

## THE FUNCTION OF UNCERTAINTY WITHIN JURY SYSTEMS

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### INTRODUCTION

Throughout history, justice systems have sought to make jury verdicts fairer and more predictable. Many characterize the American jury system as maximizing fairness, urging that it allows a group of representative citizens to adjudicate disputes rather than allowing the state to run rampant.<sup>1</sup> Popular opinion also maintains that the voir dire process prevents one person with extreme opinions from poisoning an entire jury.<sup>2</sup> In reality, however, these perceptions are false. Indeed, current jury selection methods all but guarantee that jury trial outcomes are uncertain and unpredictable.

In designing their justice system, the ancient Greeks aimed to ensure that juries were fair and representative of the entire populace. They used juries of 500 randomly selected citizens<sup>3</sup> and forbade jury deliberations in

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<sup>1</sup> *E.g.*, 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 309 (Henry Reeve trans., J. & H.G. Langley 4th ed. 1841).

Trial by jury . . . appears to me to introduce an eminently republican element into the government . . . it always preserves its republican character, inasmuch as it places the real direction of society in the hands of the governed, or of a portion of the governed, instead of leaving it under the authority of the government. . . . [T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority.

*Id.* De Tocqueville considered the jury to represent society. *Id.* at 313. Indeed, juries have the power to free a defendant even when the state has clearly made its case; this phenomenon is known as jury nullification, and it is an ongoing problem in criminal law. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 19-20 (5th ed. 2009) (“[T]he power of the jury to acquit despite not only overwhelming proof of guilt but despite the jury’s belief, beyond a reasonable doubt, in guilt, is not one of the precious attributes of the right to trial by jury.” (quoting *State v. Ragland*, 519 A.2d 1361, 1369 (N.J. 1986))).

<sup>2</sup> *E.g.*, *Pointer v. United States*, 151 U.S. 396, 408 (1894) (“The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused.”); *Lewis v. United States*, 146 U.S. 370, 376 (1892) (“The right of [peremptory] challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury.”). It bears note that support for peremptory challenges is far from unanimous. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (“The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.”).

<sup>3</sup> See RUSS VERSTEEG, LAW IN THE ANCIENT WORLD 214-16, 223 (2002). The ancient Romans eventually settled on seventy-five jurors: twenty-five senators, twenty-five equestrians, and twenty-five *tribuni aerarii* (i.e., property-owning citizens). *Id.* at 296. The Greeks had no peremptory strikes or voir dire, because the number was large enough to make individual bias essentially irrelevant; they were more concerned about preempting the bribing of jurors through this device than with addressing the

order to make it infeasible for unscrupulous defendants to bribe enough jurors to affect a case's outcome (or for one bribed juror to sway the others).<sup>4</sup> One downside of this method was that the law of large numbers made the results very predictable from case to case, and hence there was systemic fragility; an erroneous notion that prevailed among the citizenry could skew many subsequent cases toward bad results.<sup>5</sup> The entire Greek legal system could lurch in a bad direction altogether,<sup>6</sup> for example in overreaction to a national disaster or disruption, even though bribery was not a primary danger.<sup>7</sup>

Modern American juries are smaller and yield the opposite effect—individual juries can be quirky, with plumbers comprising the majority in one case and stockbrokers in the next.<sup>8</sup> The hours or days of jury deliberation can introduce ridiculous groupthink problems,<sup>9</sup> but the inconsistent results from case to case stabilize the overall legal system, making it less susceptible to headlong movements in bad directions. The Founders, who worried more about concentrations of power in the overall system than

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jurors' subjective biases and attitudes. *Id.* at 216, 223. The 500 jurors voted immediately after the final speeches without deliberation (or even jury instructions). *Id.* at 222; *see also* Stanley Barney Smith, *The Establishment of the Public Courts at Athens*, in 56 *TRANSACTIONS AND PROCEEDINGS OF THE AMERICAN PHILOLOGICAL ASSOCIATION* 106, 106-19 (1925) (debating the timing of the creation of the 6,000-man *venire* or *dikasteria*); Robert von Moschzisker, *The Historic Origin of Trial by Jury*, 70 *U. PA. L. REV.* 1, 5-6 (1921) (describing the Greek system of 500 jurors called "Dikasts"). Scandinavians appear to be the first to use twelve-member juries, but that development may have been one born out of necessity because villages were so small. *See* von Moschzisker, *supra*, at 8-11. It may also have been based on apostolic reasons. *See* William Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 *MISS. L.J.* 185, 188-89 (1950) (describing the apostolic theory of the number of jurors in Scandinavia).

<sup>4</sup> VERSTEEG, *supra* note 3, at 222-23.

<sup>5</sup> *See, e.g.*, Virginia Hunter, *Gossip and the Politics of Reputation in Classical Athens*, 44 *PHOENIX* 299, 318-19 (1990) (describing specific trials involving women in which juries reached troubling results due to appeals to extraneous issues).

<sup>6</sup> *See* Andrea Wilson Nightingale, *Plato's Lawcode in Context: Rule by Written Law in Athens and Magnesia*, 49 *CLASSICAL Q.* 100, 111 (1999) (discussing rapid, detrimental shifts in Athenian law arising from the juries).

<sup>7</sup> *See* Claire Taylor, *Bribery in Athenian Politics Part I: Accusations, Allegations, and Slander*, 48 *GREECE & ROME* 53, 56-57 (2001).

<sup>8</sup> *See, e.g.*, *Frazier v. United States*, 335 U.S. 497, 498-99, 507 (1948) (upholding narcotics conviction despite the jury being composed—by pure chance—entirely of government employees); *Kinney v. City of Springfield*, 35 Mo. App. 97, 101-02 (1889) (holding that the plaintiff was entitled to a jury composed entirely of non-taxpaying citizens in a negligence case).

<sup>9</sup> *See, e.g.*, Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 *STAN. L. REV.* 1267, 1319-21 (2006) (discussing the inherent, pervasive uncertainty surrounding jury verdicts, especially that connected to deliberation, and the effects this uncertainty has on incentives of parties to litigate); David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 *COLUM. L. REV.* 1139, 1168 (2000) ("[T]o the extent that there is a concern about unpredictable damage awards, deliberation [by juries] is not likely to alleviate that concern, and indeed is likely to aggravate it . . .").

about corruption on the incidental level,<sup>10</sup> inadvertently injected this unpredictability into the legal regime.

Petit juries are consistent with the other structural safeguards or decentralizing elements that the Framers incorporated into the Constitution, such as the separation of powers or the fragmentation effects of federalism.<sup>11</sup> Checks and balances not only offset the self-interested pursuits of those with power but also mitigate the large-scale mistakes that arise from well-intentioned actions. The ancient Greeks' system left them somewhat more vulnerable to collective-error scenarios, and the Greeks were more likely to see such scenarios careen beyond the point of no return.<sup>12</sup>

Devices of decentralization or fragmentation, of which juries are an example by design and by effect, by their nature introduce randomness. An inherent tension exists between "fairness" in the sense of uniform, consistent results in the legal system and resilience against both systemic errors and irremediable harms. Scholars have noted, however, that uncertain outcomes are not necessarily something to be avoided. For example, Professor Adrian Vermeule has commented, "[P]ervasive uncertainty reduces the correlation of biases and pushes the whole group toward randomly distributed error, which is desirable."<sup>13</sup>

Our modern system of small juries, which deliberate and whose members are screened through a system of strikes, speaks to a set of values distinct from the Greeks' commitment to democracy as opposed to aristocracy or patriarchy. The modern system maximizes uncertainty about the leanings of each empaneled jury; uncertainty about likely outcomes across multiple cases; and consensus decisionmaking (i.e., deliberation), which subordinates individual views to those of the group. The modern, quirky small-jury

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<sup>10</sup> See, e.g., Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 114 (2006) (referring to "the Founders' belief that the jury was an important protection against government oppression"); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 746 (1993) ("[B]ecause the jury was composed of several individuals who were not known to the parties until the day of trial, corrupting the jury seemed far more difficult than corrupting a judge."); see also *infra* note 11.

<sup>11</sup> See, e.g., THE FEDERALIST NO. 83, at 498-99 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (observing that the main value of petit juries in criminal trials was to obstruct despotism by powerful judges).

<sup>12</sup> Blackstone acknowledged this problem of letting the entire local citizenry decide a case, which is in effect what a large jury does, because it is so representative of the average views of the community. "On the other hand, if the power of judicature were placed at random in the hands of the multitude, their deci[s]ions would be wild and capricious, and a new rule of action would be every day e[s]tabli[s]hed in our courts." 3 WILLIAM BLACKSTONE, COMMENTARIES \*379-80. At the same time, Blackstone primarily emphasized what had become in his time the favorite virtues of the English jury system: accuracy in fact finding, empathy between jurors and litigants, and checks on the aristocracy, for example. *Id.* at \*380.

<sup>13</sup> Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1505 (2007) (discussing the Condorcet jury theorem).

system would impede a destructive idea or agenda from contaminating the entire legal system—a frequent occurrence throughout the world’s history.<sup>14</sup>

Our system’s procedures for removing jurors through peremptory or “for-cause” challenges are a second area where uncertainty plays a counterr intuitive role. Uncertainty is not, as many practitioners may feel,<sup>15</sup> merely an irritating impediment to the jury selection process; instead, it functions as the goal or product of the strike. Litigants do not select jurors; they deselect them. The peremptory strike system creates the illusion, for many at least, of maximizing the jury’s neutrality or fairness.<sup>16</sup> Critics of the system, however, see peremptory challenges as doing the exact opposite—allowing a party to stack the jury in her favor by removing jurors who might be fair or, worse, biased toward the other side.<sup>17</sup> Indeed, peremptory strikes maximize uncertainty rather than neutrality or foregone conclusions, since the parties remove the most “predictable” jurors and leave those who are hardest to read. Maximizing the jury’s opacity squelches the likelihood of settlement immediately after the voir dire segment, because the jurors’ attitudes remain a mystery until the ensuing trial begins to draw out visible juror reactions.

The sequencing rules employed during voir dire to seat prospective jurors in the box represent a third element of jury construction in which uncertainty analysis reveals a surprising effect. In jurisdictions that empanel a dozen or more potential jurors in the box and then subject those individuals to questioning and possible strikes (the “jury-box” or “sequential” method), the parties must exercise their strikes without knowing who will replace a juror that they’ve removed—the rest of the venire remains unquestioned.<sup>18</sup> In jurisdictions using the “struck” method, in which the litigants screen the entire jury pool with questioning and strike from the entire pool, the parties cannot predict which remaining venirepersons will form the final panel.<sup>19</sup> The different position of uncertainty in each of these procedures has important implications for litigants’ strategies in using their peremptory strikes.

This Article exposes a surprising role for unpredictability in our jury selection system; it discusses both the placement of specific types of uncertainty within the process and uncertainty’s effects on the likelihood of settling cases. The academic literature has largely neglected jury unpredicta-

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<sup>14</sup> See Hunter, *supra* note 5, at 318-19; Nightingale, *supra* note 6, at 111.

<sup>15</sup> See, e.g., Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 385-86 (2010) (describing the effects of uncertainty in different methods for preempting potential jurors).

<sup>16</sup> *Id.* at 377; see also *Lewis v. United States*, 146 U.S. 370, 376 (1892).

<sup>17</sup> See Ford, *supra* note 15, at 378; see also *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (“The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.”).

<sup>18</sup> See Ford, *supra* note 15, at 383.

<sup>19</sup> See *id.* at 384.

bility, focusing instead on the degree of fairness in our jury system—that is, the results, not some a priori benchmark of rightness.<sup>20</sup> Uncertainty analysis has earned an important place in many other academic fields, like decision theory,<sup>21</sup> that are highly relevant for the study of juries, so this Article’s course of inquiry seems overdue. This is not an advocacy piece; the purpose here is to provide some useful foundational analysis, a first foray into applying uncertainty studies to our jury system.

Uncertainty is not entirely avoidable, nor is it always a bad thing—it can actually be useful in averting certain feedback-loop and moral-hazard problems in the legal system. This Article certainly does not join the chorus of voices calling for the abolition of juries<sup>22</sup> or of peremptory strikes.<sup>23</sup> Instead, it provides a fresh perspective that may challenge some long-held assumptions and may run counter to some of our tired rhetoric about the purpose and functioning of juries.

A final disclaimer: even though most cases settle without going to trial, juries decide almost 70 percent of those that do go to trial within the state courts;<sup>24</sup> in fact, jury verdicts decide the outcome in 90 percent of tort trials.<sup>25</sup> Even with parties’ clear incentives to consider plea bargains and pretrial settlements, therefore, juries still play a critical part in our legal system.

This Article proceeds by discussing three different aspects of the modern American jury system and revealing the role that uncertainty plays in each. Part I begins by proposing a link between jury size and economists’ concepts of uncertainty. Part II applies uncertainty theory to juror-removal mechanisms and concludes that they result not in an unbiased jury, but in an unpredictable one. Part III addresses the uncertainty introduced by the various procedures for screening and seating jurors.

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<sup>20</sup> See generally Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POL. 762 (2005).

<sup>21</sup> See, e.g., JAMES O. BERGER, *STATISTICAL DECISION THEORY AND BAYESIAN ANALYSIS* 1, 8 (2d ed. 1985).

<sup>22</sup> See, e.g., Edward J. Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 A.B.A. J. 570, 570 (1974).

<sup>23</sup> See, e.g., Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 809-10 (1997); see also *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring).

<sup>24</sup> LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 1 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf>.

<sup>25</sup> *Id.* at 2.

## I. JURY SIZE, SYSTEMIC CONSISTENCY, AND RANDOMNESS

The uncertainty that attends large juries arises from several sources, specifically the overall effects of variance from jury verdict to jury verdict and how “pervasive uncertainty”<sup>26</sup> helps make the legal system less prone to lurching and more resilient against shocks.<sup>27</sup> This Part begins by tracing the history of large juries such as those in ancient Greece, describing the weaknesses and pitfalls that emerged over time. The Part continues by outlining an economic theory about uncertainty in large systems and applying it for the first time to the question of why the Greek system failed.

### A. *Beware of Greeks Bearing Verdicts*

The jury system employed by the ancient Greeks addressed a set of distinct policy goals, many of which have not been preserved in the modern American legal system. Understanding the driving force behind a given judicial theory aids in deciphering the types of uncertainty permitted in the system. This Section begins by describing the ancient Greek jury system and the values that motivated it. The Section continues by discussing some of the principles on which the Founders based the modern American jury system.

#### 1. Greek Juries: Voice of the People

Ancient Greece provides an excellent illustration of the harmful effects of large juries on a justice system. In designing their jury process, the Greeks aspired to certain principles: opposition to bribery (itself a cluster of interrelated values); democracy, rather than aristocracy or patriarchy; consistency, which arose from “the wisdom of crowds”; and verdicts representing the community’s shared values.<sup>28</sup> These four principles are preserved in our modern system only to a certain extent, but they all provide useful insights into the changing goals of justice over the centuries.

The first two points are certainly understandable from our perspective; justice systems have always valued fair trials. Modern scholars more easily recognize these rationales for using juries<sup>29</sup>—at least, they are more famili-

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<sup>26</sup> Vermeule, *supra* note 13, at 1505.

<sup>27</sup> See Nightingale, *supra* note 6, at 111.

<sup>28</sup> John Gerring et al., *Democracy and Economic Growth: A Historical Perspective*, 57 *WORLD POL.* 323, 330-31 (2005) (internal quotation marks omitted).

<sup>29</sup> See, e.g., Rachel Hartje, Comment, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 *CAL. W. L. REV.* 479, 481 (2005) (“Most importantly, the jury is a necessary component of our democratic sys-

ar—although the Greeks’ preference for larger juries reflects a particular interest in obstructing bribery that the modern American system does not emphasize.<sup>30</sup>

The Greeks’ third concern, consistency, requires the averaging out of the individual biases that necessarily arise in any large group that casts votes. The final rationale was a corollary of the third, because the jurors’ biases will average out and cause the group to gravitate toward the perspective of an average citizen in that locale. The Greeks had no peremptory or for-cause strikes in their jury selection process;<sup>31</sup> they attempted to construct impartial juries by diluting extreme opinions within a large jury, rather than attempting to screen out the biased individuals.<sup>32</sup>

Jury size affects the systemic uncertainty of the adjudicatory system. Very large juries, like those of ancient Athens, which may have comprised 10 percent of the citizens of the city-state,<sup>33</sup> tend to produce consistent results across cases.<sup>34</sup> The large number of voters averages out the biases of individual, idiosyncratic jurors time after time, in case after case. Consistency can be virtuous because it tends to reflect the values of the majority of the community,<sup>35</sup> but this predictability has the same effect as centralized power. As the system goes, so goes the individual case.

Consistent, almost-guaranteed jury verdicts present hazards that are similar to a situation in which a single political party controls the legislative, executive, and judicial branches—a bad idea becomes a systemwide error very quickly, sometimes with disastrous results for society. Although an individual case in such a system will likely produce the expected and desired result, after many cases accrue, the system becomes so interconnected as to be fragile. Decentralization, fragmentation, and randomness in the legal system can prevent society from rushing over the edge of the

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tem in that it ‘raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society.’” (alteration in original) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334 (Schoken Books 1961))).

<sup>30</sup> VERSTEEG, *supra* note 3, at 216, 223.

<sup>31</sup> *See id.* at 215-16 (noting that Greeks customarily used 500 jurors drawn by lot from an annual venire of 6,000, while some special cases used more jurors); *see also* Smith, *supra* note 3, at 108.

<sup>32</sup> VERSTEEG, *supra* note 3, at 215-16.

<sup>33</sup> *See id.* at 214-15; Alastair J. L. Blanshard, *What Counts as the Demos? Some Notes on the Relationship Between the Jury and “The People” in Classical Athens*, 58 PHOENIX 28, 33 (2004).

<sup>34</sup> Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 757 (2010) (describing the uncertainty attending jury verdicts generally and noting that variability or randomness of results increases as juries get smaller); Note, *Prediction Markets and Law: A Skeptical Account*, 122 HARV. L. REV. 1217, 1231-32 (2009) (discussing random results from current petit jury system).

<sup>35</sup> *See* Andrew Oxman Wolpert, *Addresses to the Jury in the Attic Orators*, 124 AM. J. PHILOLOGY 537, 550 (2003) (“The verdict did not depend on the personal idiosyncrasies of the individual jurors but on the laws of the city.”). Wolpert continues, “The correct verdict voiced the will of the Athenian people rather than merely reflect the wishes of those jurors who happened to be present on that particular day.” *Id.* at 551.

cliff—they are buffers against mass hysteria, mass deception (as when trusted leaders lie to the populace), or self-reinforcing feedback loops that escalate a mistake beyond the point of no return.

The ancient Greeks do not appear to have been concerned about such institutional or structural threats to democracy.<sup>36</sup> Professor Alastair Blanshard observed, “The Athenian discourse about threats to the absolute sovereignty of the people rarely envisages danger deriving from institutional arrangements. Instead, it tends to focus on potential events or actions. Traitorous individuals, the return of exiles, and envious foreign powers always feature as the more likely culprits.”<sup>37</sup>

Orators addressing Athenian juries would often remind the jurors that many of them had voted a particular way in a previous case, hoping to persuade them to vote that way again.<sup>38</sup> They would also “conflate[] the jury with other groups of Athenians and den[y] that composition changed over time both because such fictions promoted democratic ideals about participation and popular authority and because they simplified the litigants’ cases.”<sup>39</sup> Addresses to the jury often equated the group to the entire *polis* without raising any objection from the opposition’s counsel.<sup>40</sup>

Greek juries became increasingly political over time.<sup>41</sup> Trials included—and verdicts rested upon—imprecise, undetailed accusations of wrongdoing; the litigants knew that “immorality” would have a given meaning to the average large jury.<sup>42</sup> Rhetoric and emotional appeals designed to convince the jury to lurch in a certain direction played a larger role in trials than did narrative testimony or other evidence.<sup>43</sup> A perceived violation of the community norms—such as an attitude of hubris—could easily constitute a criminal offense in the jury’s eyes.<sup>44</sup> It bears note that ancient Greek writers were aware of the problem and frequently criticized the juries of their day for producing unjust or unreasonable results that reflected the community’s dislike of certain ethnicities or physical features; they essentially accused the juries of functioning as a *claque*.<sup>45</sup>

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<sup>36</sup> Blanshard, *supra* note 33, at 29.

<sup>37</sup> *Id.*

<sup>38</sup> Wolpert, *supra* note 35, at 540-41.

<sup>39</sup> *Id.* at 541.

<sup>40</sup> *Id.* at 542-43.

<sup>41</sup> Christopher Carey, *Legal Space in Classical Athens*, 41 GREECE & ROME 172, 173 (1994).

<sup>42</sup> *See id.* at 174 (discussing the trials of Timarchus and Neaira, at which the prosecutor, upholding standards of good taste, avoided mentioning details of the defendants’ immoral acts).

<sup>43</sup> *See id.* at 178.

<sup>44</sup> *See id.* at 179.

<sup>45</sup> *See* J. O. Lofberg, *Trial by Jury in Athens and America*, 17 CLASSICAL J. 3, 7-10 (1921).

## 2. Development of the American Petit Jury

Scholars often draw parallels between the democracy of ancient Greece and the current American system of government; the wish to emulate a society that we hold in such high esteem is understandable.<sup>46</sup> Indeed, for the last 150 years or so, some legal writers have praised the jury system as a component of democracy, emphasizing the representativeness of juries and the empathy between jurors and litigants.<sup>47</sup>

Some commentators have questioned, however, whether American juries were designed with a democratic purpose, suggesting instead that such a position may actually be revisionist history.<sup>48</sup> Indeed, it seems that juries actually ensconced themselves within the American legal system as a bulwark against concentrated power and a diversification of state authority, not as an insurer of democracy.<sup>49</sup> Such decentralization mitigates not only malice by those in power, but also well-intentioned, fallacious attempts at control.

If it is true that the American jury system was not designed to ensure democratic decisionmaking at trial, one might reasonably wonder which goals the Founders did aim to address. Understanding the different motivators for the different societies is key here. The Framers were less interested than the ancient Greeks were in using juries as an antidote to bribery or corruption;<sup>50</sup> Hamilton wrote in *The Federalist No. 83* that juries can “mul-

<sup>46</sup> See, e.g., Mogens Herman Hansen, *The Tradition of the Athenian Democracy A.D. 1750-1990*, 39 GREECE & ROME 14, 15 (1992).

<sup>47</sup> See, e.g., William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 71 (2006).

<sup>48</sup> E.g., Blanshard, *supra* note 33, at 42 (comparing ancient Greek and modern American juries and finding few similarities).

A look at this modern jury serves to remind us that the association between democracy and the jury is not inevitable, but an artefact of historical circumstance and political rhetoric. There is nothing inherently democratic about the jury; the “ad hoc parliament” is only one manifestation in a series. It further reminds us that, however we construe the relationship between the jury and the wider population (signifier and signified, agent and principal, or collective and representative), there will always be a tension. Between the abstract and the concrete, we can inevitably expect a certain degree of friction.

Re-definition of identity lies at the heart of the development of the Anglo-American jury, an institution whose origins lie not in democracy, but in the feudal battle between king and barons. The devolution of judicial power onto the jury was merely a gambit designed to weaken the power of the ecclesiastical and manorial courts.

*Id.* (footnote omitted).

<sup>49</sup> See George L. Priest, *Justifying the Civil Jury*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 103, 117 (Robert E. Litan ed., 1993).

<sup>50</sup> See Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953, 987 (2010) (discussing scholars’ views on the jury at the time of the drafting of the Constitution); Joseph I. Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent Adult Sentences*, 15 BERKELEY J. CRIM. L. 65, 87 (2010) (“[T]he right to a jury trial in criminal cases was the only guarantee common to the twelve state constitutions that predated the Constitutional Convention and every state that subsequently entered the Union

tipl[y] the impediments” to corruption<sup>51</sup> even while arguing they were not an absolute failsafe, given the ability of courthouse personnel to manipulate a jury’s composition.<sup>52</sup>

Much of the academic literature about American juries has focused on our system’s inability to prevent instances in which racial bias tilts an individual verdict, but it fails to acknowledge that any method for ensuring uniform jury verdicts is susceptible to producing uniformly *bad* verdicts in some regard.<sup>53</sup> However, the Founders were concerned less about diversity (i.e., avoiding the exclusion of minorities, in particular racial minorities) than they were about adjudicatory diversification—that is, ensuring that the jury was not simply a mirror of the people in power.<sup>54</sup>

It appears that the Framers did not trust the results of any individual jury verdict,<sup>55</sup> valuing instead the overall institution for its ability to dilute state power.<sup>56</sup> Modern small juries may have originated out of logistical

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incorporated such a right into its own constitution.”); Elizabeth R. Sheyn, *A Foothold for Real Democracy in Eastern Europe: How Instituting Jury Trials in Ukraine Can Bring About Meaningful Governmental and Juridical Reforms and Can Help Spread These Reforms Across Eastern Europe*, 43 VAND. J. TRANSNAT’L L. 649, 664-65 (2010) (discussing the omission of the right to a jury trial from the original Constitution and its subsequent inclusion in the Bill of Rights); *see also* United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977) (noting that juries “stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction”); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (theorizing that juries “protect against unfounded criminal charges brought to eliminate enemies” as an “inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge”); THE FEDERALIST NO. 83, *supra* note 11.

<sup>51</sup> THE FEDERALIST NO. 83, *supra* note 11, at 500.

<sup>52</sup> *Id.*

<sup>53</sup> *See* Blanshard, *supra* note 33, at 44; Lofberg, *supra* note 45, at 8.

<sup>54</sup> Adjudicatory diversification is the Author’s term for the key role juries play in decentralizing state power; by placing the responsibility for decisionmaking with different groups, no single faction can easily become tyrannical. A full discussion of adjudicatory diversification is beyond the scope of this Article, but it bears mention that courts have consistently rejected mandatory representativeness in jury composition. *See, e.g.,* *Akins v. Texas*, 325 U.S. 398, 403 (1945) (“Fairness in selection has never been held to require proportional representation of races upon a jury.”). The Founders’ incorporation of petit juries into their elaborate proposed system of divided government furthered their goal of avoiding concentrations of state power. Litigants in the Founding era faced two types of uncertainty from the nascent American jury system: divergent verdicts from jury to jury, and differing rules from state to state about whether a jury would hear the case at all. THE FEDERALIST NOS. 81, 83, *supra* note 11, at 487-88, 501-02 (Alexander Hamilton). The Framers actually avoided eliminating either of these types of uncertainty; adjudicatory diversification was a structural feature of the federalist regime. *See, e.g.,* *Gray v. Jackson & Co.*, 51 N.H. 9, 37 (1871) (noting that the Framers considered the importance of jury trials to outweigh the uncertainty of jury verdicts).

<sup>55</sup> *See* THE FEDERALIST NO. 65, *supra* note 11, at 397 (Alexander Hamilton) (“But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court.”).

<sup>56</sup> *See* THE FEDERALIST NO. 83, *supra* note 11, at 498.

necessity,<sup>57</sup> but they also provide an ancillary systemic benefit. Smaller juries mitigate disruptive changes in social norms and prevailing ideas.<sup>58</sup>

Inconsistent results across cases naturally result from small, quirk-prone juries, each of which provides no definite indication of what the next might do. The unpredictability makes it harder for a single faction to capture the legal system, harder for a widespread misconception to taint every trial, and harder for the whole system to change at once. Early American jurists were aware of the unpredictability, as evidenced by several antebellum judges' mentioning uncertain or varying jury verdicts.<sup>59</sup> Given the infatuation that the Framers had with ancient Greek political philosophy,<sup>60</sup> it is striking that they went to the opposite extreme from the Greeks on the point of jury size. Such a deviation from the republican model they otherwise idealized could only have been deliberate, based on their observations

<sup>57</sup> Scandinavian villages may have had too few people to assemble a jury of more than a dozen. Cf. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 142-43 (2d ed. 1982) (1899) (noting that the earliest twelve-member juries were composed of Danish noblemen).

<sup>58</sup> Cf. Marc Galanter, *The Regulatory Function of the Civil Jury*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 61, 83-84 (Robert E. Litan ed., 1993) (theorizing that verdicts of civil juries in the modern legal system are stable and any uncertainty results from characteristics of the litigation process).

<sup>59</sup> See, e.g., *Walker v. Bolling*, 22 Ala. 294, 298 (1853) (“[T]he principle now proposed to be laid down, if maintained, must be carried out in a great variety of cases . . . and the litigation which will arise under it will be of precisely that loose, uncertain character, most objectionable in courts, with our jury system, proverbially uncertain in result.”); *Maddox v. Jackson*, 18 Va. (4 Munf.) 462, 465 (1815) (referring to the “variable verdicts of juries”); see also *Anderson v. Darby*, 10 S.C.L. (1 Nott & McC.) 369, 376-77 (1818).

However, a very few cases in practice showed as well the uncertainty as the utter impracticability of ever carrying it into effect as a rule of law. No two juries could be had, who could think alike on the same legal question.

One jury would give the party the lands which he had cultivated for five years, and the same quantity of wood land to supply it with timber. Another jury, where there was no reason to differ in the case, would give twofold of wood land. And a third jury, with perhaps a little reason to differ, would give three and sometimes fourfold.

Thus the measures of justice was as fluctuating as the caprice or different opinions of juries on the subject of convenience could make it. The rule had no uniformity, permanence or universality.

*Id.* at 376-77; see also *Whirley v. Whiteman*, 38 Tenn. (1 Head) 610, 617 (1858) (urging that juries should base their verdicts on the actual law and not on their interpretation of it), *overruled on other grounds*, *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992); *Turner v. Lowry*, 2 Aik. 72, 75 (Vt. 1827) (“But, place him in a field of uncertainty as to what different courts would decide was a reasonable time in which to make a return, and much more as to what the opposite party might prove, and what different juries might find, the facts to be in each case . . .”).

<sup>60</sup> See Paula A. Monopoli, *Gender and Constitutional Design*, 115 YALE L.J. 2643, 2645 (2006); Kevin F. Ryan, *Lex Et Ratio: We Hold These Truths*, VT. B.J., Winter 2005-2006, at 9, 9-10; Rosemary C. Salomone, *The Common School Before and After Brown: Democracy, Equality, and the Productivity Agenda*, 120 YALE L.J. 1454, 1466 (2011) (reviewing MARTHA MINOW, *IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* (2010)); Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 69 n.305 (2002); Susan Henderson-Utis, Comment, *What Would the Founding Fathers Do? The Rise of Religious Programs in the United States Prison System*, 52 HOW. L.J. 459, 463 (2009).

about the fallibility of the Greeks' huge juries. Modern judges and commentators may complain about rogue juries, but recent developments in uncertainty theory make clear that the quirkiness of the American system is what ensures its success.

### B. *Lessons from Economists: Taleb and Transaction Costs*

Iconoclastic philosopher Professor Nassim Nicholas Taleb leads a school of skeptical empiricism that has received widespread attention from scholars and the general public by challenging traditional uncertainty theory.<sup>61</sup> Taleb's work focuses on systemwide fragility, large systems' susceptibility to unexpected catastrophes (so-called "black swans"), and systems' ability (or inability) to exploit extraordinary but unexpected good opportunities.<sup>62</sup> Professor Taleb's concepts of uncertainty provide a new explanation for the failure of ancient Greek juries. Indeed, Taleb's descriptions of uncertainty demonstrate that the Greek jury system's descent into irrelevance and worthlessness was inevitable.

This Section begins by briefly describing the cornerstones of Professor Taleb's theories: fragile systems, black swans, and serendipity. The Section then applies these principles to American juries, demonstrating that the inherent quirkiness of these small, unpredictable groups is what will sustain the jury system. The Section concludes by applying the familiar law-and-economics principle of transaction costs to petit juries and concluding that the efficiency arising from their small size is critical to their survival.

#### 1. The Inevitable Failure of Too-Big-to-Fail Systems

Taleb's system-fragility theory relies on the principle that large organizations that continually rely on a model that fails to account for all possible failures render themselves inherently susceptible to hidden dangers.<sup>63</sup> The

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<sup>61</sup> See NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* 57-58, 171-73 (2d ed. 2010). Professor Karl Popper criticized society's unwavering acceptance of scientific theories in several publications in the 1950s and 1960s in which he pointed out that many of them can be tested only indirectly. *See id.* at 57. Professor Taleb's work extends Popper's doubts about the validity of scientific knowledge by several steps. *Id.* at 57-58, 171-72. Professor Frank Knight proposed an uncertainty theory in 1921 that distinguished between "risk" (which arises when the probability of a certain outcome is known) and "uncertainty" (which arises when the odds of each possible outcome cannot be calculated). *Id.* at 128; Stephen F. LeRoy & Larry D. Singell, Jr., *Knight on Risk and Uncertainty*, 95 J. POL. ECON. 394, 396 (1987). Taleb also attacks Knightian uncertainty by saying this. TALEB, *supra*, at 128, 272, 333-45. Taleb further warns against "iatrogenic harm," which is this, in markets and in society. *See id.* at 369-70.

<sup>62</sup> See TALEB, *supra* note 61, at xxiv-xxv.

<sup>63</sup> *See id.* at 225-27.

collapse of large corporations vividly illustrates system fragility,<sup>64</sup> but the “too-big-to-fail” problem extends to any system that depends on everything being predictable. In such systems, external events or small errors by decisionmakers can be catastrophic when they have effects for which the system’s structure does not account. Predictive models can be intoxicating; when leaders rely on a model based on impressive amounts of data but plagued by flawed core assumptions, however, their dependence on the models becomes dangerous. A model that seems on its surface to be reliable or accurate invites centralized decisionmaking, which promises to guarantee conformity of action.

This uniform decisionmaking, however, requires more and more concentration of all the entity’s assets in order to facilitate the decisionmaker’s control. The executive who trusts her model and her data will tend to streamline chains of command throughout the organization to reduce the number of potential deviators from her executive directives. Bank accounts and asset-holding entities are also easier to control (and to monitor) when they are consolidated, so assets gradually become more aggregated or concentrated. Models create an appetite for data; greater control and consolidation of assets reduce the executive’s information-gathering costs—but they also put all her eggs in one basket. When decisionmaking is uniform throughout an organization, a single mistake can affect the entire system. Such systemic effects can turn what otherwise would have been a minor error into a true catastrophe.<sup>65</sup> Decentralized decisionmaking, in contrast, means errors affect a limited domain, partitioned off from the rest. Decentralization, however, seems inefficient to managers, who focus more on reducing monthly operating costs than reducing remote possibilities of complete disaster. By taking a limited view, they expose the entire organization to complete failure.

When a business enjoys early success, leaders attribute it to “the model,” regardless of whether the organization’s prosperity arose from a deliberate business plan or from extraordinary investments of time and talent, random events, or fortuitous accidents.<sup>66</sup> When the business is not based on an underlying model, leaders credit all success to the organization’s “leadership style” or “instincts”—again, though, some consistent approach to decisions.<sup>67</sup> The business’s progress grows the pool of concentrated assets

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<sup>64</sup> See generally Nassim N. Taleb & Charles S. Tapiero, *Too Big To Fail, Hidden Risks, and the Fallacy of Large Institutions* (May 2, 2009) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1398102](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398102).

<sup>65</sup> See TALEB, *supra* note 61, at xxi-xxiii.

<sup>66</sup> See Thomas W. Malone et al., *Do Some Business Models Perform Better Than Others?* 1 (MIT Sloan Sch. of Mgmt., Working Paper No. 4615-06, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=920667](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=920667).

<sup>67</sup> See Robert Moment, *Top 7 Leadership Skills for Business Success*, CHRISTOPHER M. KNIGHT’S TOP7 BUS., <http://top7business.com/?Top-7-Leadership-Skills-for-Business-Success&id=3632> (last visited Nov. 4, 2011).

along with the concentration of authority, as successful managers seek tighter control of the entire organization in order to implement their approach—whether stylistic, instinctual, or theoretical—more consistently.<sup>68</sup> They want to implement whatever policy they consider the key to their success more pervasively, and thorough implementation of any approach requires streamlining of control: concentrate the assets; centralize the authority. They reduce exposure to certain known liabilities this way but increase the potential for black swan events—the unknowable perils that can affect everything at once.<sup>69</sup>

Taleb's theory predicts that at some point the tiny margin of error in the original model will roar in with a vengeance.<sup>70</sup> Indeed, it is even more likely that the model simply ignored an infinite number of unforeseeable events, one of which can create a glitch in the tightly interdependent system. When the unanticipated occurs, the house of cards falls, and vast, concentrated assets disappear.

Taleb's tale of a multimillion-dollar Las Vegas casino's failure to properly account for risk provides a striking example of inherent fragility.<sup>71</sup> In planning for adversity, the casino's own risk managers focused on reducing losses from cheaters, installing an elaborate, sophisticated surveillance system.<sup>72</sup> Yet the four largest losses ever incurred—or barely averted—by the casino were wholly unrelated to cheating patrons.<sup>73</sup> Taleb points out that the casino had invested hundreds of millions of dollars on sophisticated gaming-theory research and surveillance equipment built around a model of preventing cheaters, but all of the casino's most devastating losses—and its near destruction—came from threats about which their models were completely silent.<sup>74</sup> Taleb argues that in actuality, the model made its users blind

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<sup>68</sup> Cf. Tommy Chan, *Sticking to the Plan—Costco's Recession Success*, RETAIL MARKETING MGMT. (Feb. 12, 2009), <http://bus4411.blogspot.com/2009/02/sticking-to-plan-costcos-recession.html> (discussing the success of Costco's consistent business strategy).

<sup>69</sup> See TALEB, *supra* note 61, at xxi-xxii.

<sup>70</sup> If the leaders emphasize a "style" or the leader's "instincts," these are really just imprecise models, and instead of acknowledging margins of error, the leader is likely to concede that "everybody makes mistakes" or "nobody's perfect."

<sup>71</sup> TALEB, *supra* note 61, at 125-30 (recounting a story of a private symposium on the subject of risk management at a Las Vegas casino).

<sup>72</sup> *Id.* at 129.

<sup>73</sup> The casino had lost \$100 million when a performing tiger mauled the star of a major attraction, a completely unexpected incident given that the same tiger slept in the performer's bedroom every night. *Id.* at 130. On another occasion, a disgruntled former contractor had attempted to blow up the casino with a pile of dynamite in the basement, but the plot failed at the end. *Id.* Third, the casino clerk responsible for sending reports of gambling payouts to the IRS had neglected to do so for a period of several years, for unexplained reasons; the documents accumulated in a box unmailed, and the casino had to pay a "monstrous" fine to keep its operational license. *Id.* Finally, the casino's owner had embezzled large sums to pay a ransom for his kidnapped daughter on one occasion. *Id.*

<sup>74</sup> TALEB, *supra* note 61, at 130.

to other potential catastrophic risks, because its existence encouraged the casino to concentrate only on the possibilities it could predict.<sup>75</sup>

A personal anecdote illustrates systemic errors in a more academic setting. This Author spent a summer in college working on an archeological dig at ancient Lachish, Israel.<sup>76</sup> “Digging” mostly involved sifting through thousands of pieces of nondescript broken pottery and compacted earth, gradually forming square-shaped holes called “balks.” When diggers unearthed any interesting artifact, supervising archeologists immediately measured the depth at which the item lay in the dirt and quickly assigned a date based on the “level” of the bottom of the balk. When questioned about how they knew the date of a particular levels, however, the archeologists urged that it was evident from the age of the artifacts found there. This circular reasoning allowed for variations of thousands of years in date estimation, depending on which archeologist dated the artifact and his or her favorite historical model. Worse, each one defended against the charge of systemic error by pointing to the sheer number of experts in the field who subscribed to his or her own theory.

The house-of-cards metaphor is clearly an easy fit for practical organizations like corporations and casinos, but the archeology story shows how systematic errors can plague the world of academic ideas and, as a result, the world of laws. An inception of some pervasive, underlying idea—like judicial acquiescence to executive authority, deep-set attitudes on class relations, or “honor” as an overriding virtue—can tilt a legal system toward horrific harms.

The obvious danger of concentrated power is the malicious self aggrandizing that occurs when those in power exploit and oppress others. Too often, though, we ignore the more innocent peril—that despite careful model making, a seemingly small margin of error in fact hides a looming catastrophe, or that an infinite array of unforeseen events could thwart a decisionmaker’s expectations, leading to disastrous consequences. This danger applies to lawmakers, judges, and unitary executives. And as we will see, it also explains the success of the American jury system.

## 2. Unpredictable Juries Breed a Stable Justice System

When one considers jury size in the context of uncertainty theory, one cannot help but conclude that the large juries of ancient Greece were destined to fail and to destroy the Greeks’ entire legal system. On the other hand, uncertainty theory predicts that the quirkiness of each given American petit jury will preserve American legal principles by preventing the

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<sup>75</sup> See *id.* at 129.

<sup>76</sup> This volunteer work took place during the summer of 1987 and earned two college credits.

system from careening headlong toward perverse results. The independence of each jury from every other one is what strengthens the whole system.

The variation among petit juries means that the results of any given case are not guaranteed—a good result is not a certainty, but neither will the results be consistently bad—and the Framers understood tyranny, it seems, in terms of consistently oppressive results.<sup>77</sup> They also understood that government could naturally become tyrannical without safeguards,<sup>78</sup> so it seems reasonable to presume that they designed their jury system to include such mechanisms.

Besides the protection that independent, small juries provide against centralized government power, their inherent unpredictability also provides an extra benefit: each party, uncertain about each particular case's outcome, has an incentive to work hard to persuade the jury that its version of events is correct. As a result, the jury receives the most possible evidence and the best possible theories of the case so it can make an informed decision. Because no two cases are completely identical and no two quirky juries will see the facts the same way,<sup>79</sup> each case exists in isolation, so the law evolves in tiny increments.

As we have seen, however, the large juries of the ancient Greeks tended to produce predictable outcomes,<sup>80</sup> thereby reducing the incentives of the parties to prove their version of the facts or argue for their interpretation of the law. After all, when victory is virtually guaranteed, few advocates would invest more energy than necessary to win; similarly, no wise attorney would throw resources at a lost cause. Because the Greek system viewed each case as being much like any other, the juries had no reason to reach different conclusions in seemingly similar cases. In such a system, sequential verdicts merely reinforce each other, leading inevitably to the law moving without impediment toward an arbitrary—or even incorrect—rule.

In other words, the small jury system is more likely to harness the advantages of the adversarial system—the need for each party to put on its best possible case. In this sense, small juries probably do yield more accurate results, in addition to being more independent of one another, and the relatively limited applicability of the facts of a given case to any future situation prevents the rule of law from hurtling headlong toward bad results.

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<sup>77</sup> See THE DECLARATION OF INDEPENDENCE paras. 2-29 (U.S. 1776).

<sup>78</sup> See *supra* text accompanying notes 11-12.

<sup>79</sup> Indeed, in the American appeals system, convicted defendants can request a new trial with a new jury; the defendant hopes that the second jury will reach a different verdict than the original jury, and sometimes this outcome does occur. See FED. R. CRIM. P. 33(a) (allowing the court to vacate a judgment and to grant a new trial).

<sup>80</sup> See *supra* text accompanying notes 33-34.

### 3. Transaction Costs and Structural Safeguards

Transaction costs—the price of coming to a decision, be it the cost to gather information or the time to negotiate the terms of an agreement—provide another paradigm to illustrate the relationship between uncertainty and jury size.<sup>81</sup> In many respects, firms have lower transaction costs than a group of affiliated independent contractors trying to produce the same result;<sup>82</sup> a law firm might have an in-house notary or clerical staff in order to save the time and hassle of outsourcing every notarization or filing task the firm needs to complete.

Bigness also carries risks, though. The same streamlining of transaction costs that allows firms to save costs permits bad methods, bad decisions, or bad corporate culture to spread through everything the firm does, possibly bringing its collapse or bankruptcy. Large, integrated systems may be more predictable and efficient, but they are also susceptible to low-probability, high-cost harms. The same principle applies to governance: the checks and balances in our systems intentionally raise transaction costs of state action, making the government less efficient—at doing both harm and good. The Framers were particularly concerned about the government doing harm,<sup>83</sup> so they sacrificed a bit of its ability to do good in exchange for curbing its power for evil.

## II. PEREMPTORY STRIKES AND MAXIMIZED UNCERTAINTY

It seems counterintuitive, but uncertainty at the individual-jury level can result from our procedures for screening out biases: peremptory and for-cause strikes. This Part begins by demonstrating that jury screening methods, like peremptory challenges that rely on predictions about jurors' likely dispositions, might reduce bias but certainly introduce uncertainty. The Part continues by discussing lawyers' common—but erroneous—presumption that a juror who has extreme views is necessarily less desirable than a juror whose position is only slightly unfavorable but who can effectively persuade others to see her viewpoint. The Part concludes by describing a common misconception about jury decisionmaking that can lead parties to make bad decisions about whether or not to settle before a case goes to the jury.

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<sup>81</sup> See George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 215 (1961) (discussing strategies for reducing search costs).

<sup>82</sup> See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 391 (1937).

<sup>83</sup> See THE FEDERALIST NO. 51, *supra* note 11, at 318-39 (James Madison) (describing the appropriateness of checks and balances as a means to control government power).

A. *Prediction-Based Screening Actually Reduces Predictability*

Peremptory strikes do not necessarily produce a more neutral jury. When a lawyer strikes an undesirable potential juror, she removes the other side's favorite from the pool—unless the parties' predictions about that potential juror diverge significantly. In other words, each side cancels out the other's first-order preferences and drives the panel toward maximum uncertainty for both sides, which makes settling the case unlikely until the parties get new information. It is perhaps counterintuitive, but removal of potential jurors based on the widely accepted predictors makes the resulting jury's actions less predictable.<sup>84</sup>

Most of the decision-theory literature treats trials as unitary events when discussing the uncertainty for the parties,<sup>85</sup> but litigation is a sequence of distinct, severable segments, each presenting different risks and information problems to a litigant, and each providing an opportunity for settlement. Of course, the jury's sympathies are a "known unknown" at the outset of litigation; the point here is that peremptory strikes exacerbate the unpredictability or randomness experience in real time. Even so, the voir dire process puts the litigants through the psychological process of watching the jury become increasingly unpredictable as strikes remove the most predictable venirepersons from the pool. The actual panel (twelve is the traditional and most common number)<sup>86</sup> has mostly jurors whose pre-existing biases eluded the litigators during voir dire<sup>87</sup> and those whose prior

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<sup>84</sup> See *United States v. Boyd*, 86 F.3d 719, 724 (7th Cir. 1996) ("Decisions about challenges to jurors are of another order altogether. No one knows in advance how a potential juror will react to the evidence, or how the jurors will interact with each other in the jury room. Even experienced advocates find predictions difficult. The best available study concludes that both prosecutors and defense counsel, in exercising peremptory challenges, are as likely to remove from the jury persons who favor their cause as persons who vote against it.")

<sup>85</sup> See, e.g., John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1071 (1968).

<sup>86</sup> See Ford, *supra* note 15, at 381 ("[T]rial juries have been standardized at twelve people since the early days of jury trials . . .").

<sup>87</sup> See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 152 (2010). For instance, it is hard to elicit implicit biases during jury selection:

A battery of state and federal laws are aimed at eradicating intentional discrimination, that is, discrimination based on explicit bias, from the workplace, from housing, and from the dissemination of public services.

Implicit biases, on the other hand, are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful. Unfortunately, they are also much more difficult to ascertain, measure, and study than explicit biases. One scientific explanation suggests that implicit bias is formed by repeated negative associations—such as the association of a particular race with crime—that establish neurological responses in the area of the brain responsible for detecting and quickly responding to danger.

*Id.*

commitments seem weakest, meaning they are easily swayable—that is, unpredictable.

This Section begins by demonstrating that while the peremptory challenge procedure may remove some biased jurors, it has the overall effect of increasing the uncertainty of the jury's eventual verdict. The Section then directly addresses other commentators' position that peremptory challenges increase jury bias.

### 1. Peremptory Challenges Serve to Maximize Unpredictability

Those who argue that peremptory challenges primarily ensure an impartial jury and fulfill that Sixth Amendment requirement<sup>88</sup> make a number of unqualified assumptions along the way.<sup>89</sup> One assumption is that the number of allowed peremptory challenges equals or is close to the amount of biased jurors.<sup>90</sup> It is doubtful, however, that there are enough peremptory challenges available in any case to remove all prejudiced individuals from the final jury. Attorneys are probably always aware that they have not attempted to remove all of the jurors they disfavored. Similarly, peremptory challenge supporters tacitly assume that the parties are able to “identify the ‘extreme’ jurors” in every case.<sup>91</sup> Attorneys cannot spot biased jurors by merely eliciting a direct response from each venireperson as to whether he can be impartial in a given case.<sup>92</sup>

Even apart from the parties' ability to identify bias and to remove all who are indeed biased, we cannot assume that a group of six or twelve impartial venirepersons is necessarily available in any given pool.<sup>93</sup> These assumptions seem necessary to the prevailing view that challenges produce unbiased tribunals.<sup>94</sup> But in fact, peremptory challenges generate further uncertainty as to whether the petit jury is in fact impartial. Rather than max-

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<sup>88</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”); *see also* United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000) (“[U]nlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension.”).

<sup>89</sup> *See* Ford, *supra* note 15, at 379.

<sup>90</sup> *See id.*

States are all over the map [for the number of peremptory challenges available]: some defendants are entitled to as few as one peremptory challenge, while others receive as many as twenty-five. These numbers are typically minimums; frequently courts grant additional challenges for use in selecting alternate jurors, to correct an error, or for other discretionary reasons.

*Id.* at 381 (footnote omitted).

<sup>91</sup> *Id.* at 379.

<sup>92</sup> *See* Bennett, *supra* note 87, at 152. (discussing how difficult it is to discover the implicit biases potential jurors may harbor towards either a party or the facts involved).

<sup>93</sup> *See* Ford, *supra* note 15, at 379.

<sup>94</sup> *See* NEIL J. KRESSEL & DORIT F. KRESSEL, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING 13 (2002).

imizing the jury's neutrality or fairness, the peremptory strike system instead maximizes uncertainty about the jury's eventual verdict by allowing lawyers to remove potential jurors whom they suspect their opponent favors—in other words, the jurors whose positions they believe they can predict. One prominent jury consultant states, “You can’t stack a jury. You can only unstack one,”<sup>95</sup> while another insists that the parties do not select jurors, but rather “deselect” them.<sup>96</sup> The parties merely remove those with evident preconceptions,<sup>97</sup> but they cannot remove those jurors whose biases *voir dire* does not reveal.

Jury predictability is directly proportional to the likelihood of settlement; when the parties are uncertain about what the jury might decide, they are less likely to agree to a settlement, preferring to take their chances.<sup>98</sup> Similarly, when a defendant predicts that she will lose her case, she becomes more amenable to taking a deal. By making the jury unpredictable, the peremptory strike system has a temporary chilling effect on settlements immediately following the *voir dire* segment of the litigation, because it yields an unpredictable jury.<sup>99</sup>

“Uncertainty” in the Knightian sense,<sup>100</sup> also called “ambiguity” in the decision-theory literature,<sup>101</sup> refers to situations where we cannot quantify

<sup>95</sup> *Id.* at 79 (internal quotation marks omitted).

<sup>96</sup> *Id.* (internal quotation marks omitted); see also Gillian Drake, *Deselecting Jurors Like the Pros*, MD. B.J., March/April 2001, at 18, 23.

<sup>97</sup> See, e.g., Hartje, *supra* note 29, at 483 (describing peremptory challenges as useful because they enable a party to remove a juror who seems biased without having enough proof to establish a challenge for cause; challenges for cause are subject to judicial scrutiny, whereas peremptory challenges are not).

<sup>98</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 764-69 (8th ed. 2011) (discussing the interrelationship between the parties' predictions about expected verdicts and the likelihood of settlement).

<sup>99</sup> See Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, If Anything, To Do About It*, 1999 WIS. L. REV. 441, 443 (1999) (quoting jury researchers as stating a “case may be won or lost at the [jury selection stage]” (alteration in original) (quoting Jeffrey R. Boyll, *Psychological, Cognitive, Personality and Interpersonal Factors in Jury Verdicts*, 15 LAW & PSYCHOL. REV. 163, 176 (1991))); Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 LAW & PSYCHOL. REV. 301, 303 (2005) (“[P]ersuasion in the courtroom starts with picking the right jury.”).

<sup>100</sup> FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 20 (1921) (internal quotation marks omitted); see also John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 965 (1984) (arguing generally that uncertainty overdeters and underdeters the wrong people); Claire A. Hill, *How Investors React to Political Risk*, 8 DUKE J. COMP. & INT'L L. 283, 297-304 (1998) (discussing investor skittishness in response to any sign of political turmoil); Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information About Whether Acts Are Subject to Sanctions*, 6 J.L. ECON. & ORG. 93, 93 (1990) (discussing the social cost of uncertainty about whether an act is legal or not); Johan Deprez, Note and Comment, *Risk, Uncertainty, and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynesian*

the risks involved, due either to information problems or to openings for unforeseeable events.<sup>102</sup> Professor Frank Knight distinguished such scenarios from those in which the outcome is uncertain, but the probability of each potential ending is predictable.<sup>103</sup> Ambiguity or uncertainty—whether from incomplete discernment of bias or from openings for strange turns of fortune—makes agreements like settlements or stipulations more difficult for the parties.<sup>104</sup> A clearer outcome fosters consensus between the parties about the expected verdict, including losses they will incur by going through with the trial, so they become more likely to settle as the probable verdict becomes more evident.<sup>105</sup> Conversely, uncertainty discourages settlements and stipulations because the parties' guesses about the outcome may diverge,<sup>106</sup> and because parties generally fear unknown quantities more than known risks.<sup>107</sup>

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*Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings*, 34 LOY. L.A. L. REV. 1221, 1237, 1242-46 (2001) (discussing investor behavior in the face of uncertainty).

<sup>101</sup> See generally Peter Klibanoff et al., *A Smooth Model of Decision Making Under Ambiguity*, 73 ECONOMETRICA 1849 (2005).

<sup>102</sup> KNIGHT, *supra* note 100, at 20.

<sup>103</sup> *Id.*

<sup>104</sup> POSNER, *supra* note 98, at 764-69.

<sup>105</sup> *Id.* at 765.

<sup>106</sup> See, e.g., SEAN G. OVERLAND, *THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS* 13 (2009); see also Richard S. Gruner, *How High Is Too High?: Reflections on the Sources and Meaning of Claim Construction Reversal Rates at the Federal Circuit*, 43 LOY. L.A. L. REV. 981, 1039 (2010) (discussing how the closeness of "case value estimates, in conjunction with the costs of litigation, seem likely to be determinants of case settlements at every stage of litigation").

<sup>107</sup> See Daniel Ellsberg, *Risk, Ambiguity, and the Savage Axioms*, 75 Q.J. ECON. 643, 650-51 (1961). Ellsberg conducted now-famous experiments in which subjects faced two urns, I and II, which each contained one hundred red or black balls. *Id.* at 650. Subjects were informed that Urn II contained exactly half red and half black balls; the other contained an unknown proportion of each. *Id.* If asked to bet on drawing a ball of a particular color from an urn of their choice, Ellsberg hypothesized that most subjects would prefer Urn II, where the probability of drawing a ball of either color is known to be 50 percent, over Urn I, where the probabilities are unknown. *Id.* at 650-51. This presents a contradiction to the classic rational-actor model of economic thought, because the subjects would have no rational basis for such a consistent preference—uncertainty would be just as likely to favor them, especially when compared to a fifty-fifty chance, as to disfavor them. *Id.* at 651, 653. Numerous empirical experiments have since verified this pattern of human decisionmaking, which decision theorists now call "Ellsberg's Paradox." Colin Camerer & Martin Weber, *Recent Developments in Modeling Preferences: Uncertainty and Ambiguity*, 5 J. RISK & UNCERTAINTY 325, 332, 334 tbl.3 (1992) (listing several empirical experiments that have replicated Ellsberg's hypothesis). Uncertainty can also take the form of straightforward ambiguity—the individual knows the set of possible outcomes but cannot ascertain the relative likelihood of one as opposed to another. *Id.* at 330.

## 2. Current Theories: Peremptory Strikes Increase Jury Bias

The existing literature on jury selection generally fails to acknowledge that a jury's likely verdict becomes more uncertain as more-predictable potential jurors are struck from the pool.<sup>108</sup> Our voir dire process creates a significant moment of jury opacity, a period when the likelihood of settlement is probably at its nadir. What we call "stacking" the jury really sets it up for uncertainty, because each side tries to eliminate those jurors who it predicts will side with its opponent. Jury selection yields a panel that is "fair" more in the sense of information symmetries for the parties (or better, *ignorance* symmetry) than of having a panel guaranteed to be opinion-neutral for a particular case. Juries are therefore "fair" because they present equal risks—they are equally uncertain or unpredictable for each side—but they are not necessarily "fair" in the sense of being objective or having good judgment.<sup>109</sup> In some jurisdictions, defendants get more peremptory challenges than plaintiffs do,<sup>110</sup> a situation that makes unpredictability uneven between the parties.

Jury consultants and voir dire manuals suggest that lawyers can construct a favorable jury simply by eliminating the known undesirables from the pool.<sup>111</sup> With each side trying to do the same thing, though, the ultimate result is a panel with an unknown quantity of undesirables for each party—a result that is not clearly preferable to a jury biased against one side.

Some commentators have argued that peremptory strikes actually make the jury *more* biased.<sup>112</sup> Professor Roger Allan Ford's recent article in

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<sup>108</sup> See, e.g., OVERLAND, *supra* note 106, at 20-28; Drake, *supra* note 96, at 23.

<sup>109</sup> See *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956) (describing peremptory strikes as a method of reducing prejudice or "unfairness" by excluding objectionable jurors).

<sup>110</sup> Ford, *supra* note 15, at 382 ("[T]he usual practice is to allocate the same number of peremptory challenges to the prosecution as to the defense. Forty states always do so, while nine sometimes give the defendant more challenges and Minnesota always gives the defendant more.").

<sup>111</sup> See Debra Sahler, Comment, *Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule*, 6 ALB. L.J. SCI. & TECH. 383, 386-87 (1996) (describing how consultants believe that through the use of various types of research and studies, in addition to obtaining the demographics of jurors, they are able to predict those that are favorable or unfavorable to the client or case; with this information, they advise attorneys which individuals to strike from the jury pool); see also THOMAS A. MAUET, TRIAL TECHNIQUES 42 (8th ed. 2010). The Director of Trial Advocacy at the University of Arizona teaches the following:

As an advocate for a party, your purpose during the jury selection process is clear: You want to select a jury that will be open-minded, receptive to your proof, favorably disposed to you and your party, and ultimately will return a favorable verdict. Your opponent, of course, while also looking for a jury with an open mind, is also looking for a jury that will react favorably to her, her client, and her case. What constitutes a good jury depends on which side of the case you represent and determines how you will use your peremptory challenges.

*Id.*

<sup>112</sup> See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 170 (1989); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 410-13 (1992).

this journal provides a series of probability-based models for the peremptory challenges' effects on jury composition and case outcomes.<sup>113</sup> Ford's models demonstrate that changes in the number of peremptory strikes permitted to each side, the choice of jury-selection methods, and the advent of jury-predictor technology have resulted in most juries being biased.<sup>114</sup>

Ford's probability models, however, merely confirm the common-sense notion that eliminating clear outliers from the jury pool (i.e., those most evidently biased) yields juries that are more homogenous and comprised disproportionately of jurors who share popular viewpoints and who represent the majority demographic.<sup>115</sup>

Ford sees the lack of demographic or attitudinal diversity as both inherently wrong and inherently likely to yield inaccurate verdicts—too many guilty verdicts, in fact.<sup>116</sup> He argues that statistics showing high conviction rates bear out his predictions,<sup>117</sup> but that conclusion requires the assumption that defendants would win an “accurate” verdict at least half of the time.<sup>118</sup> This presumption seems unfounded. Prosecutors have both an ethical duty and an incentive to bring cases to trial only if they believe they have enough evidence to prove guilty beyond reasonable doubt.<sup>119</sup> In fact, the difficulties associated with bringing a criminal case in the first place create a screening effect that makes it unlikely that “accurate” outcomes would divide evenly.<sup>120</sup>

Ford further assumes that defendants, not prosecutors, make the decision about whether to go to trial instead of accepting a plea bargain.<sup>121</sup> From the notion that defendants are the first movers in the strategic decisions that trigger empanelment of a jury, Ford infers that most defendants who request jury trials must be innocent or see obvious flaws in the prosecutor's case.<sup>122</sup> In other words, the right of the defendant to decide whether to put her case

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<sup>113</sup> See generally Ford, *supra* note 15, at 393-414.

<sup>114</sup> *Id.* at 414.

<sup>115</sup> *Id.* at 416-19.

<sup>116</sup> *Id.* at 418.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 405-06 (describing Ford's setup for his probability analysis, which seems to be based on this assumption).

<sup>119</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2011) (stating that “[a] prosecutor in a criminal case” must “refrain from prosecuting a charge that the prosecutor knows is unsupported by probable cause”); see also Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1506 (1999) (suggesting that the limited nature of “prosecutorial resources” gives prosecutors an incentive to pursue the defendants who are most clearly guilty).

<sup>120</sup> Posner, *supra* note 119, at 1506 (pointing to the “heavy burden of persuasion” on prosecutors and the fact that defendants enjoy numerous “procedural advantages” in explaining that prosecutors in fact bring charges only when they are comfortably certain that they can win the case). Judge Posner concludes that “[t]ight screening implies that some, perhaps many, guilty people are not prosecuted and that most people who are prosecuted and acquitted are actually guilty.” *Id.*

<sup>121</sup> Ford, *supra* note 15, at 415-16.

<sup>122</sup> *Id.* at 416.

before a jury creates a screening effect, giving the result that only defendants who *should* win will have jury trials. Ford finds it incredible, therefore, that juries convict most criminal defendants by a wide margin, and he attributes this in part to the skewing effect that peremptory strikes have on jury composition.<sup>123</sup>

Ford's theory ignores the other, more obvious screening effect—the prosecutor's decisions to press charges, to proceed to trial and to accept a modest counteroffer in plea bargaining—which would produce the exact opposite result, one much more consistent with the current outcomes.<sup>124</sup> Prosecutors face constraints on their time and resources and cannot litigate every case referred to them, so they have a significant incentive to screen the cases and prosecute only those they think they will likely win.<sup>125</sup> The prosecutor's reputational interests compound these effects; careful screening of the cases to ensure a high success rate provides a prosecutor with more credibility and leverage during future plea negotiations.<sup>126</sup> Win rates can factor into prosecutors' promotions and career prospects in public service, so they have long-term incentives to screen cases for ones in which the defendant's guilt seems relatively certain.<sup>127</sup> The same set of incentives—demands on time and reputational concerns—influence prosecutors

<sup>123</sup> *Id.*

<sup>124</sup> See *State v. Rummer*, 432 S.E.2d 39, 71 n.18 (W. Va. 1993) (Neely, J., dissenting) (“It is because the prosecutors have everything to lose and nothing to gain by going before a jury that they have incredible incentives to obtain a plea bargain, often at true bargain prices.”).

<sup>125</sup> See J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?*, 30 *J. LEGAL STUD.* 53, 61-62 (2001) (demonstrating that prosecutors' incentives to screen cases explain conviction rates in Japan that exceed 99 percent); Eric Rasmusen et al., *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 *AM. L. & ECON. REV.* 47, 75 (2009) (explaining how prosecutors' selection of cases skews the conviction rates upward) [hereinafter Rasmusen, *Convictions*]; see also POSNER, *supra* note 98, at 829.

The higher the crime rate in relation to prosecutorial resources, the more thoroughly prosecutors will screen cases for easy ones to win, and these will tend to be drawn from the tail of the distribution of suspects that contains the suspects who are most likely to be guilty in fact. The heavy burden of persuasion and the other procedural advantages of criminal defendants increase the incentive of prosecutors to go after the guiltiest by making it difficult to convict a defendant, notwithstanding the disparity of resources between the prosecuting authorities and all but the wealthiest defendants, unless the case is one-sided against him.

*Id.* (footnote omitted).

<sup>126</sup> Cf. Rasmusen, *Convictions*, *supra* note 125, at 61-63 (explaining that prosecutors who wish to present higher conviction rates to the voting public may offer more favorable plea bargains in order to increase guilty pleas).

<sup>127</sup> See POSNER, *supra* note 98, at 829.

Being a prosecutor is rarely a terminal job; it is a stepping stone. Future employers will evaluate a prosecutor by his success in litigation, which will be seen as a function of his win rate weighted by the opposition that he had to overcome in order to win; the opposition will usually be greater the graver the offense charged.

*Id.* At least one reported case addresses the prosecutor's alleged incentive to work cases in a manner that would fit dramatically into his forthcoming novel; the court in that case found that personal concern was outweighed by the more commonplace incentives discussed here. See *Haraguchi v. Superior Court*, 182 P.3d 579, 585-86 (Cal. 2008).

during plea negotiations.<sup>128</sup> From the prosecutor's viewpoint, proceeding to trial with doubtful cases both wastes time and risks undermining the state's position in future plea negotiations; in such cases, the prosecutor is more likely to cave to a low-end plea agreement. In other words, the defendants whose cases go to trial are more likely to be guilty, given a prosecutor's incentives as he screens cases and considers plea negotiations.<sup>129</sup>

Despite Ford's failure to account for this alternative explanation, most of his points are valid, and his models provide a significant contribution to the literature. This Article disagrees, however, with one of Ford's statements, which verges on recognizing that peremptories maximize uncertainty rather than bias: "Unpredictability makes jury trials *riskier* and could make trial outcomes *less reliable*, since it increases the effects of random variation in jury composition."<sup>130</sup>

This Article makes exactly the opposite argument; it urges that variation is a *justification* for both the petit jury system overall and the peremptory strike system. Uniformity across jury verdicts, which Ford sees as an ideal,<sup>131</sup> was the goal of the ancient Greeks' failed legal system; their juries ensured consistent results from case to case.<sup>132</sup> Yet this Article has demonstrated that uniformity is not necessarily desirable; it makes a system susceptible to systemic lurches in the wrong direction. Indeed, the Framers wanted juries to serve a decentralizing function and to dilute state power, not to ensure consistent results.<sup>133</sup>

This Article uncovers a latent paradox in our jury selection system: allowing more strikes will prolong the proceedings, thus adding to the costs of trial and lowering the incentives for plaintiffs and prosecutors to file a case in the first place. At the same time, allowing more strikes would increase uncertainty (by removing predictable jurors), thereby lowering the chance of settlement once the jury is seated.<sup>134</sup> Settlement negotiations before trial occur separately from the actual trial,<sup>135</sup> as do decisions about

<sup>128</sup> Debra S. Emmelman, *Trial by Plea Bargain: Case Settlement as a Product of Recursive Decisionmaking*, 30 LAW & SOC'Y REV. 335, 346 (1996).

<sup>129</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) (discussing the incentives of prosecutors in bringing cases); *United States v. Torres-Echavarria*, 129 F.3d 692, 695 (2d Cir. 1997) (acknowledging "'institutional incentives' that induce a prosecutor to plea bargain"); *United States v. Lawson*, 751 F. Supp. 1350, 1354 n.2 (N.D. Ind. 1990) ("[P]lea bargaining provides incentives for prosecutors to seek more lenient sentences than an objective application of the guidelines would yield." (alteration in original) (quoting Albert W. Alschuler & Stephen J. Schulhofer, *Commentary, Judicial Impressions of the Sentencing Guidelines*, 2 FED. SENT'G REP. 94, 95 (1989))).

<sup>130</sup> Ford, *supra* note 15, at 395 (emphasis added).

<sup>131</sup> *Id.* at 394.

<sup>132</sup> See *supra* note 54 and accompanying text.

<sup>133</sup> See *supra* note 54 and accompanying text.

<sup>134</sup> Cf. OVERLAND, *supra* note 106, at 13-14.

<sup>135</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 969 (1979); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2551 (2004).

whether or not to file a case, so the numerical rules about peremptory strikes can have some screening effect on the cases that lawyers file and which filed cases go to trial.

One study showed that the number of civil cases filed in federal court between 1988 and 2002 increased by almost 50 percent; during that same time period, however, the number of cases in which a trial was completed decreased by more than half.<sup>136</sup> After considering the many potential uncertainties involved with permitting the jury to deliberate,<sup>137</sup> some parties may be choosing to settle rather than face the jury.<sup>138</sup> The inherent uncertainty that the selection rules add to the jury system has undoubtedly influenced pretrial settlement rates, even if practitioners do not consciously realize that the peremptory challenge system is to blame.

#### B. *Predictor Conflation: Extremity Is Not Tenacity*

Substantial empirical evidence suggests that lawyers overestimate their own ability to predict juror sympathies and to strike jurors accordingly.<sup>139</sup> One source for this discrepancy is attorneys' conflation of presumed juror opinions with the strength of jurors' convictions. Many people (not just lawyers) presume that a person who holds an extreme view does so fervently; however, careful inspection reveals the fallacy of this presumption. People with views right or left of center may quickly change their minds when they hear the other side's argument for the first time. Individuals can cave on extreme positions, especially when they have merely been parroting what they have heard other people say on the subject.<sup>140</sup> Conversely, mainstream beliefs can be just as tenacious as deviant ones.

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<sup>136</sup> See Daniel R. Cahoy & Min Ding, *Using Experimental Economics to Peek into the "Black Box" of Jury Behavior: A Proposal for Jury Research Reform*, 14 S. CAL. INTERDISC. L.J. 31, 40-41 (2004) (noting that the number of completed federal civil trials fell from 5,422 in 1988 to 2,650 in 2002 and that during the same period, the total number of filed cases increased from 287,649 to 345,483).

<sup>137</sup> See *United States v. Dougherty*, 473 F.2d 1113, 1135 (D.C. Cir. 1972) (pointing out that although the judge instructs the jury on the law, each juror's interpretation of those instructions may be colored by popular culture, news coverage, and the juror's concept of tradition).

<sup>138</sup> Cahoy & Ding, *supra* note 136, at 40-41 (speculating that as time has gone by, litigators have altered their trial practice in order to avoid giving unpredictable juries the chance to decide cases, preferring instead to settle out of court).

<sup>139</sup> See KRESSEL & KRESSEL, *supra* note 94, at 97 (describing empirical studies demonstrating remarkable attorney overconfidence and general incompetence at predicting juror biases). For a more general discussion of this heuristic bias, which would affect jurors as well as attorneys, see generally Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCH. 1121 (1999).

<sup>140</sup> See generally Kaushik Mukhopadhyaya, *Jury Size and the Free Rider Problem*, 19 J.L. ECON. & ORG. 24 (2003) (arguing that in larger juries, each juror pays less attention due to the free-rider problem, thereby diminishing the quality or correctness of the jury's decisions).

The underlying assumption that extreme opinions always go together with stubbornness or recalcitrance pervades the jury selection literature.<sup>141</sup> Jury consultants and lawyers' training manuals exclusively emphasize predicting each juror's bias, as if it were a static and stable input.<sup>142</sup> This literature, along with judicial discussions about the jury system,<sup>143</sup> presumes a false dichotomy between people who are open-minded and have moderate views and those who are stubborn and hold extreme views. A litigant may correctly flag the predictors while ignoring the great variation in tenacity of attitudes or dispositions.<sup>144</sup> As a result, litigators use peremptory strikes to eliminate jurors whose traits are predictors for an unfavorable bias (like hating or loving cops),<sup>145</sup> including those who hold their opinions weakly and easily change their minds when presented with persuasive evidence that contradicts their views.<sup>146</sup> Pliable jurors present an especially opaque hazard to both parties because their fellow jurors' views will affect their own. By the same token, a lawyer may retain a juror on the panel when her pre-existing biases seem only mildly unfavorable; however, if that juror misunderstands legal standards, she may be a strong influence on the rest of the panel because she will require overwhelming evidence or argument to change her position.<sup>147</sup>

Modern approaches to jury selection presume that pre-existing biases about particular factors like race and gender will outweigh the likelihood that a juror will react unfavorably to information or events that are irrele-

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<sup>141</sup> See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 73-74 (1986) (describing the contradictory rules of thumb one encounters in the jury selection literature about which stereotypes are the best predictors).

<sup>142</sup> See, e.g., WALTER F. ABBOTT, *ANALYTIC JUROR RATER* § 1.05, at 8 (1987) ("The attorney should develop a prognosis of the probable composition of the jury and prepare to select the jurors using probabilistic reasoning to attempt to achieve a majority of favorable jurors." (emphasis omitted)); JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION* 6-7 (1995) (describing the two main sequencing rules as "sequential" and "struck" methods and explaining further variations within each category); ROBERT A. WENKE, *THE ART OF SELECTING A JURY* 66-68 (1979).

<sup>143</sup> See, e.g., *Fields v. Brown*, 503 F.3d 755, 770-72 (9th Cir. 2007).

<sup>144</sup> See Cahoy & Ding, *supra* note 136, at 37-38 (noting that human decisionmaking processes are complex).

<sup>145</sup> See *id.* at 34-35 (describing biases jurors may have either about the specific party in the lawsuit or about that sort of party in general).

<sup>146</sup> See John R. Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection*, 4 *LAW & HUM. BEH.* 89, 99 (1980) (discussing the interplay of demographic juror predictors with juror attitudes about evidence, proof, and causation).

<sup>147</sup> According to a recent survey on juror beliefs, "53 percent believed 'preponderance' meant jurors need to believe a plaintiff's case beyond a reasonable doubt, and 19 percent thought it meant they had to be 100 percent convinced by the plaintiff's case." Correy E. Stephenson, *Study Offers Trial Lawyers Insights On Jurors' Thinking*, *LAWYERS USA* (Oct. 25, 2010), <http://lawyersusaonline.com/blog/2010/10/25/study-offers-trial-lawyers-insights-on-jurors%E2%80%99-thinking/>.

vant to the legal issue in the case.<sup>148</sup> Litigators might attempt to cover this front by asking questions during voir dire about how much evidence each potential juror might require before voting a certain way; unfortunately, this does little more than invite each juror to propose an appropriate burden of proof long before he understands the facts of the case. Yet a juror's opinion about how to weigh evidence has nothing to do with how easily the juror may be swayed. In fact, the voir dire questions probably screen the jurors to put the most whimsical panelists—most susceptible to extraneous, irrelevant influences—on the jury, because the questions merely serve to eliminate those who can articulate their settled positions.

A mistake related to conflation occurs when lawyers fail to account for leadership traits in potential jurors.<sup>149</sup> A slightly unfavorable juror whose personal charisma will allow her to influence the others can certainly be more problematic than a deviant-viewpoint juror who is a follower by temperament. And the ability to influence may overlap with pliability, but these traits also do not always correlate—the person who is charismatic enough to win over the group may herself be fickle, changing her mind often. Many judges and lawyers who conduct voir dire perceive those who speak or act confidently in interactions as more truthful than those who hesitate or are timid.<sup>150</sup> But confidence sometimes merely indicates public speaking ability, not whether someone can be impartial.<sup>151</sup> Jury selection methods actually serve to ensure an uncertain outcome, at least at the outset of the trial.

### C. *Problematic Tails in Probability Assessments*

Statistical predictors, whether by jury consultants or JuryQuest software,<sup>152</sup> cause three distinct, almost unrelated problems. These expensive

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<sup>148</sup> Most indicative of this consensus in the widespread use of JuryQuest software and similar products, which compute values for each prospective juror based on such factors. See James R. Gadwood, Note, *The Framework Comes Crumbling Down: JuryQuest in a Batson World*, 88 B.U. L. REV. 291, 306 (2008).

<sup>149</sup> See JAMES P. LEVINE, JURIES AND POLITICS 56 (1992); Drake, *supra* note 96, at 23 (“If you have two jurors who look bad—one is a middle-aged man and the other a young man—strike the older guy because he has more potential to be a leader against you in the jury room.”). In earlier eras, jurors with leadership ability were unacceptable, and lawyers instead sought those who seemed naïve. HANS & VIDMAR, *supra* note 141, at 74.

<sup>150</sup> See PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 94 (1984) (discussing painfully shy jurors); Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC'Y REV. 513, 518 (2008).

<sup>151</sup> Rose & Diamond, *supra* note 150, at 542; see also HANS & VIDMAR, *supra* note 141, at 86 (mentioning incidents where lawyers viewed inarticulate jurors as favorable because they assumed such jurors would not be persuasive in the deliberation room).

<sup>152</sup> Gadwood, *supra* note 148, at 306.

litigation tools trigger obvious fairness concerns,<sup>153</sup> and the reliability of the data furnishing the basis for the predictors is controversial.<sup>154</sup> The third problem, probability-related heuristic fallacies even where the statistics are accurate, has been missing from the literature about juries up to now.

The problem lies in the tails of the probability curves.<sup>155</sup> A standard bell-shaped curve illustrates a normal distribution; the “tails” of the bell curve represent the rarer events, those that are beyond five or more standard deviations from the mean.<sup>156</sup> However, in some instances, the normal distribution does not apply, and the tails actually account for more events than one might think.<sup>157</sup> A curve in which the unlikely events are more likely than one might predict is a curve with a “fat tail.”<sup>158</sup> A predictability problem arises when an observer acts in reliance on a phenomenon being governed by a normal distribution, when in fact the situation is better described by a curve with a “fat tail.”<sup>159</sup> The problem, of course, is the difficulty in knowing in advance whether a phenomenon is governed by a fat-tail curve or by the normal distribution.

To take what the Author hopes is an uncontroversial example, suppose corporate executives are statistically likely to favor corporate defendants in tort suits or to disfavor tort plaintiffs. If this bias exists 90 percent of the time, then the researchers would have 90 percent confidence in their results.

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<sup>153</sup> See HANS & VIDMAR, *supra* note 141, at 90 (quoting brochures from jury consultants that boast a 95 percent win rate); SANDRA DAY O’CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 219 (Craig Joyce ed., 2003) (estimating jury consulting to be a \$200 million per year industry); Strier & Shestowsky, *supra* note 99, at 474 (describing the extremely high cost of jury consultants in key U.S. jurisdictions); Voss, *supra* note 99, at 322 (describing trial consulting “as a service for the rich and a disservice for justice” (quoting Dennis P. Stolle et al., *The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation*, 20 LAW & PSYCHOL. REV. 139, 147 (1996)) (internal quotation marks omitted)).

<sup>154</sup> A full discussion of the deficiencies of the available data is beyond the scope of this Article. For a thorough study, see Sahler, *supra* note 111, at 388. Sahler contends that research shows the ability to predict the outcome of a trial by using trial consultants is not considerably stronger, finding that their techniques are only minimally more effective than traditional intuition or other typical attorney selection procedures. *Id.* at 393-94; see also Michael O. Finkelstein & Bruce Levin, *Clear Choices and Guesswork in Peremptory Challenges in Federal Criminal Trials*, 160 J. ROYAL STAT. SOC’Y 275, 282-83 (1997).

<sup>155</sup> For a highly technical explanation, see Nassim Nicholas Taleb, *Errors, Robustness, and the Fourth Quadrant*, 25 INT’L J. FORECASTING 744 (2009) [hereinafter Taleb, *Errors*]; Nassim Nicholas Taleb, *Finiteness of Variance Is Irrelevant in the Practice of Quantitative Finance*, 14 COMPLEXITY 66 (2009) [hereinafter Taleb, *Finiteness*].

<sup>156</sup> 5 AM. JUR. PROOF OF FACTS 3D *Weather Conditions* § 8, at 230 (1989).

<sup>157</sup> Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 1600 (2009).

<sup>158</sup> Taleb, *Errors*, *supra* note 155, at 745.

<sup>159</sup> Cf. Freeman, *supra* note 157, at 1554 (citing environmental catastrophe as an illustrative example of the impact of the fat-tail problem that causes poor risk assessment).

This confidence would be represented by a curve with a “fat tail,”<sup>160</sup> because a normal distribution presumes confidence close to 100 percent beyond one standard deviation from the mean.<sup>161</sup> The misconception about which curve governs jury selection leads parties to feel overconfident about the “certainty” of identifying the latent bias of prospective jurors whom they wish to remove. Yet in this example, the corporate executive will actually vote the less likely way 10 percent of the time, even assuming the researchers’ data is reliable and the numbers accurate.

In a high-dollar, tort-liability case, 10 percent is a relatively small probability of a large misfortune for the defendant; that slim chance encourages the litigators to employ peremptory strikes accordingly, all the while not fully appreciating the risk. This effect compounds with each prospective juror or each strike, depending on one’s vantage point. Of course, most of the predictors occur with nowhere near 90 percent frequency, and the degree of confidence does not approach that level. Therefore, the potential for error when parties misperceive the shape of the bell curve is usually much larger than the 10 percent from our hypothetical example.

The use of jury prediction techniques also invites the fallacy of survivor’s bias—those who win by accident or due to a combination of extraneous factors often attribute their survival or success to their own skills.<sup>162</sup> For example, successful jury consultant firms boast of high win rates, but firms who are less lucky do not stay in the business. If enough firms try their hand at jury consulting, sheer chance will produce at least a few who get a lucky streak early on. These winners will advertise their prowess at winning, even if their actual probability of success was on par with the chance of a lottery win.<sup>163</sup> Attorneys can do the same—those who hit a losing streak early in their litigation career might shift to non-courtroom work, and those who win their first few cases can keep going, even if the win-lose streaks resulted from the slate of opposing parties or judges in those cases rather than from the attorneys’ jury-picking skills.

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<sup>160</sup> For more explanation of the “fat tail” concept and its application in other areas of law, see *id.* (defining the “fat tail problem” as “the tendency to gravely underestimate the risk of low probability/high consequence events” (first internal quotation marks omitted)), William Poole, *Causes and Consequences of the Financial Crisis of 2007-2009*, 33 HARV. J.L. & PUB. POL’Y 421, 441 (2010) (citing Benoit Mandelbrot, *The Variation of Certain Speculative Prices*, 36 J. BUS. 394 (1963)), Eric L. Talley, *Cataclysmic Liability Risk Among Big Four Auditors*, 106 COLUM. L. REV. 1641, 1643-44 (2006), and Robert F. Weber, *New Governance, Financial Regulation, and Challenges to Legitimacy: The Example of the Internal Models Approach to Capital Adequacy Regulation*, 62 ADMIN. L. REV. 783, 858 (2010).

<sup>161</sup> 5 AM. JUR. PROOF OF FACTS 3D, *supra* note 156, § 8, at 230 (describing a normal distribution along a bell curve, including the first, second, and third standard deviations).

<sup>162</sup> Edwin J. Elton et al., *Survivorship Bias and Mutual Fund Performance*, 9 REV. FIN. STUD. 1097, 1098 (1996).

<sup>163</sup> Even if there is only a 0.1 percent chance of being correct in any given case, one in one thousand firms will be right; that firm will likely tout its success as being a product of skill, when in reality, each of the thousand firms had the same chance of being correct.

In sum, voir dire and peremptory strikes screen out the jurors whose pre-existing biases are the most obvious—most likely, they eliminate the potential juror who uses the words “always” and “never” when expressing his or her opinions. The process does not work particularly well, however, for screening out mild but recalcitrant biases, intentionally masked biases, or ability to influence others. The incomplete information problem that attends jury selection results in panels with a disproportionate number of jurors whose pre-existing biases might be dangerous to one side but are impossible to discern during voir dire. The process also allows for—and probably increases—the likelihood of seating jurors who will lurch from one viewpoint to another based on spontaneous random occurrences and information.

### III. SEQUENCING RULES AND UNCERTAINTY

Another key governing principle in the jury selection process is sequencing rules ordering the voir dire proceedings.<sup>164</sup> Sequencing rules for peremptory strikes directly affect the amount of uncertainty for the parties.<sup>165</sup> The rules can even impact the trial’s outcome, given the strategic advantage that one side may have, and the parties are generally not free to bargain around the rules within a given jurisdiction.<sup>166</sup>

The “sequential” or “jury-box” method<sup>167</sup> is the most common in American jurisdictions<sup>168</sup> and likely the most familiar to readers. The sequential method begins by impaneling jurors from the venire pool one by one, subjecting them to questions, and striking them from the panel (either by for-cause or peremptory challenge) at that time.<sup>169</sup> The sequential me-

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<sup>164</sup> See, e.g., WILLIAM J. BRYAN, JR., *THE CHOSEN ONES: OR (THE PSYCHOLOGY OF JURY SELECTION)* 117-18 (1971); FREDERICK, *supra* note 142, at 6-9, 179-80 (describing the two main sequencing rules as “sequential” and “struck” methods, and explaining further variations within each category). The author has addressed other types of rules, including the numerical rules about peremptory strikes, threshold rules for “for cause” strikes, and *Batson* rules, in a forthcoming symposium Essay. See Dru Stevenson, *Jury Selection and the Coase Theorem*, 97 IOWA L. REV. (forthcoming).

<sup>165</sup> See FREDERICK, *supra* note 142, at 8-10.

<sup>166</sup> See BRYAN, *supra* note 164, at 117-18 (explaining the importance of understanding a particular jurisdiction’s jury-selection rules because the various sequencing rules affect the trial and, ultimately, an attorney’s strategy). *But see* Steven J. Brams & Morton D. Davis, *Optimal Jury Selection: A Game-Theoretic Model for the Exercise of Peremptory Challenges*, 26 OPERATIONS RES. 966, 968-69 (1978) (favoring what they call the “[p]anel challenge” method, in which challenges are reserved until all potential jurors have been screened (emphasis omitted)).

<sup>167</sup> FREDERICK, *supra* note 142, at 6-7; Ford, *supra* note 15, at 383 (explaining that in the sequential procedure, small groups of potential jurors selected from a pool are subjected to voir dire, the lawyers each exercise challenges and excuse jurors, and more jurors from the pool fill the excused jurors’ slots).

<sup>168</sup> Ford, *supra* note 15, at 383 & n.31.

<sup>169</sup> FREDERICK, *supra* note 142, at 6-7; Ford, *supra* note 15, at 383.

thod generates uncertainty as the jury selection process nears its end and each party has few peremptory strikes remaining. Under the sequential-selection system, the attorneys know almost nothing about the remaining jurors in the pool once they use their last peremptory strike.<sup>170</sup>

The “struck-jury” method<sup>171</sup> contrasts with the sequential-selection method both in its operation and in its generation of uncertainty. In the struck-jury method, sequencing rules allow questioning and striking of prospective jurors while they are part of the entire venire, and jurors are impaneled after the questions have concluded.<sup>172</sup> The struck-jury method minimizes uncertainty about the overall pool, because the attorneys are permitted to question all of the potential jurors before deciding to use any peremptory challenges. However, this selection method maximizes uncertainty about which venirepersons will sit on the final panel because the panel’s overall composition is a black box until the very end of voir dire.<sup>173</sup>

The jury-box method and the struck-jury method thus pose different information problems. The former reveals the overall composition of the final panel sooner but keeps parties in the dark about who might replace whatever jurors they remove;<sup>174</sup> the latter reveals more information about the potential jurors in the pool but hides the composition of the final panel until the end.<sup>175</sup>

Sequential-selection<sup>176</sup> methods, sometimes called “jury-box” methods,<sup>177</sup> postpone peremptory strikes until the impaneling of individual

<sup>170</sup> FREDERICK, *supra* note 142, at 8-10; Ford, *supra* note 15, at 384.

<sup>171</sup> Ford, *supra* note 15, at 384 (explaining that in the struck-jury selection method, the parties select a number of potential jurors from the pool that is the sum of the panel size and the total number of peremptory challenges; then, the parties each exercise all of their challenges at once).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* This is true whether peremptories occur in an alternating-seriatim approach or simultaneously at the end of the process. *See id.* (“Under the struck-jury system, the attorney will have already seen and examined the entire panel and so can compare a potential juror to the rest of that panel; under the sequential-selection system, the replacement is unknown.”).

<sup>174</sup> United States v. Esparza-Gonzalez, 422 F.3d 897, 902 n.7 (9th Cir. 2005); People v. Avila, 133 P.3d 1076, 1110 (Cal. 2006) (“Defendant maintains that, under the variation of the ‘jury box’ system employed here, he was unable to make informed exercise of peremptory challenges because he did not know the composition of the final jury.”); *see also* Ford, *supra* note 15, at 384.

<sup>175</sup> *See* Rhodes v. Varano, No. 08-3236, 2009 WL 805506, at \*10 (E.D. Pa. Mar. 26, 2009), *adopted in part, rejected in part*, 2011 WL 3290360 (E.D. Pa. July 29, 2011); *see also* Ford, *supra* note 15, at 384.

<sup>176</sup> Note that the nomenclature varies in this area. For example, Pennsylvania refers to the “struck” method as the “list” system and the “sequential” method as the “individual” system. *See, e.g.,* Rhodes, 2009 WL 805506, at \*10.

<sup>177</sup> *See* United States v. Burrus, 375 F. App’x 323, 325 & n.1 (4th Cir. 2010) (per curiam); United States v. Williams, 986 F.2d 86, 88 (4th Cir. 1993) (denying relief to a Florida attorney who was unfamiliar with Virginia’s “jury box” method, which employs sequential peremptory challenges but no backstrikes).

jurors in the box,<sup>178</sup> which prevents the parties from wasting peremptory strikes on venirepersons whom their opponents might already have planned to strike from the panel.<sup>179</sup>

As long ago as the nineteenth century, the Supreme Court recognized the “struck-jury” selection method as a minority rule in the United States.<sup>180</sup> The rules in jurisdictions using this method vary as to when the parties may use their strikes for the panel. Most use the strikes to remove individuals after a group of twelve or more is in the jury box,<sup>181</sup> but other jurisdictions move jurors into the box one by one, allowing strikes along the way.<sup>182</sup>

The struck-jury approach entertains peremptory strikes while potential jurors are still in the venire pool, then assembles the final panel from those remaining after the strikes, either in order of seating or by random selection.<sup>183</sup> Many states have the attorneys submit their respective lists of peremptory strikes to the judge at the end of voir dire, so that the panel emerges from those remaining in the pool (the for-cause strikes are made more publicly, during voir dire itself).<sup>184</sup> Other states have one-by-one peremptory strikes from the pool, sometimes alternating between the parties,<sup>185</sup> striking jurors as they sit in the box.<sup>186</sup> At least two courts have been extremely critical of the struck-jury method.<sup>187</sup>

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<sup>178</sup> See FREDERICK, *supra* note 142, at 179-80 (referring to this mechanism as the “sequential method”).

<sup>179</sup> *Id.* at 180-82 (discussing this feature of the “struck” method and suggesting strategies for addressing it).

<sup>180</sup> See *St. Clair v. United States*, 154 U.S. 134, 147-48 (1894) (upholding the struck-jury method while describing it as the common practice in England but a minority rule in the United States). California is one of the few states that use the “jury-box” method today. See *People v. Avila*, 133 P.3d 1076, 1109 (Cal. 2006); James Oldman, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623, 632 n.42, 640-48 (1998) (identifying twelve states whose statutes require the struck-jury method, noting that other states may also use the struck-jury method, and listing states in which the struck-jury method is no longer valid).

<sup>181</sup> See, e.g., *United States v. Ricks*, 802 F.2d 731, 736 (4th Cir. 1986) (en banc).

<sup>182</sup> See Maisa Jean Frank, Note, *Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota as a Case Study*, 94 MINN. L. REV. 2075, 2086 (2010) (describing Minnesota’s alternating sequence for peremptory strikes, with each party required to use all of its peremptories in the process).

<sup>183</sup> See Ford, *supra* note 15, at 387.

<sup>184</sup> See FREDERICK, *supra* note 142, at 7 (describing a similar procedure). Texas is one such state. See *Hughes v. State*, 24 S.W.3d 833, 841 (Tex. Crim. App. 2000) (stating that a judge has the authority to decide whether the prosecution must voice challenges for cause and peremptory challenges); see also *Jury Selection in Criminal Cases*, CENTER CRIM. JUST. ADVOC., <http://criminaldefense.homestead.com/JurySelection.html> (last visited Nov. 4, 2011). Alabama, the District of Columbia, Kentucky, and Louisiana also use this procedure. See *United States v. Houston*, 456 F.3d 1328, 1332 (11th Cir. 2006); *United States v. Smith*, 891 F.2d 935, 936 (D.D.C. 1989); *Baze v. Commonwealth*, 965 S.W.2d 817, 825 (Ky. 1997); *State v. Kennedy*, 584 So. 2d 702, 708-09 (La. Ct. App. 1991).

<sup>185</sup> See Frank, *supra* note 182, at 2086.

Both the struck-jury and jury-box methods operate today.<sup>188</sup> Although the struck-jury method seems to allow a more effective opportunity for parties to assess a petit jury's potential members, it does not completely eliminate uncertainty. There is no legal right to a trial with no uncertainty; indeed, uncertainty is the nature of the game. Individuals sometimes challenge the type of method a court uses, but legal rights pertain only to the required number of jurors, not to the method the court uses to choose them.<sup>189</sup> The struck-jury method allows the defendant to see the whole picture of potential jury members and make challenges from there.<sup>190</sup> In contrast, the jury-box method begins by filling the twelve-member jury box and refilling the slots as they are emptied by peremptory challenges, with the remaining slot fillers being unpredictable.<sup>191</sup>

Defendants have certainly attempted constitutional challenges against peremptory-strike procedures. For example, in *United States v. Blouin*,<sup>192</sup> the trial judge employed the struck-jury method to hold five rounds of selection.<sup>193</sup> The court's procedure allowed the defendant two challenges in each round and the government one in the first round and two in the final round.<sup>194</sup> Blouin used his ninth peremptory challenge in the fifth round and requested the struck juror be replaced in the jury box before he decided whether to exercise his last challenge, but the judge refused.<sup>195</sup> Left with no alternative, Blouin exercised his last challenge, and the two empty spots on the jury were filled, completing the petit jury for his trial.<sup>196</sup>

On appeal, Blouin argued that he could not effectively exercise his tenth peremptory challenge without information about the potential jury member who would be seated in the box to fill the gap his ninth challenge

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<sup>186</sup> See generally Joseph B. Kadane & David Kairys, *Fair Numbers of Peremptory Challenges in Jury Trials*, 74 J. AM. STAT. ASS'N 747, 747 (1979) ("[P]resent[ing] a model for deciding how many peremptory challenges should be allowed each side as a general rule, whether more peremptory challenges should be allowed in a particular case, and how many more to allow."). Seriatim jury selection has two interesting effects on the strategies of the parties: lawyers will sometimes pass on their turn in order to "get behind" the other party, hoping that opposing counsel will strike some of the same undesirables from the jury pool using her peremptory strikes instead, and the practice of saving one unused peremptory strike in case a surprise happens when the last juror is seated. See Marvin Zalman & Olga Tsoudis, *Plucking Weeds From the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 358 (2005) (internal quotation marks omitted).

<sup>187</sup> *United States v. Esparza-Gonzalez*, 422 F.3d 897, 903-04 (9th Cir. 2005); *People v. Miller*, 307 N.W.2d 335, 337 (Mich. 1981) (finding struck-jury method improper under Michigan law).

<sup>188</sup> Ford, *supra* note 15, at 383.

<sup>189</sup> *United States v. Blouin*, 666 F.2d 796, 798 (2d Cir. 1981).

<sup>190</sup> *See id.*

<sup>191</sup> *See id.* at 796.

<sup>192</sup> 666 F.2d 796 (2d Cir. 1981).

<sup>193</sup> *Id.* at 797.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

left.<sup>197</sup> Blouin claimed that being denied this information “unduly restricted” him in using his tenth peremptory challenge.<sup>198</sup> The federal rules provide that both parties have a specified number of peremptory challenges, but they do not require any particular method.<sup>199</sup> The appeals court held that the struck-jury method did not prevent Blouin from exercising his final peremptory challenge and was, therefore, permissible.<sup>200</sup> The court agreed that the struck-jury method would necessarily result in the jury containing at least one juror whom one party had no opportunity to challenge, but it emphasized that overall, the struck-jury method allows the parties to effectively use their peremptory challenges by providing maximum information about the jury pool.<sup>201</sup> The court noted, however, that there must be a reasonable opportunity to challenge most replacements, and holding rounds for peremptory challenges (as the *Blouin* trial court did) provides such an opportunity.<sup>202</sup>

In sum, the various sequencing rules each inject uncertainty into the empanelment process, merely locating it in different places along the way. This is an options problem—distinct, in terms of uncertainty, from the case-to-case variability or the problem with discerning jurors’ sympathies beforehand. The sequencing rules control the location of the parties’ uncertainty in the midst of voir dire about what options will remain after they exercise each permitted choice.

## CONCLUSION

This Article has had an ambitious descriptive agenda and a modest normative goal. Its primary aim has been to cut through our favorite narratives about the virtues of the American jury system and to highlight the built-in unpredictability that pervades this institution. The background normative point is a word of caution about investing ourselves in legal or strategic devices to ensure uniformity and predictability, whether across cases or within the voir dire segment of the litigation process.

Despite the idealized rhetoric that typifies discussions about the jury system,<sup>203</sup> the size of modern juries inherently generates inconsistent ver-

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<sup>197</sup> *Id.*

<sup>198</sup> *Blouin*, 666 F.2d at 797.

<sup>199</sup> *Id.* at 798; *see also* FED. R. CIV. P. 47 (citing 28 U.S.C. § 1870 (2006)); FED. R. CRIM. P. 24.

<sup>200</sup> *Blouin*, 666 F.2d at 798-99.

<sup>201</sup> *Id.* at 798 (“Whoever goes second in the final round will have used his last challenge before knowing the identity of the juror who replaces that last challenge.”).

<sup>202</sup> *Id.* at 799. In *Carr v. Watts*, the court determined it was not fair where the plaintiff had to use all of his peremptory challenges before obtaining information on half of the members of the final jury. 597 F.2d 830, 833 (2d Cir. 1979) (per curiam). There was no reasonable opportunity to challenge these replacements and it was held to be a “direct impairment.” *Id.*

<sup>203</sup> *See supra* notes 46-47 and accompanying text.

dicts across cases. This unpredictability seems at first blush to be in tension with the supposed virtues typically ascribed to the system—accurate and reliable fact finding, representativeness, and jurors’ ability to empathize with individuals.<sup>204</sup>

Uniform results and representative correlation to the community’s values, however, are actually dominant traits of the failed large juries used in ancient Athens. Large juries might provide a handy bulwark against bribery or corruption, but modern small juries are better able to check concentrations of power, despotism, and self-destructive mistakes. The American founders, unlike the ancient Greeks, seemed unconcerned about the amount of damage one individual could do, instead seeing freedom as more imperiled by institutional capture. Modern uncertainty theory supports the notion that small juries provide a failsafe against serial bad decisions that would endanger the entire legal system. It might be somewhat counterintuitive that inconsistency would provide stability and resilience to the structure and substance of American law, but this buffering effect of juries is consonant with other constitutional safeguards against concentrated power.

This Article has also attempted to disabuse the reader of two contrasting illusions: the notion that peremptory strikes maximize the neutrality of the jury and the fear that strikes allow parties to stack juries in their favor by deselecting jurors who are fair or who are biased toward the opposition. Peremptory strikes maximize uncertainty rather than fairness because the parties remove the most “predictable” jurors, leaving only those who are hardest to read. Maximizing the opacity of the jury has a brief chilling effect on settlements immediately after the voir dire segment, thereby increasing the overall cost of litigation.

The debunking tour then turned to the longstanding rituals various jurisdictions employ for selecting juries, examining the different sequencing rules by which parties exercise strikes and move individuals from the venire pool to the jury box. All of the sequencing rules present an options problem at some point in the procedure, as parties must make choices without knowing how it will affect some of their future choices or options.

Uncertainty is not necessarily bad, even if it prevents ensuring the “right” results in individual cases. The robustness of the overall legal system lends significant value to each case, even if that weight comes at the price of guarantees about particular outcomes. Eliminating uncertainty—or making results more predictable—may seem appealing for individual litigants, but it would raise the chance of systemwide errors and increase the scale of the systemic harm when those errors occur. The very aspects we find most frustrating about the jury system may in fact be its greatest benefits.

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<sup>204</sup> See *supra* notes 46-47 and accompanying text.