonable accuracy as possible, and I therefore prioritized identifying those individuals who had Black ancestry. For individuals who marked more than one category for race, I did the following recodes:

*A person was coded as “Black/African American” if that person marked either “Black” (alone) or marked “Black” in conjunction with one other racial group (e.g., “Black/Asian” or “Black/White”). A total of 33 people who marked two categories, one of which was “Black” were recoded as “Black.” If someone marked three or more racial categories that included “Black,” that person was coded as “Multiracial.”

*A person was coded as “Asian” if that person marked either “Asian” (alone) or marked “Asian” in conjunction with one other racial group besides “Black/Asian.” A total of 17 people who marked “Asian” and one other category (exclusive of “Black”) were recoded as “Asian.” If someone marked three or more racial categories that included “Asian,” that person was coded as “Multiracial.”

*A person was coded as “White” if that person marked either “White” (alone) or marked “White” in conjunction with one other racial group besides “Black/White” or “Asian/White.” A total of 54 people who marked “White” and one other category (exclusive of “Black” or “Asian”) were recoded as “White.” If someone marked three or more racial categories that included “White,” that person was coded as “Multiracial.”

D. Conclusion and Recommendations #2a, #2b, and #2c. As I noted in Recommendation #1, New Jersey should develop a plan for more routinely measuring and keeping records about the demographic. The experience of this

study shows that, whether they develop this system or embark on additional stand-alone studies like the current effort, a few principles of questionnaire design will lessen the likelihood of missing data and will allow results to be consistent with existing jurisprudence on jury representation. The aims are (a) to lower the likelihood that people do not answer questions; (b) give people the opportunity to indicate the racial group that best describes how they identify themselves; and (c) remove confusion about whether or not they should answer the question about Latino/Hispanic ethnicity. Therefore, I make three recommendations about questionnaire design in any future systems of measuring race/ethnicity in jury pools:

Recommendation #2a: Because of the policy and legal importance of understanding the demographic patterns in a jury selection system, people should not be specifically invited to consider questions about race, ethnicity, or gender to be voluntary. This will lower the likelihood that people fail to turn in a survey at all or that they skip questions (e.g., by indicating that the question is optional). New Jersey may take a position that such questions *should be* voluntary. If so, court personnel can treat the survey that way by not admonishing people who fail to turn one in, not returning questionnaires to people who have skipped questions, and by programming any online questionnaires so that people can skip a question. But neither the text of the questionnaire itself nor the race/ethnicity questions should invite people to fail to answer. Instead, people should be informed about the reasons why the questions are necessary to ask, with a brief explanation accompanying any questions about race, ethnicity or gender.

Recommendation #2b: Because the concept of a “cognizable group” is one requirement for proving that underrepresentation has occurred in the jury summoning, qualification, or selection process, questions

about race should not invite people to select multiple categories. Instead respondents should be asked to select the category that “best describes” their race. Options appearing on the form can include a “Multiracial” category so that people who feel that this designation best describes them can select it. However, a “best-describes” design would increase the likelihood of identifying those people who may be multiracial but who tend to identify with and experience their race primarily through one aspect of their background more than another; it also reduces instances in which people are part of a group that is too small in size to reliably analyze.

Recommendation #2c: To minimize the tendency to skip a question about Latino ethnicity whenever it follows rather than precedes a question about race, respondents should be asked about whether or not they are Latino/a before they are asked to identify the racial group that best describes them.

APPENDIX B: STATISTICAL TESTING OF UNDERREPRESENTATION ON JURIES

As described in Section III, scholars of representativeness prefer the comparative disparity test as the best way to convey whether underrepresentation is “not fair and reasonable,” and throughout the report, I adopt a threshold of at least a 25% comparative disparity to call underrepresentation “substantial” or “concerning.” A wholly other way to look at underrepresentation is to ask whether the likelihood that members of one group will become jurors differs statistically from the likelihood that exists for members of another group. Here, the question is whether it is reasonable to assume that the likelihood of becoming a juror is the same for different groups. Scholars call this approach testing against the “null hypothesis,” or testing against the hypothesis that the difference in likelihoods for the different groups is zero.

A. The meaning of a p-value. Unlike a comparative disparity, in which larger values get more notice, in statistical testing a low probability is the relevant threshold; that threshold stems from a commonly-accepted statistical metric called a “p-value” (or, probability-value). In most social science disciplines, a probability is considered “low” if it is lower than 1 in 20, or $p < .05$. The meaning of this p-value and this likelihood is quite technical and specific, so it bears describing here.

One way to think about a p-value is to imagine a hypothetical world that contains a large venire of, for example (and for simplicity), equal numbers of African American and White members. Further imagine in this hypothetical that selection into a sub-group (e.g., to become jurors) is, in fact, exactly equal for every member; it is equal because samples are drawn completely randomly – that is, this hypothetical is nothing like actual jury selection in the real world. With random sampling, every member of the venire has exactly the same probability of being selected into the subgroup called “jurors”; the difference in the true likelihood of selection would be, literally, zero.

However, every time a sample is drawn, this sub-sample will differ some from the larger population; this is called “sampling error.” Usually, given random sampling, the differences between the population and sampled sub-group will be small, but sometimes the difference, by chance, will be quite substantial. For example, by chance, twice as many White people as African Americans could be selected for the juror-group, even though, in the hypothetical, the prevalence of the two groups in the population is exactly the same and selection is random. Although such discrepancies could happen, truly large discrepancies like this one – with twice as many Whites and Blacks on a jury when there should have been equal numbers of each – will be unusual and rare. Indeed, the bigger the discrepancy between the profile of the sampled group and the profile of the population (again,

in this hypothetical null world of random sampling), the lower the probability that this could occur if there should have been no difference.

Thus, when conducting statistical testing, one is basically asking: “What is probability that I got this big of a difference in jury participation between these groups when, given the null hypothesis, their likelihood of participation should have been exactly equal?” P-values quantify the precise probability of a given outcome under the assumption of a null hypothesis, i.e., that there should have been no difference in outcomes. If that likelihood is small – typically set at a threshold of less than one in twenty, or $p < .05$ – then we term that difference “statistically significant.” P-values depend on many factors, including the size of groups that were sampled/observed in a study, the prevalence of the outcome being predicted, and the properties of the distribution of different statistics under the null hypothesis.

B. Choosing the appropriate statistical test. There are various ways to test whether the likelihood of becoming a juror differs across groups, and which approach to take depends on the structure of one’s data. In this study, for example, a statistical test must account for the fact that each observation in the dataset is part of a trial, and the basic likelihood of becoming a juror differs across each trial (e.g., the venire sizes are different, as are the jury sizes). I therefore used a mixed-model logistic regression, with trial number accounting for the fact that observations are

clustered together by trial. For tests described in this section, becoming a juror (or not) was the outcome variable, and the different racial groups served as predictors of this outcome. I coded groups as “Black,” “Asian,” and “Other/Multiracial” (see Appendix A for more information on putting people into racial groups); “White” served as the reference category - that is, the question was always whether the likelihood of becoming a juror for one group (e.g., “Blacks”) differed from the likelihood that White venire-members would become jurors. I ran separate models for race, and then for Latino ethnicity (with Latinos compared to non-Latinos). Finally, I also tested a model that interacted race and gender, in case, for example, Black Males have a different probability of selection compared with White Males.

C. Results for predicting jury participation. The statistical tests revealed no instance of a statistically significant level of underrepresentation in the New Jersey trials that were part of this study. Exactly one comparison produced a near-significant effect: Asians were slightly less likely to be selected as a juror compared to Whites, but the p-value was just shy of conventional significance, $p < .07$. Further, that result is sensitive to the counties studied. When I restricted the test to only those counties in which Asians make up more than 5% of the venires, the effect went away entirely ($p < .23$).

To ensure that counties with strong levels of racial representation were not off-setting counties with comparatively poorer levels, I re-ran the models by

county. This did not change results. Results were also non-significant when I included in the model variables designed to test whether any race effects depended upon the gender of a person (e.g., African American men are disproportionately underrepresented on juries, compared to other groups); those tests were also non-significant. Turning to tests of whether Latinos are underrepresented on these juries, there was no statistically significant effect in the overall model, no statistically significant underrepresentation in models examined by county, and no evidence that any effects for being Latino depend upon the gender of a person.

Although it is certainly impressive that rates of participation for Blacks, Latinos, Asians, and others are not statistically lower than rates for non-Hispanic Whites, there exists one serious limitation of using statistical significance as a lens on these data. As Section VII of this report details, New Jersey uses quite large-sized jury pools to select jurors. This means that for everyone, being selected for a jury is a low-probability event: about 11% of people in New Jersey jury pools were selected for a jury. When the likelihood of being selected is low for everyone, then only the very largest disparities will test as statistically significant. For example, one significant result did emerge in all the tests I ran: Latinos tested as significantly *overrepresented* on juries in Morris County. However and notably, their prevalence on juries was over three times as high (28.6%) as their prevalence in the venire (8.9%); for differences smaller than this type of magnitude,

particularly when the group's prevalence on the venire is even smaller than this example, the null hypothesis – that differences are due to sampling error – remains plausible. In short, statistical significance is but one way to view levels of underrepresentation, and particularly in analyses of participation on a jury, a disparity must be extremely large to be “significant.” Few disparities in the New Jersey data were that large in size.