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A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries

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COMMENTS

A JURY OF YOUR PEERS?: HOW JURY CONSULTING MAY ACTUALLY HELP TRIAL LAWYERS RESOLVE CONSTITUTIONAL LIMITATIONS IMPOSED ON THE SELECTION OF JURIES

I. INTRODUCTION

> The man and the woman who have sat quietly in front of the Redwood City courtroom for the past month are hardly noticeable. During the course of the trial, they will not testify, cross-examine a witness, or address the judge. But they rank high among the critical courtroom players in the double-murder trial of Scott Peterson.
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> From opposite sides of the courtroom, Howard Varinsky and Jo-Ellan Dimitrius are there to pick the jury—Varinksy working with the prosecution, Dimitrius with the defense. Although both come well trained in the art of jury selection, they work with decidedly different purposes.
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> He wants consensus-oriented individuals who, in the end, will decide that circumstantial evidence is all that's needed to bring a guilty verdict. She's looking for strong-willed people who might view authorities with suspicion and remain open to the idea that Laci Peterson died at the hands of an unknown assailant.
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> Ultimately, however, they must settle on a group of 12 people who will sit in the jury box and decide whether Scott Peterson is innocent or guilty of killing his wife and the fetus she was carrying, and if guilty, whether he lives or dies.[1]

On November 12, 2004, after seven tumultuous days of deliberations, twelve jurors found Scott Peterson guilty for the double murder of his wife and their unborn child.[2] The trial lasted over five months and received media attention unrivaled since O.J. Simpson's double murder trial in 1995.[3] Ever since O.J. Simpson was acquitted of murdering his wife and Ronald Goldman, the role of the jury has

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1. Diana Walsh, *The Peterson Trial: The Art of High-Stakes Jury Picking, 2 Seasoned Consultants Compete in Courtroom*, S.F. CHRON., Apr. 4, 2004, at A-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=c/a/2004/04/04/MNG1060G101.DTL.

2. Catherine Donaldson-Evans et al., *Peterson Found Guilty of Murdering Wife, Unborn Son*, *at* http://www.foxnews.com/story/0,2933,138362,00.html (Nov. 13, 2004).

3. *Famous American Trials: the O.J. Simpson Trial 1995*, *at* http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/simpson.htm (last visited Mar. 23, 2005), is an educational website dedicated to the murder trial of O.J. Simpson [hereinafter *O.J. Simpson Website*].

come under great scrutiny, and the idea that money can buy justice through a legal dream team has become rampant.[4] Additionally, public interest in the courtroom has grown dramatically in recent years, spawning the creation of numerous television programs and even an entire television channel devoted to courtroom drama.[5]

Despite the increased focus on juries and courtroom drama, in most instances jury consultants have remained off the public radar. This low profile has led to a less than favorable public image as not much is known about jury consultants and the services they offer. Further, the few portrayals of jury consultants in the media have hardly been complimentary to the industry. For example, in the Hollywood blockbuster *Runaway Jury*, jury consultants are depicted as high-priced emissaries who will stop at nothing, including the use of illegal tactics, to achieve a favorable verdict for their client.[6] Contrary to public perception and their Hollywood image as unethical spies who manipulate jurors, "jury consultants do not lurk around wearing dark glasses and hidden earpieces, tracking down potential jurors with a vast array of spy gadgetry."[7] However, the existence and rapid growth of the jury consulting industry has caused many to criticize their services, especially their role in selecting jurors.

This comment will address the role of jury consultants in modern jury trials. The venire process and the role of the jury in the American judicial system, including the use of challenges for cause and peremptory challenges, will be discussed in Part II. Part III will discuss the constitutional issues associated with the selection of juries and various Supreme Court cases that have shaped juror selection. Part IV will discuss the evolution of the jury consulting industry and

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4. *See* Joan Ryan, *Trash TV, or a Lesson in Justice?*, S.F. CHRON., Nov. 14, 2004, *available at* http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/11/14/BAGGI9RE3M1.DTL.; *see also* NEIL J. KRESSEL & DORIT F. KRESSEL, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING 67 (2002). Critics argue a loss of confidence in the jury is, in large part, a reaction to an increasing number of controversial, high-profile trials including the William Kennedy Smith rape case, the Menendez brothers murder trial, the police officers accused of beating Rodney King, the attempted murder trial of Reginald Denny, the criminal and civil trial of O.J. Simpson, and the McDonalds hot coffee case, along with many others. *Id.* at 9.

5. KRESSEL & KRESSEL, *supra* note 4, at 9. The American public is allowed inside the courtroom, able to catch a firsthand look at the trial system at work. Cameras in the courtroom and televised post-trial interviews with jurors serve to "deprive the jury system of some of its purported sanctity and inherent mystique." *Id.*; Court TV is a channel dedicated to trials and the law; popular television shows include Law & Order, Law & Order: Special Victim's Unit, Law & Order: Criminal Intent; *see also* Kenneth Conboy, *The Race Factor and Trial by Jury*, 20 FORDHAM URB. L.J. 551 (1993). "[T]he development of the juror as a potential media celebrity [has] brought to the forefront certain doubts about the American jury system." *Id.* at 551.

6. *See* RUNAWAY JURY (Twentieth Century Fox 2003).

7. KRESSEL & KRESSEL, *supra* note 4, at 67; *see also* JEAN HANFF KORELITZ, A JURY OF HER PEERS (1997), a book about jury tampering by a jury consulting firm.

its advantages and criticisms. Finally, Part V will discuss the role jury consultants play in alleviating the conflict faced by trial lawyers in following the constitutional standards established by the Supreme Court while also zealously representing their client. This comment suggests jury consultants may actually help trial lawyers follow the constitutional standards set forth by the Supreme Court. By assisting trial lawyers in selecting a more diverse and basing jury selection on factors other than race or gender alone, jury consultants help trial lawyers adhere to these standards.

II. THE VENIRE PROCESS AND ROLE OF THE JURY IN THE AMERICAN JUDICIAL SYSTEM

The right to a trial by jury is the cornerstone of the American judicial system.[8] However, critics argue the institution is in need of change and have proposed many avenues of reform from the use of professional juries to the elimination of juries all together.[9] Despite criticisms, the value of the jury far outweighs such criticisms. Most importantly, the jury is a necessary component of our democratic system 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."[10]

A. The Venire Process

Jurors are to be selected from a fair cross section of the community.[11] In federal courts, the pool of potential jurors is usually created from voter registration lists and the list includes voters within

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8. *See generally* Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285 (1999); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997); Conboy, *supra* note 5, at 551.

9. Eric N. Einhorn, Batson v. Kentucky *and* J.E.B. v. Alabama ex rel. T.B.*: Is the Peremptory Challenge Still Preeminent?*, 36 B.C. L. REV. 161, 164 (1994).

10. ALEXIS DE TOQUEVILLE, 1 DEMOCRACY IN AMERICA 334 (Schocken 1st ed. 1961.) Toqueville commented over 150 years ago, "I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ." *Id.*

11. 28 U.S.C.S. § 1861 (2004), provides in relevant part, "[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." California Code of Civil Procedure provides, "[a]ll persons for jury service shall be selected at random, from a source or sources inclusive of representative cross section of the population of the area served by the court." CAL. CIV. PROC. CODE § 197(a) (Deering 2004).

the district where trial is to take place.[12] A random number of potential jurors are then selected from the total pool for jury service on a certain date.[13] The selected jurors are notified and required to complete a juror qualification form.[14] Based upon the information provided in the qualification form, the potential jurors are qualified, exempted or excused from jury service.[15] Those qualified to serve on a jury will be empanelled as potential jurors, otherwise known as the "venire," from which the litigants must choose to charge with deciding a case.[16]

Every jury trial in the United States includes at least some voir dire questioning.[17] During voir dire, venire members are subject to examination and questioning by the judge and at the judge's discretion , by the attorneys themselves.[18] Voir dire is often considered the most crucial phase in the trial as it is the only opportunity parties have to examine potential jurors and ascertain their beliefs, attitudes and views on subjects pertinent to the issues involved in litigation. [19]

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12. 28 U.S.C.S. § 1863(b)(2) (2004) requires jurisdictions to "specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters . . . within the district or division." *Id.*; *see also* Einhorn, *supra* note 9, at 164.

13. 28 U.S.C.S. § 1864(a) (2004)states in relevant part, "[f]rom time to time as directed by the district court, the clerk or district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service."

14. 28 U.S.C.S. § 1864(a) (2004), states in relevant part, "[t]he clerk or jury commission shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk or jury commission y mail within ten days."

15. 28 U.S.C.S. § 1863(b)(5)-(6) (2004), states grounds by which potential jurors may be excused or exempt from service; 28 U.S.C.S. § 1865(a) provides:

> [t]he chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, or the clerk under supervision of the court if the court's jury selection plan so authorizes, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service.

See generally PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 134 (1986).

16. Einhorn, *supra* note 9, at 165; Michael Taylor, *Peterson Trial: Inside Look at How Jury is Picked; Process Includes Ample Time for Probing Questions*, S.F. CHRON., Feb. 29, 2004, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=c/a/2004/02/29/BAG2A5AGFF1.DTL.

17. RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 129 (2003). Voir dire questioning is "constitutionally required in criminal cases in order to meet the Sixth Amendment requirement that jurors be 'impartial.'" *Id.*

18. Einhorn, *supra* note 9, at 164; *see* FED. R. CRIM. P. 24(a); FED. R. CIV. P. 47(a), provides, "[t]he court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors additional questions of the parties or their attorneys as it deems proper."

19. Landsman, *supra* note 8, at 292-94; *see also* Walsh, *supra* note 1, which states, "'[p]icking the jury is the absolutely most crucial part of the trial. It's more important than

B. Peremptory Challenges

Venire members may be excused by either party by the exercise of a challenge for cause or a peremptory challenge.[20] A challenge for cause is based on a "narrowly specified, provable and legally cognizable basis of partiality"[21] and is subject to judicial scrutiny.[22] In contrast, peremptory challenges are those made "without inquiry and without being subject to the court's control."[23] As long as the peremptories are not being used to exclude jurors solely on the basis of race or gender, no explanation for a juror's dismissal is required.[24]

The rationale underlying peremptories is "to allow a party to act on mere suspicion of unfavorable bias when the party does not possess enough proof to establish a cause challenge."[25] Although peremptory challenges are not a constitutional right, state and federal courts grant the use of them in both civil and criminal trials.[26] The Supreme Court noted, "[t]he right to challenge is the right to reject, not to select a juror. If from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained."[27]

English common law laid the framework for the use of peremptory challenges in the United States.[28] Over a hundred years ago, the United States Supreme Court first recognized a state's right to

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everything else together,' said Bill Fazio, a criminal defense attorney who worked for the San Francisco district attorney's office for 20 years."

20. Swain v. Alabama, 380 U.S. 202, 220 (1965).

21. *Swain*, 380 U.S. at 220 (noting challenges for cause are unlimited in number).

22. *See generally* JONAKAIT, *supra* note 17, at 134-35.

23. *Swain*, 380 U.S. at 220.

24. *See generally* JONAKAIT, *supra* note 17, at 139-55.

25. *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1464 (1997).

26. 28 U.S.C.S. § 1870 (2004) (limiting the number of peremptory challenges exercised by each party in a civil cases to three); FED. R. CRIM. P. 24(b) also limits the number of peremptory challenges allowed by each party in a criminal case in stating "[e]ach side has 20 peremptory challenges when the government seeks the death penalty. . . . The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year. . . . [E]ach side has peremptory challenges when the defendant is charged with a [misdemeanor]." Robert W. Rodriguez, Baston v. Kentucky*: Equal Protection, the Fair-Cross Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755, 756 (1988).

27. Hayes v. Missouri, 120 U.S. 68, 71 (1887).

28. 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, 166 (1989). While England may have provided the foundation for the use of peremptories in the American judicial system, use of peremptories in England has dwindled. *Id.* The author notes a 1979 study of English criminal trials that reported the right of challenge exercised by either the prosecution or defense was "no more than one trial in seven, and only exceptionally was there more than a single challenge in a case." *Id.* Additionally, the number of peremptory challenges allowed in England has been lowered to three. *Id.*; *see also* Duncan v. Louisiana, 391 U.S. 145 (1968).

use a peremptory challenge in *Hayes v. Missouri*.[29] The Supreme Court stated, "[e]xperience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge."[30] While the Supreme Court has recognized the value of peremptory challenges, their use is a highly contested issue with strong opinions and proposed reform being forged at each end of the spectrum.[31]

When the Supreme Court decided *Hayes*, the country was experiencing an influx of diversity in its citizenry as urban areas were becoming more educated and populated.[32] The Supreme Court recognized that such a mixed population required special care to select impartial jurors.[33] Today's proponents of the use of peremptory challenges argue a similar rationale in declaring the "institution of the peremptory challenge [as] one essential ingredient of ensuring an impartial jury."[34] Justification for the peremptory challenge is based on the need to root out the radicals on both sides and ensure jurors are deciding the case on the "basis of the evidence placed before them, and not otherwise."[35]

C. The Role of the Jury

The role of the jury has always been the subject of debate.[36] America's mixture of reverence and scorn for the jury system is perhaps best illustrated in a quote often attributed to Mark Twain: "We have a criminal jury system that is superior to any in the world,

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29. *Hayes*, 120 U.S. at 68; *see also* Rodriguez, *supra* note 26, at 755.

30. *Hayes*, 120 U.S. at 70.

31. Einhorn, *supra* note 9, at 167. "Although peremptory challenges have withstood the test of time, their continued use raises questions of equity and efficiency. . . . Critics argue for the elimination of the peremptory challenge from the judicial system altogether. Proponents, in contrast, argue that peremptory challenges contribute valuably to the judicial system." *See generally* Alschuler, *supra* note 28; Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. REV. 227 (1986).

32. *Hayes*, 120 U.S. at 69-70.

33. *Id.* at 71.

34. Rodriguez, *supra* note 26, at 755; Landsman, *supra* note 8, at 294; KRESSEL & KRESSEL, *supra* note 4, at 9. With the increasing availability of our judicial system through the television and other resources, people have become more cynical and suspect of the judicial system. *Id.*

35. Swain v. Alabama, 380 U.S. 202, 219 (1965); *see also* Einhorn, *supra* note 9, at 169 (arguing "[e]liminating the extremes of a jury also helps to eliminate the occurrence of hung juries").

36. *See generally* DIPERNA, *supra* note 15, at 216-39; W.R. CORNISH, THE JURY (1968); JONAKAIT, *supra* note 17; JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 150 (1994).

and its efficiency is only marred by the difficulty of finding twelve men everyday who don't know anything and can't read."[37]

The jury is charged with being the finder of facts.[38] This function "lie[s] at the core of the adjudication" system and is a "measure of sovereign authority that is seldom assigned to lay persons."[39] However, the criticism of the jury as "an imperfect institution in terms of accurate fact-finding and producing justice"[40] has gained momentum in recent years. Specifically, the jury has come under attack as being obsolete and passé, producing unwarranted delay, and sometimes irrational verdicts with detrimental outcomes.[41]

Jury trials today are often complex, expensive and lengthy.[42] Even though only a small percentage of cases actually reach the jury, the high cost of going to trial is often credited with the rise in plea bargains, settlements and other alternative forms of dispute resolution.[43] Moreover, the selection of qualified jurors is limited by the increasing length of trials as many prospective jurors are unable to dedicate weeks, perhaps months, to a single jury trial.[44]

While most people tend to cower away from jury service and begin to think of excuses for disqualification the moment they receive their notice of service, "[j]ury service is an experience which comes unexpectedly upon people once or twice in a life-time. Once they have overcome initial irritation at the disruption of their lives and puzzlement at the unfamiliar surroundings, most jurors find the duty an absorbing one, involving important responsibilities."[45]

Once selected, the duties commissioned to jurors are sophisticated and often emotionally charged. First, prospective jurors are often subjected to lengthy, comprehensive intrusions into their private lives that in any other context would be considered "inappropriate and demeaning."[46] They are required to answer probing questions about

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37. Alschuler, *supra* note 28, at 154. The author attributes the quote to Mark Twain but indicates he was unable to locate the remark in his writing. *Id.* at 154 n.4.

38. Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 55 (2001).

39. *Id.*

40. Smith, *supra* note 8, at 444.

41. *Id.*

42. *Id.* at 489-90.

43. *Id.* at 490-92.

44. *Id.* at 491 ("Jurors that are able to serve on lengthier trials are more likely to be unemployed or retired, female, or unmarried and are less likely to have a college education. The result of this phenomenon is often a less educated jury and an impairment of the representative nature of the jury as being composed of a cross-section of the community.").

45. CORNISH, *supra* note 36, at 7.

46. Alschuler, *supra* note 28, at 155. "In one notorious case, lawyers examined more than 1000 prospective jurors over a four month period before finding twelve who could try the defendant." *Id.* at 157; *see also* JONAKAIT, *supra* note 17, at 153. *See generally* 28 U.S.C.S. § 1864(a) (2004) which states in relevant part, "At the time of his appearance for

their religious beliefs, hobbies, prior experience with the judicial system, drinking habits, drug use, political affiliations, sexual preference and family life.[47] Next, with the use of a peremptory challenge, venire members may be excused from service without being given a reason, an act that in other circumstances would be "discriminatory and unconstitutional."[48] If selected, jurors usually face a financial hardship in fulfilling their civic duty as most jurisdictions' daily stipend and mileage allowance is paltry.[49] For all this, jurors are faced with the awesome job of deciding the fate of their peers and are subject to widespread criticism from the media and general public if their verdict is not popular.[50]

Despite its criticisms, the jury is the very embodiment of the democratic ideal; "[t]he concept of the jury system is as close as any society has ever come to true democracy."[51] Active participation in the judicial system by citizens creates not only a broader understanding of the governing laws but gives citizens a chance to insert social pragmatism and common sense into an into an area that would otherwise remain rigid.[52] Juries also serve as an important non-legal, apolitical check on the government:[53] "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt and overzealous prosecutor and against the compliant, biased or eccentric judge."[54] Finally, jurors

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jury service, any person may be required to fill out another juror qualification form in the presence of the jury commission of the clerk of the court, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form."

47. *See also O.J. Simpson Website*, *supra* note 3, providing the questionnaire given to the jurors in the OJ Simpson murder trial. The questionnaire consisted of 79 pages, 28 parts and 294 questions, most requesting an explanation. Questions included, "Have you ever experienced domestic violence in your home, either growing up as a child or as an adult?"; "How do you feel about interracial marriage?"; "Do you have a religious affiliation or preference?"; and "Do you believe it is immoral or wrong to do an amniocentesis to determine whether a fetus had a genetic defect?" *Id.*

48. Alschuler, *supra* note 28, at 155.

49. DIPERNA, *supra* note 15, at 86.

50. Ethan Fletcher, *Serving as Juror is 'Thankless Job,'* THE INDEP., *at* http://www.sfindependent.com/article/index.cfm/i/121504n_juror (last visited Mar. 23, 2005).

51. DIPERNA, *supra* note 15, at 1; *see also Developments in the Law: The Civil Jury*, *supra* note 25, at 1445; Landsman, *supra* note 8, at 285.

52. *See* Smith, *supra* note 8, at 480-89.

53. *Id.* at 475.

54. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). In keeping with this tradition, any extension of power to judges, or any branch of government, should be made with great caution. *Id.*

> If peremptories were abolished, the authority of the judge to mold the jury would increase tremendously. The judge would have essentially unchecked power to fashion the jury, and consciously or not, judges will often produce less than truly impartial juries. Our system of checks and balances teaches us to be on guard

are independent citizens[55] and "have no interest in the case before them, nor is their judgment coloured by regular experience of the business of the courts."[56]

III. CONSTITUTIONAL ISSUES SURROUNDING JURY SELECTION

The Sixth and Seventh Amendments of the United States Constitution provide for the right to an impartial jury in all criminal and civil cases.[57] Additionally, the Fourteenth Amendment assigns all citizens equal protection under the law.[58] Trial lawyers have had to learn how to balance a juror's rights under the Fourteenth Amendment with a client's right to an "impartial" jury. The constitutional limitations on the selection of jurors imposed by the Supreme Court have made this task even more daunting.

A. The Sixth & Seventh Amendments of the United States Constitution

Every defendant has a right to a jury trial and to be heard by a jury of his or her peers.[59] The Seventh Amendment states, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[60] Similarly, the Sixth Amendment states, in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[61] "Although some are prone to overlook it, an accused's right to trial by a jury of his fellow citizens when

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about such situations.

JONAKAIT, *supra* note 17, at 169; *see also* Smith, *supra* note 8, at 477.

55. Smith, *supra* note 8, at 475; *see also* CORNISH, *supra* note 36, at 9.

56. CORNISH, *supra* note 36, at 9; *Duncan*, 391 U.S. at 157. In holding the defendant entitled to a trial by jury for a simple battery, a misdemeanor punishable by a maximum of two years in prison and a $300 fine, the jury recognized:

> [A]t the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of the dice. Yet, the most understanding and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

Id.

57. U.S. CONST. amends. VI & VII.

58. U.S. CONST. amend. XIV.

59. U.S. CONST. amend. V-VII. *See generally* DIPERNA, *supra* note 15, at 85-98.

60. U.S. CONST. amend. VII.

61. U.S. CONST. amend. VI.

charged with a serious criminal offense is unquestionably one of his most valuable and well-established safeguards in this country."[62]

In defining what constitutes an "impartial jury," courts have recognized that given the vast diversity of races and nationalities in the U.S., a defendant does not have the right to a jury composed "in whole or in part of persons of his own race."[63] However, a defendant does have the right to a jury that is "composed of... his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[64] Therefore, the purpose of voir dire is to seek out a litigant's peers and "question potential jurors in an attempt to discover any biases or prejudices that the juror may have concerning the litigants or the case."[65] This selection of the peers who are to listen, evaluate and eventually decide the fate of a dispute is often considered the most important phase of trial.[66]

B. The Equal Protection Clause of the Fourteenth Amendment

The Fourteenth Amendment of the U.S. Constitution reads, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[67]

The Supreme Court has stated that both a litigant and a juror have rights, independent of each other, grounded in the Fourteenth Amendment.[68] First, when a litigant is tried by a jury from which members have been purposefully excluded, the litigant is denied equal protection under the law.[69] Second, jury service is considered a right of citizenship as "potential jurors possess an independent right grounded in the Equal Protection Clause not to be excluded from jury service based on group membership."[70]

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62. Green v. United States, 356 U.S. 165, 215 (1958) (Black, J., dissenting).
63. Batson v. Kentucky, 476 U.S. 79, 85 (1985).
64. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).
65. Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System*, 32 SUFFOLK U. L. REV. 463, 467 (1999).
66. *Id.*
67. U.S. CONST. amend XIV, § 1.
68. *See* discussion *infra* Part III.C.
69. *Id.*
70. *Developments in the Law: The Civil Jury*, *supra* note 25, at 1444.

C. Supreme Court Decisions

Over a century ago, in *Strauder v. West Virginia*,[71] the Supreme Court recognized that racial discrimination in jury selection violates the Fourteenth Amendment of the Constitution.[72] In *Strauder,* the Court held a state statute prohibiting persons of color from serving on a jury amounted to denial of equal protection of the laws to an African-American when he is charged and put on trial for an alleged offense against the state.[73] The principle announced in *Strauder* has since been elaborated upon and expanded. Most notably, in *Batson v. Kentucky*,[74] the Supreme Court held a prosecutor's act of using peremptory strikes to remove all black jurors from the venire violated both the defendant's and the jurors' rights under the Fourteenth Amendment.[75] In reaffirming that a "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria,"[76] the Court also noted, "by denying a

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71. 100 U.S. 303 (1880).

72. *Id.*

> The very fact that [members of a particular race] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race the equal justice which the law aims to secure all others.

Id. at 308.

Discrimination in jury selection on the basis of race has been a crime since Congress enacted the Civil Rights Act of 1875, 18 U.S.C. § 243, which states:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State on account of race, color or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

Id.

73. *Strauder*, 100 U.S. at 303. In this case the defendant was convicted of murder and petitioned his conviction based on a West Virginia statute that did not allow black males to qualify for jury duty. *Id.* The court held the state statute discriminated on the basis of race and that it amounted to a denial of equal protection under the United States Constitution and Defendant's conviction was reversed. *Id.*

74. 476 U.S. 79 (1986).

75. *Id.* at 97. In the criminal trial of a black male, the prosecutor used his peremptory challenges to strike all four minority persons on the venire, thus comprising a jury of only Caucasians. *Id.* at 83. The court upheld the principle set forth in *Strauder v. West Virginia* in that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Id.* at 89-90. The dissent argued that peremptories are based on "seat-of-the-pants instincts" and as long as they are applied across the board to jurors of all races and nationalities, there is no violation of the Fourteenth Amendment. *Id.* at 138 (Rehnquist, J., dissenting).

76. *Id.* at 85-86 (citations omitted).

person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror."[77]

While *Batson* and *Strauder* sought to "put an end to governmental discrimination on account of race,"[78] the Supreme Court has since broadened its prohibition to criminal defendants and civil litigants.[79] The Supreme Court has also included gender on the list of constitutionally prohibited discriminatory criteria in holding, "[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded."[80] Additionally, the Supreme Court has held a criminal defendant may object to race-based exclusion of jurors whether or not the defendant is the same race as the excluded juror, thereby allowing a defendant to assert the equal protection rights of a juror.[81]

Although the Supreme Court's decisions in the above cases are constitutionally driven, "they express a deep concern about professional ethics and institutional values."[82] This is reflected in dicta from the cases which indicate that allowing discrimination to occur in the courtroom is especially damaging and "undermine[s] public confidence in the fairness of our system of justice."[83] Specifically, in *Edmonson v. Leesville Concrete Co.*,[84] the Court notes that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. . . . Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."[85]

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77. *Id.* at 87 (citations omitted).

78. *Id.* at 85.

79. Georgia v. McCollum, 505 U.S. 42, 59 (1992) ("We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges."); Edmonson v. Leesville Concrete Co. Inc., 500 U.S. 614, 618-631 (1991) (holding a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race).

80. *J.E.B.*, 511 U.S. at 140 (holding intentional discrimination on the basis of gender by state actors in the use of peremptory strikes in jury selection violates the Fourteenth Amendment).

81. Powers v. Ohio, 499 U.S. 400 (1990).

82. Abbe Smith, *"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 535 (1998). The article looks at the conflict in following the constitutional standards established in *Batson v. Kentucky*, and its progeny, and being a criminal defense attorney. *Id.* at 533-36. The author argues it is "unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with *Batson v. Kentucky* and its progeny." *Id.* at 531.

83. *Batson*, 476 U.S. at 87.

84. 500 U.S. 614 (1991).

85. *Edmonson*, 500 U.S. at 628.

Race and gender discrimination has been addressed at length by the Supreme Court, but recently lower courts have been grappling with requests for legal protection on the basis of religion, language and obesity.[86] While courts have yet to expand constitutional protection to these areas, the Supreme Court has left no guidance for courts to determine what other cognizable characteristics deserve the legal protection provided by the Fourteenth Amendment.[87]

IV. JURY CONSULTING

The role of the jury is constantly changing and the jury consulting industry has emerged to assist trial lawyers in adjusting to those changes.[88] An increasingly complex and diverse population, coupled with an overburdened judicial system have made jury consultants a virtual necessity for some trial lawyers.[89]

A. Evolution of Jury Consulting

The birth of jury consulting is attributed to the successful defense of the "Harrisburg Seven."[90] A group of Vietnam War protesters were accused of various acts of civil disobedience, including "conspiring to destroy selective service records and kidnap Henry Kissinger."[91] Trial was set to take place in the highly conservative area of Harrisburg, Pennsylvania.[92] To combat the government's seemingly endless resources, a team of social scientists was hired by the defense.[93] Consisting mostly of antiwar student volunteers,[94] the social scientists

86. Davis v. Minnesota, 511 U.S. 1115 (1994) (*denying cert. to* State v. Davis, 504 N.W.2d 767 (Minn. 1993)) (Thomas, J., dissenting) (declining to hear a case in which the trial court upheld the use of a peremptory challenge by a prosecutor to remove a juror on the basis of his religious affiliation as a Jehovah's Witness); Pemberthy v. Beyer, 19 F.3d 857 (1994) (holding that the trial court did not err in allowing a prosecutor to use peremptory challenges to exclude jurors because of their ability to speak Spanish where the translation of a taped conversation in Spanish was expected to be a hotly contested issue at trial); United States v. Santiago-Martinez, 58 F.3d 422 (1995) (refusing to extend the analysis of Batson to prohibit peremptory strikes on the basis of obesity).

87. *See* David Island & Daniel Westman, *Bad Strike: Jury Selection has Become Responsive to Everybody's Needs*, L.A. DAILY J., July 1999, *available at* http://www.islandtrialconsulting.com/itcquarterly_july99.html.

88. *See infra* Part IV.A.

89. DIPERNA, *supra* note 15, at 133.

90. ABRAMSON, *supra* note 36, at 147-48, 155; *see also* 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, 444 (1999).

91. Strier & Shestowsky, *supra* note 90, at 444.; *see also* U.S. v. Berrigan, 482 F.2d 171 (3d Cir. 1973).

92. Strier, *supra* note 90, at 444.

93. *Id.*

94. ABRAMSON, *supra* note 36, at 148.

conducted telephone polls and collected data on the types of people who shared the defendants' antiwar beliefs.[95] Once all data was compiled, a demographic profile was created of the type of individuals most likely to be sympathetic, or unsympathetic, to the defense.[96] The defense then used these profiles to assist them in the jury selection process.

The government spent $2 million on the case and "[d]espite the investment of considerable time and money by the prosecution commensurate with the attention given the trial by the media . . . it ended with a hung jury," a vote of 10-2 in favor of acquittal.[97] The hung jury was accredited in large part to the work of the social scientists hired by the defense and thus, the jury consulting industry was born.

Soon after the "Harrisburg Seven" were released, similar efforts were spawned throughout the country in an effort fueled "by an ethical sense that their help was merely allowing unpopular underdogs to get a fair and impartial jury."[98] However, the apparent success of these efforts did not go unnoticed by commercial enterprises, and soon large corporations were seeking the assistance of jury consultants in civil suits.[99] Additionally, high-profile figures also began to enlist the help of jury consultants. For example, jury consultants are often credited with the acquittal of two former cabinet members of President Nixon during the Watergate scandal.[100]

Although jury consultants claim high success rates, little research has been conducted on the actual effect jury consultants have in the outcome of a case. Despite this fact, many prestigious firms consider the use of jury consultants essential to trial preparation.[101] As a result, the jury consulting industry has shown a remarkable growth in both size and pocketbook.[102] "Jury consultants already dominate big-

95. Lane, *supra* note 65, at 472.

96. Strier & Shestowsky, *supra* note 90, at 444.

97. *Id.*; *see also* ABRAMSON, *supra* note 36, at 148.

98. ABRAMSON, *supra* note 36, at 148. In 1975, the National Jury Project was established in Oakland, California. The project used similar jury selection techniques in trials for the defense of radicals or political defendants who were unable to match the vast resources at the government's disposal. *Id.*

99. *Id.* at 149, including cases involving IBM, MCI, Penzoil, Firestone, NFL.

100. *Id.*

101. Lane, *supra* note 65, at 463 (stating that prior to a small study of 132 participants in 1996, no empirical studies have addressed the issue of the effectiveness of jury consultants in jury selection); Dennis P. Stolle et al., *The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation*, 20 LAW & PSYCHOL. REV. 139, 172-73 (1996).

102. ABRAMSON, *supra* note 36, at 149 (stating that from 1982 to 1994 the jury consulting industry grew 100% and currently fees run about $150 per hour and in a high-profile case, fees can range from $10,000-$250,000); Strier & Shestowsky, *supra* note 90, at 444-45 (stating that the trial consulting industry has turned into a $400 million a year industry with over 700 practitioners and 400 firms).

money civil cases. They frequently play key roles in those criminal cases with the highest visibility and greatest implication for public policy."[103] Cases with unrelenting media coverage are also prone to the use of jury consultants. Just to name a few recent cases, Martha Stewart, Scott Peterson, David Westerfield, O.J. Simpson, the Menendez brothers, the police officers in the Rodney King police brutality case, and basketball star Jayson Williams, have all used jury consultants.[104] In these cases, there were increased concerns over the complexity of the issues and the development of relationships with jurors, and jury consultants were utilized in all stages of litigation.[105]

There is an "inescapable irony" that follows the evolution of jury consulting.[106] The first beneficiaries were indigent defendants who were being prosecuted for their political beliefs during a volatile time in our history when a majority of jurors were not able to see beyond the guilt of the defendant.[107] By contrast, today's typical clients are "wealthy and privileged: corporations and well-heeled, prominent individuals."[108] How quickly the pendulum swings.[109]

B. Jury Consultant Assistance with Voir Dire

Although jury consultants offer a wide variety of services and can be utilized at virtually every stage of litigation, they are most recognized for their assistance with jury research and selection.[110] Jury research is "a tool used by trial attorneys to prepare their cases for trial. It is a proven way to test and make adjustments to the case prior to trial as well as to obtain juror profiles in preparation for [voir dire]."[111]

Jury consultants predominantly rely upon the use of opinion polls to construct a profile of the type of person that will be most receptive to a client's case.[112] As "jurors are products of what they have been

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103. KRESSEL & KRESSEL, *supra* note 4, at 16.

104. 49 AM. JUR. *Trials* § 2 (2004); Leonard Post, *High-Profile Trials Keep Jury Consultants Busy*, BROWARD DAILY BUS. REV. 17, Apr. 19, 2004; Debra Sahler, *Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule*, 6 ALB. L.J. SCI. & TECH. 383, 395 (1996); *see also* Tom McCann, *Jury Consultants Try to Turn Voir Dire Into a Science*, CHI. LAW., Aug. 2004, at 21.

105. *See generally* Strier & Shestowsky, *supra* note 90.

106. *Id.* at 446.

107. Paul Lisnek, *Bill to Ban Jury Consultants Misses Point*, CHI. DAILY L. BULL., Nov. 6, 1995, at 6.

108. Strier & Shestowsky, *supra* note 90, at 446.

109. Lisnek, *supra* note 107.

110. KRESSEL & KRESSEL, *supra* note 4, at 15.

111. Walter F. Becker, Jr., *How to Use a Jury Consultant: A Guide for Trial Attorneys*, 50 LA. B.J. 426, 426 (2003). *See generally* DIPERNA, *supra* note 15, at 130-50.

112. Stephanie Yarbrough, *The Jury Consultant: Friend or Foe of Justice*, 54 SMU L.

exposed to and are thus reflections of the people, experiences, and lifestyles they have known,"[113] opinion polls consist of surveying a random sample of the community from which jurors are to be drawn.[114] These residents are asked general questions about their attitudes toward a variety of relevant factors, as well as specific questions relating to a client's particular case.[115] This demographic data is compiled and jury consultants look for specific correlations between desirable traits and a person's age, race, religion, sex, political affiliations, occupation, habits and social standing.[116] Based on these correlations, profiles are constructed of favorable and unfavorable jurors.[117]

The profiles are then used by lawyers during voir dire and assist in the development of trial strategies and the presentation of evidence.[118] For example, Jo-Ellan Dimitrius, a jury consultant for the defense in the O.J. Simpson murder trial, noted that her pre-trial research for the case indicated that women over thirty "would not necessarily believe spousal abuse leads to murder."[119] Consequently, ten out of the twelve jurors were women and seven of those women were over the age of thirty.[120]

Other methods of assistance with voir dire include the "community network" or "background check" approach.[121] In jurisdictions where the names and addresses of potential jurors are disclosed,[122] jury consultants "employ[] field investigators or private detectives... to ride through the neighborhoods of prospective [and actual] jurors, interviewing acquaintances about marital problems, drinking problems, and treatment of minorities."[123] For example, in Boston it was reported that consultants for tobacco companies drove

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REV. 1885, 1891 (2001).

113. ABRAMSON, *supra* note 36, at 150.

114. *Id.* at 148.

115. *Id.*

116. *Id.*; Yarbrough, *supra* note 112, at 1891.

117. *Id.*

118. KRESSEL & KRESSEL, *supra* note 4, at 14; Lane, *supra* note 65, at 471-72.

119. Yarbrough, *supra* note 112, at 1892.

120. *O.J. Simpson Website*, *supra* note 3.

121. ABRAMSON, *supra* note 36, at 150.

122. The list of qualified jurors:

> shall be disclosed to parties and the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

28 U.S.C.S. § 1863 (b)(7) (2004)

123. ABRAMSON, *supra* note 36, at 150.

through neighborhoods of potential jurors just days just before jury selection was to begin.[124]

During voir dire, jury consultants consider themselves to be "the eyes and ears of the lawyer,"[125] and despite criticisms of their effectiveness, jury consultants have become essential in the anonymous and more lucrative world of civil cases, where financial stakes are high.[126]

C. Expansion of the Services Offered by Jury Consultants

The rapid growth of the jury consulting industry has attracted a number of professionals from varying industries. While jury consultants are typically psychologists; others such as sociologists, attorneys, political strategists and marketing experts have also been lured into this lucrative industry.[127] This increase in diversity has created a wide variety of services that can be tailored to fit a client's needs. For example, marketing specialists have found special success in the trial consulting industry by analogizing marketing techniques with the selection of juries. First, a "target audience" is identified, or one that will be most receptive to the client's case.[128] Then, a strategy is devised to help persuade the audience to "buy" the client's product of guilt or innocence.[129]

Some jury consultants indicate an increasing demand for services geared toward trial preparation after the jury has been selected, as opposed to assistance with voir dire.[130] Other services often utilized by trial lawyers include witness preparation, presentation of visual aids, courtroom observation, change of venue studies, coordination of mock trials and post trial juror interviews.[131] Oftentimes, when a lawyer hires a jury consultant, all aspects of the trial will be reviewed for their appeal to jurors. The jury consultant will "devise, refine, or

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124. *Id.*

125. Robert Hirschhorn, *Jury Consultants: Boon or Bane? But a Trial Consultant May Bring a Fresh Approach*, NAT'L L.J., June 6, 1994, at C2.

126. Strier & Shestowsky, *supra* note 90, at 443, provides a list of high stakes civil trials. *See generally* Diana Walsh, *supra* note 1.

127. Strier & Shestowsky, *supra* note 90, at 445; *see, e.g.*, Walsh, *supra* note 1 (Howard Varinsky has a background in clinical psychology while Jo-Ellan Dimitrius stumbled upon jury consulting after receiving a doctorate in criminology.); Jean O. Pasco, *Where Focus Groups Hold Court: O.C. Jury Consultant Business Strategy to Give Attorneys Upper Hand*, L.A. TIMES, Jan. 9, 2005, at B1 (addressing the rise of political strategist/consultants in the jury consulting industry and the unique perspective they bring).

128. Strier & Shestowsky, *supra* note 90, at 445.

129. *Id.*

130. Post, *supra* note 104.

131. KRESSEL & KRESSEL, *supra* note 4, at 15.

131. Lane, *supra* note 65, at 463.

test a lawyer's case strategy, tactics, opening statements, closing arguments, and appellate advocacy."[132]

One of the most popular services offered by jury consultants is the mock trial. Mock trials are utilized to prepare for trial but can also be useful if a client has yet to decide if trial is the best method of resolving a dispute.[133] A jury consultant assembles a group of mock jurists, from the community where the trial is to be conducted, who act as real jurors; listening to arguments, seeing the evidence, going thorough deliberations and rendering a verdict.[134] In order to assist in the development of an effective and persuasive trial strategy, the mock jurors are instructed to give feedback throughout the mock trial and jury consultants observe reactions to the presentation of arguments and evidence and also carefully watch deliberations.[135]

Mock trials are also used to prepare key witnesses for trial. For example, the prosecution staged a mock trial two days before jury selection was to begin in the rape case against Kobe Bryant in Eagle, Colorado.[136] The purpose was to "gauge how their chief witness would hold up under hostile cross-examination."[137] Bryant's accuser endured three hours of harsh questioning by a lawyer playing the role of Bryant's attorney which left the 20-year-old chief witness visibly shaken.[138] The mock trial solidified the accuser's decision not to testify after wavering for months.[139] Subsequently, the case against Bryant crumbled and seven days later the charges against him were dropped.[140]

Post voir dire services are often overlooked by critics of the jury consulting industry. Perhaps it is because these services seem to fall more "legitimately within the parameters of the adversarial

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132. KRESSEL, *supra* note 4, at 15.

133. Pasco, *supra* note 123.

134. *See generally*, Troy Roberts, *48 Hour Mystery: Mock Jury Weights Peterson Case*, CBSNEWS.COM, June 2, 2004, *at* http://www.cbsnews.com/stories/2004/10/29/48hours/main652399.shtml. A group of mock jurists whose profiles closely resembled the real panel trying Scott Peterson was assembled by the jury consulting firm DOAR. *Id.* The mock jury listened and saw all the evidence but resulted in a hung jury, leading to a mistrial. *Id.*

135. Yarbrough, *supra* note 112, at 1893-94.

136. Jeffe Benedict & Steve Henson, *The Case Against Kobe Bryant Unraveled in a Mock Trial*, L.A. TIMES, Nov. 6, 2004, at A1.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* In focusing on the accuser's account of the attack given to police, the mock defense attorney pointed out that the woman said she kissed Kobe Bryant consensually for five minutes before the alleged assault. *Id.* The attorney paused for 60 seconds and the entire courtroom was silent until the attorney broke in to say, "you're still kissing him, you kissed him for four more minutes." *Id.* To which the accuser replied, "That's too long. We didn't kiss that long." *Id.*

system."[141] "Lawyers are, after all, *required* to do all they can to present their client's perspective vigorously and in the best possible light."[142] With this in mind, is it any wonder litigants are willing to spend big money on jury consultants to help ensure a jury panel will be receptive to their case?

D. Advantages of Jury Consulting

Potential jurors "inevitably bring with them the views and biases built into their race, religion, age and gender. These preconceptions supposedly influence the eventual verdict as much, if not more than, the evidence presented at trial."[143] If jury selection plays such a large role in the outcome of a trial, it is no surprise a jury consultant's assistance during voir dire has become almost commonplace. Jury consultants work to eliminate some of the guesswork that goes into selecting a sympathetic jury. Further, "[a]ttorneys have increasingly recognized what successful companies have known for a long time; rarely do large companies risk millions of dollars introducing a new product without pre-testing it on potential customers."[144] This rationale is easily applied to the selection of jurors. Lawyers can spend as much money as they want on splashy presentations and coming up with catchphrases, but unless they have a receptive jury, all efforts are in vain.

One of the strongest arguments favoring the use of jury consultants is that the sophisticated methods used to profile jurors may actually decrease the use of stereotypes during voir dire, thereby allowing lawyers to stay within the constitutional limits established in *Strauder* and its progeny.[145] A lawyer who hires a jury consultant no longer relies on hunches or intuition based on blatant racial or ethnic stereotypes and "[f]ewer jurors will draw suspicion solely on the basis of their demographics."[146]

> [T]he less information attorneys have about potential jurors, the more attorneys have to rely on gross stereotypes in the exercise of their peremptories, and the likelihood increases that jurors will be excused on what are in reality race-based and gender-motivated challenges. . . .

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141. KRESSEL & KRESSEL, *supra* note 4, at 15.

142. *Id.* at 219.

143. *Id.*

144. 49 AM. JUR. *Trials* § 1 (2004); ABRAMSON, *supra* note 36, at 143; KRESSEL & KRESSEL, *supra* note 4, at 7 ("In the eyes of an increasing number of Americans, *who* serves on the jury matters at least as much as what the jurors see and hear at trial."). *Id.*

145. ABRAMSON, *supra* note 36, at 143

146. KRESSEL & Kressel, *supra* note 4, at 15. S*ee generally* JONAKAIT, *supra* note 17, at 148-49 (discussing the author's experience as a juror and the use of stereotypes).

> [M]ore information about the jurors helps satisfy the goals of *Batson*. . . .[147]

The jury selected in the double murder trial of Scott Peterson was lauded by experts for its diversity and fairness.[148] Both the prosecution and defense hired jury consultants and after looking at nearly 1600 prospective jurors, the six men and six women who served on the jury included a social worker, a firefighter-paramedic, an accountant, a Teamster, a security guard and a woman whose husband is in jail for murder.[149] Diverse juries are more likely to be seen as objective, adding to the legitimacy of the outcome and increasing public confidence in the judicial system.[150]

Previously, the legitimacy of jury trials proceeded upon the assumption that such biases, predilections or emotional dispositions can be exposed in a voir dire inquiry that is comprehensive, case specific, and respectful of the complexities of both human attitudes and the capacity of average people to express themselves about such sensitive and personal matters in the heightened and stressful environment of a public courtroom.[151]

Moreover, trial attorneys often favor a detailed and thorough voir dire.[152] An extensive voir dire, however, makes trials more costly and lengthy.[153] A trial judge has broad discretion in the amount of time dedicated to voir dire and recently, "pressures on the judiciary to clear an already overburdened docket often force courts to provide limited attention to voir dire questioning."[154] As this pressure grows, there is potential for a litigant's constitutional rights to be compromised as "lawyers will have less contact with potential jurors and will be able to learn less about them."[155] Jury consultants help alleviate this

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147. JONAKAIT, *supra* note 17, at 165.

148. *Jury Seated in Scott Peterson's Double-Murder Trial after Nine Week Search*, May 28, 2004, *at* http://www.courttv.com/trials/peterson/052704_jury_ap.html [hereinafter *Jury Seated*]; *see also A Glimpse of the Peterson Jurors*, May 28, 2004, *at* http://www.courttv.com/trials/peterson /052804_jurors_ap.html (giving a brief profile of each juror chosen and the alternates).

149. *A Glimpse of the Peterson Jurors*, May 28, 2004, *at* http://www.courttv.com/trials/peterson/052804_jurors_ap.html.

150. *See generally Jury Seated*, *supra* note 148.

151. Conboy, *supra* note 5, at 553.

152. JONAKAIT, *supra* note 17, at 150.

153. *Id.* "One study found that the voir dire process constituted 40 percent of the total trial time, and lengthy jury selections provoke some of the loudest criticisms of the jury system." *Id.* at 130.

154. Einhorn, *supra* note 9, at 169. *See generally* JONAKAIT, *supra* note 17, at 130.

155. DIPERNA, *supra* note 15, at 133 (noting a lawyer who "lamented a case he was working on in which the federal judge picked a jury in thirty-two minutes: 'We learned almost nothing about those people.' Indeed the average voir dire in the federal system in New York consumes about half an hour.").

problem by conducting research, creating juror questionnaires and developing juror profiles before voir dire even begins.[156]

It has been said when one goes to law school, one gets a "lawbotomy."[157] A "lawbotomy" is a term to describe how budding lawyers learn to analyze the world around them with a legal mind.[158] While a "lawbotomy" is beneficial to a client on issues relating to the law, jury consultants argue the qualities acquired might not fare so well in the selection of a jury.[159] "A competent jury consultant is the eyes and ears of the lawyer. A lawyer cannot develop a rapport with the jury, take notes and observe the jury all at the same time."[160] During the process of jury selection, jury consultants act as "a human BS meter,"[161] by watching a potential juror's body language, evaluating appearance, determining leadership tendencies, and examining reactions when questions are being focused at other potential jurors.[162] However, jury consultants do more than just observe behavior in the courtroom, they also analyze responses to juror questionnaires.[163] As "prejudiced jurors rarely broadcast their biases in open court,"[164] the questions are purposefully designed to bring out the subtle biases of potential jurors attempting to hide their true tendencies.[165] Additionally, a jury consultant's job does not stop once the jury has been selected, and much of what goes before a jury has been pre-tested for "persuasiveness, memorability and effectiveness."[166]

Jury consultants are especially prevalent in high-profile cases.[167] High-profile cases present the special challenge of rooting out those who are "auditioning" to be on the jury.[168] These types of jurors are

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156. *Id.*

157. Hirschhorn, *supra* note 125.

158. *Id.*

159. *Id.*

160. *Id.*

161. Troy Roberts, *The Jury Consultants*, CBSNEWS.COM, June 2, 2004, *at* http://www.cbsnews.com/stories/2004/06/02/48hours/main620794.shtml.

162. Robert L. Haig, *Using a Jury Consultant to Assist in Jury Selection*, *in* SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 64:4 (2003) (discussing the use of jury consultants and noting how during voir dire jury consultants look at appearance first, what they are wearing, the quality of their clothes, the attention to detail, whether shoes are shined); *see also* Walsh, *supra* note 1.

163. KRESSEL & KRESSEL, *supra* note 4, at 15; Walsh, *supra* note 1.

164. KRESSEL & KRESSEL, *supra* note 4, at 15.

165. *Id.*; Walsh, *supra* note 1.

166. 49 AM. JUR. *Trials* § 1 (2004).

167. Sahler, *supra* note 104, at 395. Jury consulting has been used in multiple high-profile trials including New York "subway vigilante" Bernard Goetz, Rodney King, William K. Smith, the Menendez brothers, and O.J. Simpson. *Id.*

168. Bryan Robinson, *The Jury is Out*, ABCNEWS.COM, Oct. 24, 2003 *at* http://abcnews.go.com/selection/US/GoodMorningAmerica/juryselection031024.html.

known in the legal community as "stealth jurors [or] people who lie to get chosen for the jury in a high-profile trial."[169] Usually these individuals have their own agenda, and it does not include basing the verdict on the evidence presented but rather their own fifteen minutes of fame or retribution for a past crime.[170] For example, in the jury selection phase of the Scott Peterson trial, the defense team believed it found at least one such juror in the jury pool.[171] Defense attorney Mark Geragos repeatedly asked a retired secretary on the venire about a trip she had recently taken.[172] Geragos claimed the secretary was overheard saying Scott Peterson was "guilty as hell," "he was going to get it," and she was trying really hard to get on the jury.[173]

The enticement of possible celebrity status and monetary gain makes jury selection in high-profile trials even more important. Stealth jurors are more prevalent in high-profile trials as they often "become celebrity players in some kind of reality TV performance."[174] Media attention has allowed many jurors on high-profile cases to capitalize on the experience. For example, jurors in high-profile cases have posed in Playboy Magazine,[175] received book deals detailing their experience and appeared on numerous television shows.[176] In a recent California case, after the first trial ended in a hung jury, nearly half of the jury in a highly controversial and publicized gang-rape case was retained by the defense to assist in preparations for the second trial.[177] While some consider the idea "novel and edgy," critics argue adding money to the equation "taints

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In high-profile cases, jury consultants claim they are more concerned about jurors who say they know nothing about a case that receives weekly media coverage than those jurors who admit to having prior knowledge of the case. *Id.* Jury consultants will focus their efforts on those with knowledge of the case and then determine those with preconceived opinions that cannot be changed. *Id.*

169. Kim Curtis, *Defense Says Juror Putting Her Agenda Ahead of Justice*, S.D. UNION TRIB., Apr. 1, 2004, *available at* http://signonsandiego.com/uniontrib/20040401/news_1n1jurors.html (last visited Mar. 23, 2005).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Lisa Sweetingham, *Peterson Jury has Plenty of Troubled Role Models*, Nov. 11, 2004, *at* http://www.courttv.com/trials/peterson/juror_mischief_ctv.html.

176. Curtis, *supra* note 169; Claire Luna, *From Jury Box to Defense Table: Legal Ethicists Raise Concerns About Plan to Use Jurors in O.C. Rape Case Trial as Consultants*, L.A. TIMES, July 18, 2004, at B1. On the eve of the O.J. Simpson criminal trial, the California legislature passed a law barring jurors from taking money to talk about their experiences within three months of the end of a trial. *Id.* One of the jurors who wrote a book about their experience on the Simpson jury successfully challenged the law as violating the First Amendment. *Id.*

177. Luna, *supra* note 176.

the judicial process."[178] The practice is "ethically debatable and [critics] wonder if jurors hoping to cash in on consultation fees might try to hang a jury."[179] The concern is a legitimate one as "where jurors seek self-aggrandizing media exposure to personally profit from their jury service, trial by jury is severely impugned."[180] Jury consultants help in ferreting out "stealth jurors" by developing voir dire questions aimed at eliciting subtle biases, conducting detailed research before voir dire, and observing juror reactions.[181]

Finally, lawyers have the right to hire experts in order to fulfill their duty of providing the best representation for their client.[182] "The lawyer is the client's 'champion against a hostile world'—the client's zealous advocate against the government it self [sic]."[183] A jury consultant is no different, and arguably no more persuasive, than a medical expert who takes the stand to explain a complex medical procedure or a psychologist put on the stand to create a defense for the client.[184] Whether you are being prosecuted for a crime or stand to lose millions of dollars in a civil trial, every client wants a lawyer to use all possible resources at their disposal to help prepare and present the best possible case.[185] Despite claims of exaggerated success, and "notwithstanding the absence of any guarantee of victory and the pricey costs of services,"[186] jury consultants are simply part of the modern arsenal at a trial lawyer's fingertips.[187]

E. Criticisms of Jury Consultants

The rapid growth of an industry of which not a lot is known is bound to draw criticisms. Part of what makes jury consulting so controversial is the industry's claims of effectiveness with respect to jury selection.[188] Critics argue that if jury consultants are as effective as they claim, and "[i]f the results of a trial can be controlled simply by choosing jurors labeled acceptable by social scientists, then trial by

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178. *Id.*

179. *Id.*

180. Conboy, *supra* note 5, at 558.

181. *See* Yarbrough, *supra* note 112, at 1889-96.

182. Sahler, *supra* note 104, at 390.

183. Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 60 (1998).

184. *Id.*

185. Yarbrough, *supra* note 112, at 1896.

186. JONAKAIT, *supra* note 17, at 160 ("It can't hurt. Maybe it can help. If the client can afford it, why not?"); *see also* Stolle, *supra* note 101, at 139.

187. Strier & Shestowsky, *supra* note 91, at 442-43.

188. JONAKAIT, *supra* note 17, at 158. "'Leading practitioners of jury science boast they can predict trial outcomes before the evidence is heard with over 90% certitude.' If the claims are true, jury trials are in trouble." *Id.*

jury would cease to function impartially and would ultimately have to be abandoned."[189] Just imagine the effect on the judicial system if jury "science" could actually control the result of a trial.[190] Jury consultants only feed this criticism by implicitly suggesting that "jurors are not . . . free moral agents, able to assess impartially where the truth lies, but . . . organisms whose emotional and mental processes are determined by 'predictor variables.'"[191]

However, the few studies that have looked at trials where jury consultants claim credit for a favorable verdict have concluded "the verdicts resulted mostly from the evidence and not from the personal characteristics of the jury."[192] Furthermore, the lack of empirical evidence supporting a jury consultant's claim of high success rates has allowed critics to hold on to the hope that lawyers were wasting clients' money on services that allege "human thought can be reduced to a statistically reliable and rational pattern."[193]

Critics claim the "appearance of manipulation by [lawyers who use jury consultants] gives the appearance of impropriety [and this gives] a negative perception of the legal profession."[194] Even though a lawyer's use of a jury consultant does not violate any specific professional codes, the appearance of manipulation by jury consultants is at the heart of the ethical considerations.[195] For example, the American Society of Trial Consultants (ASTC), a voluntary organization for trial consultants, does not require any specific credentials for membership.[196] While the ASTC has a Code

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189. Sahler, *supra* note 104, at 398.

190. *Id.* at 397-98.

191. ABRAMSON, *supra* note 36, at 154. Predictor variables include social status, education, religion, age, sex, personality traits and ethnic origin. *Id.*

192. Lane, *supra* note 65, at 478 (discussing the work of legal scholar Jeffrey Abramson who examined six high-profile trials where jury consultants claimed credit for the verdicts).

193. Sahler, *supra* note 104, at 392; *see also* Stolle, *supra* note 101, at 154-67. The author conducted an empirical investigation to try and determine the efficacy of trial consultants. *Id.* at 154-55. He created combinations of 132 participants where half the participants received cases in which a trial consultant was present in a jury trial and half where a trial consultant was not present, with evidence favoring either the prosecution or the defense—yielding a total of sixteen combinations. *Id.* at 156. His study revealed "no significant effects for the presence of a trial consultant for either the prosecution/plaintiff or the defendant" based on certain variables. *Id.* at 161.

194. Sahler, *supra* note 104, at 385. After conducting a small empirical study on the efficacy of trial consultants, the author noted that legal authorities were perceived as having acted more ethically when they did not use a trial consultant than when they did. Stolle, *supra* note 101, at 162.

195. Sahler, *supra* note 104, at 386; *see also* STEPHEN GILLERS & ROY SIMSON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 9-14 (2004).

196. The website for the voluntary organization, American Society of Trial Consultants, is http://www.astcweb.org. "Currently, there exists no formal monitoring system of any type for those who chose to call themselves trial consultants. . . . The ASTC . . . [does] not . . . require any specific credentials for membership and does not restrict its members' advertising

of Professional Standards, the ethical principles are not enforceable against its members and serve more as a guide to be considered by trial consultants in considering a certain course of action.[197]

The appearance of justice is "as important as the reality in order to preserve and maintain public support for an instrument or an institution of justice."[198] A common perception is that jury consultants will push the limits of finding jurors receptive to their client's case. A dramatic example of these concerns is demonstrated with the "poison pill" strategy employed by a trial consultant to elicit a mistrial in the Miami River Cops case in 1987.[199] Trial consultant Amy Singer deliberately picked jurors who would conflict with each other and concentrated on selecting jurors with personalities that would "combust" in the deliberation room.[200] Regardless of this strategy's success, it raises serious ethical concerns about some of the approaches taken by jury consultants to win a client's favor.[201] Reforms such as increased regulation of the industry and requirements for membership in the ASTC have been proposed and may help to satisfy concerns about impropriety.

Critics are also concerned the increased presence of jury consultants in jury trials abuses the system because only the rich can afford it.[202] "The affluent people and the corporations can [afford] it, the poor radicals [in political cases] get it free, and everybody in between is at a disadvantage."[203] This concern begs the question of whether a litigant has a constitutional right to a jury consultant. So far, most efforts by an indigent defendant to have the court appoint a jury consultant on his behalf have failed.[204] One court noted, "a jury

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in any way." Stolle, *supra* note 101, at 170-71.

197. The ASTC Professional Code, Preamble, *at* http://www.astcweb.org/aboutus/code.php (last visited Mar. 11, 2005). The entire code is only a few pages long and the ethics portion is only one paragraph and does not mention any specific courses of action.

198. Strier & Shestowsky, *supra* note 91, at 473.

199. *Id.* at 444.

200. *Id.* "That's what you want to do in a criminal case when it is obvious that people are guilty. You go for personalities. 'Then, you hope the personalities will combust.'" *Id.*

201. ABRAMSON, *supra* note 36, at 154 (noting that the jury consultants' loyalty is with the client and they will work with the client to select jurors most beneficial to the outcome the client wants, including selecting prejudicial jurors).

202. JONAKAIT, *supra* note 17, at 158. "The minimum for meaningful work has been put at $50,000, with extensive services going as high as $500,000." *Id.*

203. ABRAMSON, *supra* note 36, at 149.

204. Spivey v. State, 319 S.E.2d 420 (Ga. 1984) (holding the trial court's refusal to appoint a jury expert on behalf of an indigent defendant did not violate his constitutional rights); Busby v. Cockrell, 2003 U.S. Dist. LEXIS 24558 at *28 (E.D. Tex. Mar. 31, 2003) (denying the defendant's claim that he was denied his Sixth and Fourteenth Amendment rights when the trial court refused his requests for a jury consultant and expert on drug abuse); Jackson v. Anderson, 141 F. Supp. 2d 811, 853-54 (D. Ohio 2001) ("[A] defendant cannot expect the state to provide him a most-sophisticated defense; rather, he is entitled to 'access the raw materials integral to the building of an effective defense.'").

consultant is not a 'basic' tool of the defense. . . . Although a jury-selection expert's assistance would no doubt be helpful in nearly every case, such assistance is a luxury, not a necessity."[205] Even though some courts have granted an indigent defendant's request for the use of a jury consultant, it is not the norm and serves as further evidence of the exclusivity of jury consulting services.[206]

While legitimate concerns exist about the "fairness of a client-centered adversary system in which the wealth of the contending parties—and, therefore, the quality of representation—may be seriously out of balance,"[207] such concerns existed long before jury consulting entered the picture. The prevailing negative image of jury consultants has made them "scapegoats for problems inherent in our jury system. . . . Biased jurors, inept deliberations, and manipulative lawyering existed long before the consultants appeared on the scene."[208]

V. TRIAL LAWYERS IN CONFLICT

There is an inherent conflict faced by trial lawyers in the selection of a jury. The duty to zealously represent a client,[209] by doing all that is possible to ensure the selection of a sympathetic jury, often conflicts with the nondiscriminatory criteria outlined by the Supreme Court in *Strauder* and its progeny.[210]

> Every knowing lawyer seeks for a jury of the same sort of men as his client; men who will be able to imagine themselves in the same situation and realize what verdict the client wants.... In this undertaking, everything pertaining to the prospective juror needs to be questioned and weighed: his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads, and many more matters that combine to make a man.[211]

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205. *Busby*, 2003 U.S. Dist. LEXIS 24558 at *24.

206. One instance where a jury consultant was appointed by the court was in the Reginald Denny attempted murder trial where a "Los Angeles superior court appointed a consultant from Litigation Sciences to assist the defense in representing the two men charged with the attempted murder of Reginald Denny." Stolle, *supra* note 101, at 169-70. Some recommendations for trial consulting reform have included adding a pro bono requirement to membership in the industry. *Id.* at 170.

207. Freedman, *supra* note 183, at 88. The gap between the have's and have not's has given rise to much criticism of our adversarial system, as detailed in a New Yorker cartoon in which a lawyer pointedly asks his client, "How much justice can you afford?" *Id.*

208. KRESSEL & KRESSEL, *supra* note 4, at 226.

209. ABA CANONS OF PROFESSIONAL ETHICS, Canons 15 and 32 (1908) ("The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.").

210. *See* discussion *supra* Part III.C.

211. Clarence Darrow, *Attorney for the Defense*, ESQUIRE, May 1936, at 36.

It is in this capacity that jury consultants can serve a valuable role in the selection of an impartial jury. The purpose of hiring a jury consultant is to "replace the lawyers' hunches and rules of thumb about good jurors and bad jurors . . . with something more solidly grounded."[212] The sophisticated methods by which jury consultants conduct jury research reflect the diverse population in which jurors are comprised and acknowledge that individuals are more than just their race, gender, age and occupation.[213] This, in turn, allows lawyers to stay within the boundaries of the law while zealously representing their clients. For example, the first jury consultants, or the social scientists involved in defending the "Harrisburg Seven," recognized that individuals were more complicated than their stereotypes and were able to overcome the conservative venue and win a favorable verdict.[214]

The Supreme Court, with its holdings in *Strauder* and its progeny, has been a major player in advocating civil rights and ensuring society's stereotypes don't infect the judicial system.[215] When looking at the Court's rationale in *Strauder* and subsequent cases, the cost to the litigant of having to use nondiscriminatory criteria in selecting a juror seems acceptable. However, "[t]he problem is that we do not live in a color-blind—or, for that matter, gender-blind—society and citizens, no matter how well-intentioned, do not suddenly abandon racist or sexist attitudes when summoned for jury duty."[216] Jury consultants recognize this and offer services designed to take into account the various beliefs and experiences of potential jurors. Similarly, jury consultants use methods of jury research that ensure decisions to de-select jurors are based on a multitude of factors and not based solely on constitutionally prohibited stereotypes.[217]

VI. CONCLUSION

Jury consultants will have problems with public perception until there is some type of reform in the industry itself. Scholars that have addressed this issue have made numerous proposals for reform.[218]

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212. Jose Felipe Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, n.248 (1998).

213. *See* discussion *supra* Part IV.B.

214. *See* discussion *supra* Part IV.A.

215. *See* Edmonson v. U.S., 500 U.S. 614, 618-19 (1991).

216. Smith, *supra* note 82, at 540.

217. JONAKAIT, *supra* note 17, at 15.

218. Lisnek, *supra* note 107, at 6 (discussing how an Illinois Senator's proposed bill making it a misdemeanor for a lawyer to use a jury consultant misses the point); Lane, *supra* note 65, at 480 (suggesting that "the legal community and the legislature [should] enact regulations and standards for . . . attorneys who wish to utilize [jury consultants]"); Anderson, *supra* note 212, at 386-87 (proposing sanctions for lawyers who use jury consultants

While reform of the jury consulting industry is outside the scope of this paper, it appears inevitable as jury consulting gains popularity. However, a consensus remains to be gained on who is best suited to regulate the industry, and any reform will need to be more than cosmetic if the criticisms discussed in this paper are to be addressed.

The jury system is imperfect and the quest for an impartial jury is increasingly complicated. The citizenry eligible for jury service is disenchanted, the cost of going to trial is continually increasing, court dockets are overburdened and judges are constantly pressured to limit time spent on voir dire.[219]

Evidence of society's decreasing faith in the court system may be seen in the rapidly increasing number of litigants opting for alternative methods of dispute resolution.[220] The inference is clearly speculative, but not hard to make. Arbitration and mediation have become attractive alternatives to the use of costly juries "unfamiliar with the subject of the litigation before them and often ill-equipped to understand and evaluate expert testimony."[221] Similarly, jury consulting emerged as an alternative way of coping with the deficiencies in the judicial system. Jury consulting is simply another resource for trial attorneys when a client has decided a jury trial is the best method of resolving a dispute.[222] There is little doubt jury consultants have become indispensable partners with trial attorneys in the quest for sympathetic jurors. However, while jury consultants assist lawyers in satisfying constitutional standards, questions remain about whether the use of jury consultants actually increases the likelihood of an impartial jury.

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unethically and that they should be held liable for malpractice); Franklin Strier, *Paying the Piper: Proposed Reforms of the Increasingly Bountiful but Controversial Profession of Trial Consulting*, 44 S.D. L. REV. 699, 705-06 (1998) (suggesting a reduction or elimination of peremptory challenges as a control on jury research and use of jury consultants); Sahler, *supra* note 104, at 403-04 (proposing a model rule that should be adopted by the American Bar Association); Stolle, *supra* note 101, at 169-70 (discussing the possibility of more jury consultants appointed to indigent criminal defendants and also recommends jury consultants themselves should create their own ethical standards to follow, similar to membership of the Bar for a lawyer).

219. Einhorn, *supra* note 9, at 169. *See generally* JONAKAIT, *supra* note 17, at 130.

220. Lilly, *supra* note 38, at 59.

221. *Id.* at 59-60.

222. JONAKAIT, *supra* note 17, at 160.

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