

# Bound and Gagged: The Peculiar Predicament of Professional Jurors

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## INTRODUCTION

A physicist sits as a juror in a murder case. The victim is a six-year-old boy. The cause of death: a screwdriver driven into the boy's chest. The boy's father, who is charged with murder, claims the boy accidentally tripped and fell onto the screwdriver in the bathroom. In support of this theory, the defense calls an expert witness, a physicist who testifies that—given the physical characteristics of the entry wound and the way objects are propelled through space—it is unlikely the boy was intentionally stabbed. The physicist juror disagrees, and during jury deliberations he suggests that the calculations the expert witness presented do not support the defense's conclusions. The jury convicts.<sup>1</sup>

A nurse serves as a juror in a domestic violence case. The alleged victim has recanted her original charges that the defendant kidnapped as well as sexually and physically assaulted her. She testifies that bumps on her head were caused by acne, rather than by hair pulling during an assault. The defense calls a physician as an expert witness who testifies that the small bumps could indeed have been caused by acne. During deliberations the nurse juror disagrees, telling her fellow jurors that the small bumps on the woman's head are similar to those she has observed on other victims of domestic violence. The jury convicts.<sup>2</sup>

These are not hypotheticals. They are drawn from real cases involving actual jury deliberations. Similar examples abound. A psychologist juror informs her fellow jurors that she is skeptical of the accuracy of polygraph tests.<sup>3</sup> A third-generation boxer informs the court during voir dire that, if his fellow jurors ask about the damage likely to be caused by a "hook or a jab," he will tell them.<sup>4</sup> An occupational therapist states that a mother's illness during

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1. This fact pattern is drawn from *State v. Mann*, 39 P.3d 124, 125 (N.M. 2002).

2. This description is drawn from *Meyer v. State*, 80 P.3d 447 (Nev. 2003).

3. See *In re Malone*, 911 P.2d 468 (Cal. 1996).

4. See *People v. Cherry*, 729 N.Y.S.2d 591, 596 (Sup. Ct. 2001).

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pregnancy, not the negligence of a doctor, caused a child's birth defect.<sup>5</sup> A junior grade civil engineer sits on a jury in a railroad crossing fatality case that turns on the engineering of safety devices for railroad crossings.<sup>6</sup>

Should any of these jurors have served? If so, should they have been instructed to withhold their professional knowledge and judgment during deliberations? Perhaps most importantly, should the verdict have been overturned if one of them used her expertise to sway her fellow jurors?

Such questions have arisen with increasing frequency because, over the past two decades, the historic exemptions that automatically excused those with professional training from jury duty have been eliminated. The result has been a transformation of the American jury system. In New York state alone, occupational exemptions that shielded one million people<sup>7</sup> from jury service have been repealed.<sup>8</sup> With so many professionally trained "expert jurors"<sup>9</sup> now available to serve, it is important to confront the issues that arise when they serve in cases involving their professional expertise.

A central assumption of jury deliberations in the adversarial system is that jurors make decisions based on the evidence presented at trial. In the words of one scholar, "[t]he traditional view of the juror's role throughout trial is that of an empty vessel into which information presented in the form of exhibits, testimony, argument, and judicial instructions will be poured."<sup>10</sup> For this reason, jurors are typically instructed that they cannot draw on extraneous information in their deliberations.<sup>11</sup> The rationale for prohibiting extraneous

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5. See *Richards v. Overlake Hosp. Med. Ctr.*, 796 P.2d 737, 742 (Wash. Ct. App. 1990).

6. See Michael B. Mushlin, *Survey of Jury Consultants* (2006) (unpublished manuscript on file with author) [hereinafter *JURY CONSULTANT SURVEY*] (Respondent #26, Question 1).

7. See CONTINUING JURY REFORM IN NEW YORK STATE 7 (2001), available at [http://nysl.nysed.gov/uhtbin/cgiisiri/Tue+Mar++6+12:36:41+EST+2007/0/0/518/0/50404367/Content/1?new\\_gateway\\_db=HYPERION&user\\_id=CATALOG](http://nysl.nysed.gov/uhtbin/cgiisiri/Tue+Mar++6+12:36:41+EST+2007/0/0/518/0/50404367/Content/1?new_gateway_db=HYPERION&user_id=CATALOG) [hereinafter 2001 N.Y. REPORT].

8. Act To Amend the Judiciary Law, in Relation to Jury Service, ch. 86, §§ 1-12, 1995 N.Y. Laws 682-84.

9. This term "expert juror" was used by Professor Paul F. Kirgis to describe any person who, had he testified at trial, would have been considered an expert witness. See Paul F. Kirgis, *The Problem of the Expert Juror*, 75 TEMP. L. REV. 493, 496, 527-28 (2002). I believe Kirgis's definition is too narrow to cover the full range of jurors whose presence might cause difficulties should their specialized knowledge be used during jury deliberations. For example, a nurse sitting on a jury considering the cause of death in a homicide case would not qualify as a medical expert witness but could nevertheless cause difficulties if chosen for jury service. Indeed, this is exactly what happened in one of the prominent cases discussed in this Article, *People v. Maragh*, 729 N.E.2d 701 (N.Y. 2000). Thus, I prefer the term "professional juror." This term includes not only individuals who would qualify as expert witnesses, but also those with professional training or experience in a field relevant to the issues at bar. Individuals with merely cursory knowledge of a given field or industry, such as an individual who has taken a few undergraduate classes or has read books on the topic, would not fall under this definition.

10. NANCY S. MARDER, *THE JURY PROCESS* 105 (2005) ("Another way to understand this traditional conception is to think of the juror as a sponge. In other words, the juror will simply absorb all of the information presented at trial, just as a sponge absorbs water."); see also Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 328-29 (2005).

11. See 89 C.J.S. *Trial* §§ 543-44 (2006); see also, e.g., 1A COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF N.Y. SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS—

information is that the adversarial process would be compromised if jurors were allowed independently to investigate or to collect facts.<sup>12</sup> The system would be jeopardized not only because the information was obtained without the court's or counsel's knowledge, but also because it was not subject to the tests and filters provided by the rules of evidence or the crucible of cross-examination. Moreover, counsel could not refer to it—or respond to it—in opening or closing arguments.

On the other hand, jurors are not expected to function as blank slates, purging their minds of any prior experience that might be relevant to the matter at hand.<sup>13</sup> As Professor Bennett Gershman has observed:

It is not expected that jurors should leave their common sense . . . at the door before entering the jury room. Nor is it expected that jurors should not apply their own knowledge, experience, and perceptions acquired in the everyday affairs of life to reach a verdict.<sup>14</sup>

Therefore, it is also standard to instruct the panel that each person is permitted to draw on his or her everyday experience in reaching a verdict.<sup>15</sup>

The tension between these two policies emerges starkly in considering the role of professional jurors.<sup>16</sup> Juries are expected to decide cases based on

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CIVIL § 1:25 (2006) [hereinafter N.Y. PATTERN JURY INSTRUCTIONS—CIVIL] (“In deciding this case, you may consider only the exhibits which have been admitted in evidence and the testimony of the witnesses as you have heard it in this courtroom . . .”). Moreover, jurors are told they may not make unauthorized visits or conduct experiments. *Id.* § 1:25A cmt. Bailiffs and others also are prohibited from talking to jurors about the case, and jurors are forbidden from talking to third parties about the case. *See, e.g.,* United States v. Posner, 644 F. Supp. 885, 889-90 (S.D. Fla. 1986); *People v. Holmes*, 372 N.E.2d 656, 658-59 (Ill. 1978); *People v. Crimmins*, 258 N.E.2d 708, 709-10 (N.Y. 1970); Gershman, *supra* note 10, at 324-31 (describing cases in which verdicts were overturned because jurors spoke to court personnel including bailiffs and deputy sheriffs, as well as cases in which jurors improperly spoke to third parties); *see also* *Sherman v. Smith*, 89 F.3d 1134, 1137-38 (4th Cir. 1996) (holding improper but harmless a juror's unauthorized visit to the crime scene during the course of the trial); *infra* notes 89-93 (citing cases of improper juror experimentation).

12. *See* 66 C.J.S. *New Trial* § 71 (2007) (“It is generally ground for a new trial that the jury examined witnesses or received other testimony in the jury room during their deliberations . . .”); *see also* Christopher H. Hall, Annotation, *Unauthorized View of Premises by Juror or Jury in Criminal Case as Ground for Reversal, New Trial, or Mistrial*, 50 A.L.R. 4TH 995 (1986).

13. *See* United States v. Kelly, 722 F.2d 873, 880 (1st Cir. 1983) (“To assert that each juror's mind must be a *tabula rasa* is an absurdity and the courts have consistently recognized this . . .”); *see also* *Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2d Cir. 1994) (stating that a juror's “observation concerning the life of this community is part of the fund of ordinary experience that jurors may bring to the jury room and may rely upon”); *People v. Szymanski*, 589 N.E.2d 148, 152 (Ill. App. Ct. 1992) (“[T]he law is well established that the jury has a right to consider the evidence in light of its own knowledge and observations in the affairs of life.”); *People v. Brown*, 399 N.E.2d 51, 53 (N.Y. 1979) (“It is not expected that their selection as jurors should cripple their cognitive functions.”).

14. Gershman, *supra* note 10, at 331 (citing cases).

15. *See, e.g.,* N.Y. STATE UNIFIED COURT SYS., *Juror Expertise*, in CRIMINAL JURY INSTRUCTIONS 2D (1996) [hereinafter *Juror Expertise*], available at <http://www.nycourts.gov/cji/> (select “General Charges,” then “Juror Expertise”) (“In evaluating the evidence and the issues presented, you should use your common sense, knowledge, and experience just as you would in making decisions in your daily life”); *see also* 1A N.Y. PATTERN JURY INSTRUCTIONS—CIVIL, *supra* note 11, § 1:25A.

16. An additional complication is the fact that “deliberations are conducted in strict secrecy,” an effective zone of privacy meant to protect the deliberative process. *MARDER*, *supra* note 10, at 147; *see also* 23A C.J.S. *Criminal Law* § 1855 (2006); 38A C.J.S. *Grand Juries* § 179 (2006); Mark Kadish,

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evidence that is presented in open court and subject to challenge by the opposing side. That policy is put at risk if a juror with relevant professional expertise is allowed to share specialized knowledge with fellow jurors. At the same time, jurors are expected to function in a common-sense manner, drawing on the knowledge gained from living their lives. With professional jurors, it is difficult, if not impossible, to fully accommodate one policy without violating the other. As a result, courts must confront the question of whether a professional juror's use of his own expertise is "outside knowledge" or just reliance on his everyday experience. Even if a professional juror can use his expertise to reach his own conclusion about the case, courts must also decide whether he can share that opinion—and the basis for that opinion—with his fellow jurors without violating the policy that cases be decided on the evidence presented at trial.

Put another way, the use of professional jurors poses two distinct legal issues in the context of cases involving their areas of expertise. First, should such jurors be allowed to be challenged for cause based solely on their expertise? Second, if they do serve, should they be allowed to use and share their expertise?

This Article addresses both questions and answers them in the affirmative. It advocates two changes to the law. First, parties should be allowed (but not required) to strike professional jurors for cause in cases involving their expertise without any additional showing of a particular bias toward one side or the other. Second, if such jurors are empanelled, they should not be "gagged." Rather, they should be free to draw on and share their expertise as are all other jurors.

This Article proceeds in four Parts. Part I discusses recent reform efforts that have fundamentally altered the jury system by opening it up to increased numbers of professional jurors. Part II examines the law on this subject and the central debates<sup>17</sup> over how jurors in general—professional or not—should and

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*Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 16 (1996). Because this secrecy is seen as crucial to the functioning of juries, the Federal Rules of Evidence bar individual jurors from filing affidavits describing the jury's deliberative process, thereby "impeaching" a verdict. See FED. R. EVID. 606(b) (prohibiting a juror from impeaching her own verdict unless the evidence of jury deliberations depicts "extraneous prejudicial information" or "outside influence" brought to bear on the jury's deliberations).

17. There is surprisingly little in the legal literature that deals directly with the subject of professional jurors. To date, only two scholarly treatments of the subject of professional jurors have appeared in law reviews. See Kirgis, *supra* note 9; Sharon Blanchard Hawk, Note, *State v. Mann: Extraneous Prejudicial Information in the Jury Room: Beautiful Minds Allowed*, 34 N.M. L. REV. 149 (2004). The issue has been addressed more frequently in legal periodicals, perhaps indicating that this is an issue of more concern to active litigators than to academics. See, e.g., Steven W. Fisher, *The Continuing Problem of Juror Expertise*, N.Y.L.J., May 5, 2003, at 4; Thomas A. Moore & Matthew Gaier, *Expertise Among Prospective Jurors*, N.Y.L.J., Sept. 12, 2001, at 3; Leonard Post, *Dealing with Jurors' Expertise*, NAT'L L.J., Dec. 12, 2005, at 21; Janine Sagar, *Nurse Jurors Talked Too Much: Shared Expertise Prejudices Material Issue*, FORENSIC ECHO, Oct. 25, 2000, <http://echo.forensicpanel.com/2001/10/24/nursejurors.html>. See generally W.E. Shipley, *Admissibility*

do use prior knowledge when they deliberate. Part II also explores how courts grapple with the issue of prior knowledge in the case of professional jurors. There is broad agreement among the courts that it is impermissible to challenge jurors based solely on their expertise. The courts are split, however, on how to handle professional jurors once they are seated. Some courts—most notably the influential New York Court of Appeals—require lower courts to instruct professional jurors that it would be “wrong” for them to convey their knowledge to fellow jurors even if it is material to the determination of the case, and that they must refrain from using their professional expertise to influence their colleagues during deliberations.<sup>18</sup> In other words, New York courts attempt to impose a gag. Other jurisdictions, however, allow professional jurors free reign to use their expertise during the deliberation process.<sup>19</sup>

Absent from the discussion are the views of professional experts in the field of jury selection. Part III attempts to fill that void, introducing the results of an original survey of leading jury consultants from across the nation. The survey asked consultants to report their observations on the frequency with which professionals serve on juries in cases involving their expertise; the influence of professional jurors; and whether such jurors can realistically be excluded from jury panels in such cases. Finally, the consultants were asked about their views on the law—whether professional jurors *ought* to be able to serve, and if so, what special instructions, if any, they ought to be given. The survey responses provide important observations from those on the front lines of the jury selection process. In particular, the results suggest three things: First, professionals do often sit on jury panels in cases in which their expertise is

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*and Effect, in Criminal Case, of Evidence as to Juror's Statements, During Deliberations, as to Facts Not Introduced into Evidence*, Annotation, 58 A.L.R.2d 556 (2005).

18. See 1A N.Y. PATTERN JURY INSTRUCTIONS—CIVIL, *supra* note 11, § 1:25A (“Although as jurors you are encouraged to use all your life experiences in analyzing testimony and reaching a fair verdict, you may not communicate any personal professional expertise you might have or other facts not in evidence to the other jurors during deliberations. You must base your discussions and decisions solely on the evidence presented to you during the trial and that evidence alone. You may not consider or speculate on matters not in evidence or matters outside the case.”); *Juror Expertise*, *supra* note 15 (“Some of you, however, may have something more than ordinary knowledge or experience in a certain area. Indeed, it may be that you have developed a special expertise in a certain area, well beyond what an average person would have. If you have such a special expertise, and it relates to some material issue in this case, it would be wrong for you to rely on that special expertise to inject into your deliberations either a fact that is not in evidence or inferable from the evidence, or an opinion that could not be drawn from the evidence by a person without that special expertise. The reason it would be wrong to do so is that you must decide this case only on the evidence presented to you in this courtroom. Therefore, with respect to any material issue in this case, you must not use any special expertise you have to insert into the deliberations evidence that has not been presented in this courtroom during the trial.”).

19. Still others refuse to make a clear decision, telling jurors elliptically that they must rely only on the evidence adduced at trial and that they cannot share any outside information with their colleagues, if that information derives from their own experience and if that experience is not shared by other people in the community. See, e.g., *In re Malone*, 911 P.2d 468, 468 (Cal. 1996); *State v. Thacker*, 596 P.2d 508, 509 (Nev. 1979).

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involved. Second, under current law, there is little possibility of systematically excluding professionals from jury service in cases involving their expertise. Third, these jurors often play a pivotal role in jury deliberations.

Finally, in Part IV, I articulate two proposals. I argue that the law should be changed to allow challenges for cause whenever a professional juror is considered for service in a case involving the juror's professional knowledge. The challenge for cause should be allowed whether or not there is evidence that the juror may be biased toward one side or the other. I argue that this proposal is supported by the available evidence, which strongly suggests that there is an elevated risk that the professional juror will unduly affect the verdict.<sup>20</sup> This recommendation, if followed, would drastically reduce, although not totally eliminate, the number of professionals who serve on juries in cases that are inappropriate for them to hear or decide. Second, I argue that courts should go no further—they should refrain from attempting to “gag” professional jurors with ominous limiting instructions. Gagging professional jurors is bound to be ineffective, and it is inconsistent with the goal of preserving the proper role of juries. This proposal accords with the views of jury consultants, who overwhelmingly report that, even if a gagging instruction is followed, it is unlikely to achieve its purpose of neutralizing the professional juror's influence on the jury.<sup>21</sup>

At first blush, these proposals might seem inconsistent. If professional jurors can be challenged for cause in cases involving issues in which they have expertise, why not prevent those who are empanelled from speaking to their expertise? However, as I argue in Part IV, there is a significant difference between expanding challenges for cause and gagging professional jurors. While the former helps purge trials of the potentially detrimental presence of professionals on juries (while doing little harm), gagging professional jurors after jury selection encroaches on the sensitive deliberation process. Thus, the two proposals are consistent, and when implemented together, they will significantly improve the manner in which the legal system handles professional jurors. Professional jurors will no longer be “bound and gagged”—bound to serve on juries in cases that implicate their expertise, but prevented from serving fully and openly when they take their seats as jurors.

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20. The survey yielded a good deal of useful and new information; it also demonstrated the value of further empirical research concerning the effect of professionals on jury deliberations.

21. See *infra* Section IV.B.

## I. JURY REFORM

A. *Occupational Exemptions from Jury Service*

Professionals have not always served on juries.<sup>22</sup> Due to so-called occupational exclusion statutes in many jurisdictions, most professionals were, until quite recently, exempt from jury duty.<sup>23</sup> Occupational exemptions were justified on various grounds. Professionals argued that the duties they performed were too valuable to be halted for jury service,<sup>24</sup> or that they “would not be appropriate jurors in particular cases” because of their professional expertise.<sup>25</sup> Clergy argued that jury service would violate their professional ethics, forcing them to make the type of judgments about other human beings that were incompatible with their religious responsibilities.<sup>26</sup>

These arguments held considerable sway. New York, for example, maintained occupational exemptions for many years.<sup>27</sup> First enacted for a limited number of fields,<sup>28</sup> the list of exemptions grew over time, reflecting the growing political clout of more and more professional organizations.<sup>29</sup> By the

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22. See, e.g., Joanna Sobol, *Hardship Excuses and Occupational Exemptions: The Impairment of the “Fair Cross-Section of the Community,”* 69 S. CAL. L. REV. 155, 165 n.37 (1995) (noting that at one point California had as many as seventeen statutory exemptions from jury duty).

23. See *id.* at 165 (“Exemptions traditionally have been granted to every occupational group with sufficient legislative influence to obtain passage of an exemption statute.” (citing V. HALE STARR & MARK MCCORMICK, *JURY SELECTION* 44 (2d ed. 1993 & Supp. 1994))). Of course, minorities and women also have been historically excluded from jury service, but for very different and more sinister reasons.

24. See Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past*, 31 U. DAYTON L. REV. 173 (2006); Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325, 329 n.14 (2006); Sobol, *supra* note 22, at 175.

25. THE JURY PROJECT, *supra* note 23, at 32.

26. *Id.* (discussing whether clergy have valid ethical reasons for a blanket exemption from jury service, and finding that they do not, because a belief held by a small number of religious sects does not justify exemptions for all clergy of every religion). The Jury Project also discussed whether allowing judges to be called for jury service was ethically proper and concluded that it was not. See *id.* at 29-30. The Project therefore did not recommend repealing section 511 of the New York Judiciary Law, which granted judges an exemption from jury service. However, the New York Legislature disagreed and abolished occupational exemptions for judges. An Act To Amend the Judiciary Law, in Relation to Jury Service, ch. 86, § 4, 1995 N.Y. Laws 683 (codified at N.Y. JUD. LAW § 500 (McKinney 2003)). As a result of this repeal, judges, including Chief Judge Judith Kaye, have been called to jury duty. Janny Scott, *Line of Work, Ma'am? Chief Judge: No Automatic Juror Exemptions, Not Even for Judith S. Kaye*, N.Y. TIMES, Aug. 16, 1996, at B3.

27. THE JURY PROJECT, *supra* note 23, at 31 (citing N.Y. JUD. LAW § 512).

28. *Id.* at 32.

29. Originally, New York State exempted several groups from jury duty: members of the clergy, Christian Science practitioners, licensed physicians, dentists, optometrists, psychologists, podiatrists, registered nurses, practical nurses, embalmers, Christian Science nurses, attorneys, police officers, correction officers, members of a fire company, volunteer firemen, sole proprietors, principal managers of a business employing less than three persons, persons seventy years of age or older, parents or guardians who provide daily care for a child under the age of sixteen, prosthetists, orthotists, and licensed physical therapists. N.Y. JUD. LAW § 512 (McKinney 1995) (repealed 1996).



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mid-1990s, a dazzling array of professionals was formally excused from reporting for jury duty, including physicians, dentists, pharmacists, optometrists, psychologists, podiatrists, registered nurses, practical nurses, Christian Science nurses, embalmers, attorneys, police officers, corrections officers, members of fire departments, orthodontists, licensed physical therapists, and all members of the clergy.<sup>30</sup> The exemptions were so extensive that in New York City and its surrounding suburbs 5-10% of all persons who were otherwise eligible for jury duty were excluded by statutory occupational exemptions.<sup>31</sup>

### B. *The Fall of Occupational Exemptions*

Despite their prevalence,<sup>32</sup> occupational exemptions did not enjoy much academic support. As early as 1930, there were calls in leading legal journals for an end to them.<sup>33</sup> Nevertheless, occupational exemptions persisted until the 1970s, when broader reform efforts led to changes calculated to produce truly representative juries. These efforts were influenced in part by the wave of civil rights and women's movement litigation challenging exclusionary jury policies. In 1975, the Supreme Court announced its landmark decision in *Taylor v. Louisiana*,<sup>34</sup> which held that a local law that categorically excluded women was unconstitutional because the resulting jury pool did not represent a "fair cross section" of the community.<sup>35</sup> The *Taylor* court reasoned that the fair cross section requirement is "fundamental to the jury trial guaranteed by the Sixth Amendment."<sup>36</sup> The Court observed that "[c]ommunity participation . . . is not only consistent with our democratic heritage but is also critical to public

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30. *Id.* at 31.

31. *Id.* at 33. The Jury Project also noted that in New Jersey, which had exemptions similar to New York's at the time, a 1982 study indicated that the percentage of jurors excluded based on that state's exemptions was in the range of 15% statewide. *Id.* (citing INTERIM REPORT OF THE JURY SYSTEM MANAGEMENT ADVISORY COMMITTEE 35 (1984)); see also Vikram David Amar, *More on What's Wrong with the Modern Jury? How Jury Selection Can Be Improved*, FINDLAW.COM, Feb. 20, 2004, <http://writ.news.findlaw.com/amar/20040220.html> (arguing that exemptions "should be extremely limited" and citing a study indicating that "fully half of Californians failed to appear" for jury duty).

32. See AM. BAR ASS'N, STANDARDS RELATING TO JUROR USE AND MANAGEMENT STD. NO. 6, at 49-56 (1993) [hereinafter ABA STANDARDS]; PAULA DIPERNA, JURIES ON TRIAL 87 (1984); JOHN M. VAN DYKE, JURY SELECTION PROCEDURES 63, 111-34 (1977); Sobol, *supra* note 22, at 164-73; Maura Dolan, *Why Jurors Err: They're Just Human*, L.A. TIMES, Sept. 25, 1994, at A23.

33. E.g., Note, *Proposed Legislation for Jury Reform in New York*, 30 COLUM. L. REV. 721 (1930).

34. 419 U.S. 522 (1975).

35. *Id.* at 533.

36. *Id.* at 530; see also *Smith v. Texas*, 311 U.S. 128, 130 (1940) ("Juries as instruments of public justice . . . [should] be [bodies] truly representative of the community."); Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 335-39 (2005) (tracing the "fair cross section" requirement from *Smith* to present). The effect on modern jury law is obvious. Cf. N.Y. JUD. LAW § 500 (McKinney 2003) ("It is the policy of this state that all litigants in the courts of this state 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 . . .").

confidence in the fairness of the criminal justice system.”<sup>37</sup> Additional decisions from the Supreme Court and lower courts have struck down other discriminatory barriers to jury service as well, including restrictions based on race or ethnic group.<sup>38</sup> Indeed, as long ago as 1946 the Supreme Court proclaimed that:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.<sup>39</sup>

While the Court never specifically addressed the issue of occupational exceptions,<sup>40</sup> the thrust of these holdings—that jury pools were to be composed of a realistic cross-section of society—strongly suggested how legally troubling they were.<sup>41</sup> The movement to reform jury service was led by bar associations as well as commissions appointed by courts or legislatures to examine practices and make recommendations for change.<sup>42</sup> The American Bar Association played a particularly important role and generated reform efforts in many states.<sup>43</sup> This work led to recommendations for changes to virtually every

37. *Taylor*, 419 U.S. at 530.

38. *See, e.g., Castaneda v. Partida*, 430 U.S. 482 (1977) (noting that a systematic attempt to exclude Mexican-Americans from serving on a jury would be unconstitutional); *cf. United States v. Black Bear*, 878 F.2d 213, 214-15 (8th Cir. 1989) (noting that Native Americans were a “distinct group” within the community and that their systematic under-representation in a jury pool would be unconstitutional, but finding insufficient evidence of such exclusion in this case to overturn jury verdict).

39. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (citations omitted).

40. *See Georgia v. McCollum*, 505 U.S. 42, 47-48 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79, 86-87 (1986); *Duren v. Missouri*, 439 U.S. 357 (1979). While these holdings influenced the elimination of occupational exemptions, they did not compel them. In fact, the Court has never taken a case which presents the issue. Instead, the fall of occupational exemptions has been entirely driven by nonlitigation reform efforts. *See infra* notes 48-65 and accompanying text.

41. *See Mark A. Behrens & Cary Silverman, Improving the Jury System in Virginia: Jury Patriotism Legislation Is Needed*, 11 GEO. MASON L. REV. 657, 659 (2003); Patrick McLarney & Cary Silverman, *Fulfilling the Promise of a Representative Jury*, 59 J. MO. B. 172, 172-74 (2003); Sobol, *supra* note 22, at 196 n.40; *see also* Amar, *supra* note 31 (arguing that traditional occupational exemptions result in the elimination of educated individuals from juries). Amar opines that “[w]hen juries produce stupid results, it is often because [the courts] let interested parties—through their lawyers—pick jurors in stupid ways. [The] point is not that less educated jurors should not be on juries; it is that more educated jurors should not so frequently be excluded from them.” *Id.*

42. For a comprehensive list of secondary materials on jury reform, see Nat’l Ctr. for State Courts, *The Jury Bookshelf*, [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_JuryBookshelfPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_JuryBookshelfPub.pdf) (last visited Mar. 13, 2007).

43. *See* ABA STANDARDS, *supra* note 32. These standards “are the result of five years of painstaking work by twenty nationally representative panels of judges, lawyers, and jury experts aided

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aspect of jury service, including the manner in which jurors are called, the manner in which they are empanelled, and the manner in which they conduct deliberations.<sup>44</sup>

The New York experience helps to illustrate how the dismantling of occupational exemptions was a part of broader efforts at reforming the jury system. In 1993, New York Chief Judge Judith S. Kaye initiated the “Jury Project,” a commission of thirty judges, attorneys, jury commissioners, educators, journalists and business people charged with examining and critiquing the state’s jury system.<sup>45</sup> Specifically, they were instructed to consider how New York might achieve three main objectives: “jury pools that are truly representative of the community; a jury system that operates efficiently and effectively; and jury service that is a positive experience for the citizens who are summoned to serve.”<sup>46</sup>

The Jury Project concluded that exemptions for professionals called into question the representative nature of the jury. Additionally, the Project found that occupational exemptions<sup>47</sup> placed a disproportionate burden on those not

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by some of the country’s leading scholars and research institutions.” THE JURY PROJECT, *supra* note 23, at iii. The ABA’s efforts sparked a number of states, including New York, to significantly reform their own jury practices. See G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 218 (1995) (listing Alaska, Arizona, Delaware, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, North Dakota, Ohio, Virginia, Washington, and West Virginia as states that have adopted the ABA standards).

44. See, e.g., ABA PRINCIPLES FOR JURIES AND JURY TRIALS (2005) (setting out nineteen principles for assembling a jury, conducting a jury trial, jury deliberations, and post-verdict activity); THE JURY PROJECT, *supra* note 23 (recommending comprehensive changes in New York’s jury system); ABA STANDARDS, *supra* note 32; see also *People v. Harper*, 818 N.Y.S.2d 113 (Sup. Ct. 2006); *People v. Miller*, 646 N.Y.S.2d 965 (Rochester City Ct. 1996). For further information on state jury reform efforts, see, for example, Munsterman, *supra* note 43; Victor Schwartz & Cary Silverman, *Jury Service is Changing in Ohio*, 32 CAP. U. L. REV. 101 (2003); and Rebecca L. Kourlis & John Leopold, *COLO. LAW*, Feb. 2000, at 21.

45. Colleen McMahon & David L. Kornblau, *Chief Judge Judith S. Kaye’s Program of Jury Selection Reform in New York*, 10 ST. JOHN’S J. LEGAL COMMENT 263, 263-64 (1995).

46. THE JURY PROJECT, *supra* note 23, at i. The Jury Project was charged with “recommending rule changes, legislative proposals, and educational programs and materials.” *Id.* This jury reform effort was one of the first initiatives of Chief Judge Kaye in her tenure as Chief Judge. *Id.* The Chief Judge’s interest in jury reform “initially arose out of one of the recurring concerns that have bred so much dissatisfaction among jurors and potential jurors in New York.” *Id.* at i-ii. Like many states, New York looked to the ABA standards for guidance, and indeed, “[t]he ABA Standards were [the] organizing principles, and in many instances [it] needed only to endorse them and suggest specific ways in which they might be implemented.” *Id.* at iii.

47. At the time the Jury Project began, the New York Judiciary Law contained two provisions exempting various professionals from jury service: the exemption statute and the disqualification statute. Originally enacted in 1977, the exemption statute provided an exemption from jury service for members of the clergy, physicians, attorneys, police officers, and sole proprietors, among others. Act of June 29, 1977, ch. 316, § 2, 1977 N.Y. Laws 351 (codified at N.Y. JUD. LAW §§ 500-512 (repealed 1995)). Through the years, the law was amended several times to include additional exemptions for professionals such as prosthetists and orthotists, Act of May 13, 1980, ch. 114 § 1, 1980 N.Y. Laws 242, corrections officers, An Act To Amend the Judiciary Law, ch. 350, § 1, 1981 N.Y. Laws 611-12, and physical therapists, An Act To Amend the Judiciary Law, ch. 126, § 1, 1982 N.Y. Laws 486. The disqualification statute exempted members of the armed forces, elected officials, civil department heads, and state and federal judges from jury service in New York. Act of June 29, 1977, ch. 316, § 2, 1977 N.Y. Laws 351.

exempted by allowing professionals to be “free riders” and fostering public discontent with the jury system.<sup>48</sup> The Project’s report described a system in which “[w]orking people who must use vacation time to serve on juries are justifiably upset that medical personnel and lawyers can be spared by their patients and clients for a month or more vacation every year, yet don’t have to sit on juries.”<sup>49</sup> Calling occupational exemptions “the jury system’s single greatest inequity,”<sup>50</sup> the Commission urged the legislature to eliminate them,<sup>51</sup> and the legislature responded with alacrity, abolishing occupational exemptions the following year.<sup>52</sup>

The change added one million people to the New York State jury pool<sup>53</sup>

48. THE JURY PROJECT, *supra* note 23, at 33.

49. *Id.*

50. 2001 N.Y. REPORT, *supra* note 7, at 7.

51. The Jury Project, relying on the ABA standards, had recommended that all disqualifications be eliminated, except for the disqualification of judges in courts of record. THE JURY PROJECT, *supra* note 23, at 29.

52. N.Y. JUD. LAW § 500 (McKinney 2003). The legislature generally followed the Project’s recommendations, although it did not disqualify judges, and as a result, Chief Judge Kaye herself was summonsed for jury duty. *Briefly*, NAT’L L.J., Sept. 2, 1996, at A5. (“N.Y. Chief Judge Judith S. Kaye, called to jury duty under her own reform denying exemptions, never got to serve on a jury. Questioned for only one panel and cut, Judge Kaye says, ‘I left extremely disappointed.’”). The repeal of all other occupational exemptions was supported by the New York State Assembly, the State Senate, the State Unified Court System, the New York League of Women Voters, and the Association of the Bar of the City of New York, among other leading organizations. *See, e.g.*, N.Y. BAR ASS’N, LEGISLATION REPORT NO. 201 (June 9, 1995); Letter from Assemblywoman Helen E. Weinstein to Governor George E. Pataki (June 23, 1995), in N.Y. Counsel to the Governor, 12590-97 Legislative Bill & Veto Jackets, ch. 86, at 5 (1995) (on file with the State Archives and Records Administration, State University of New York—Albany) [hereinafter *Veto Jackets*]; Letter from Michael Colonder, Counsel, N.Y. Unified Court Sys., to Michael C. Finnegan, Counsel to the Governor (June 26, 1995), in *Veto Jackets, supra*, at 7; Letter from Alan Rothstein, Counsel to the Executive Sec’y, Ass’n of the Bar of the City of N.Y., to Michael C. Finnegan, Counsel to the Governor (June 30, 1995), in *Veto Jackets, supra*, at 52; Letter from Leonore H. Banks, Vice President, League of Women Voters of N.Y., to Governor George E. Pataki (June 20, 1995), in *Veto Jackets, supra*, at 29. However, the bill to repeal professional exemptions also had its opponents, including police and firefighter organizations, private professionals, and municipalities. *See, e.g.*, Letter from Edward C. Farrell, Executive Dir., N.Y. Conference of Mayors and Mun. Officials, to Michael C. Finnegan, Counsel to the Governor (June 22, 1995), in *Veto Jackets, supra*, at 15; Letter from Paul D. Carozza, President, Metro. Police Conference of N.Y., to Michael C. Finnegan, Counsel to the Governor (June 27, 1995), in *Veto Jackets, supra*, at 13; Letter from William N. Young, Jr., Counsel, Ass’n of Fire Districts of N.Y., to Governor George L. Pataki (June 28, 1995), in *Veto Jackets, supra*, at 18.

53. Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 351-52 (2005). Although the recent trend has been to eliminate occupational exemptions, there are reasonable arguments in favor of them. For instance, it has been argued that members of certain professions, such as lawyers, are not likely to be chosen for juries, and should therefore be exempted. Likewise, it has been argued that individuals who would suffer personally as a result of jury duty—such as those who are self-employed—should be exempted. *See* Am. Judicature Soc’y, *Choosing Who Serves: Who Is Eligible?*, [http://www.ajs.org/jc/juries/jc\\_whoserves\\_eligible.asp](http://www.ajs.org/jc/juries/jc_whoserves_eligible.asp) (last visited Mar. 1, 2006).

While general opinion of the elimination of professional exemptions has been positive, it has resulted in tangible hardships for some of the occupations previously exempted, particularly those individuals who are self-employed or operate small businesses. Some have noted that physicians have particular difficulty, given their typically inflexible and busy schedules. However, in a study conducted by the Vera Institute of Justice, only 12% of physicians believed that they should be entitled to an occupational exemption from jury duty. By the same token, only 3% of Manhattan and 10% of Brooklyn

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and has had a powerful impact on its juries. A 2001 report on the progress of jury reform efforts in New York revealed that, “[i]n 1995, fewer than a third of those completing the jury exit survey report being first-time jurors. By 1999, [after the occupational exemptions were eliminated] over half were first time jurors. In some counties, like Westchester, Monroe and Onondaga, roughly 80 percent were first-timers.”<sup>54</sup> Even the state’s most well-known citizens are now required to serve. Former New York City Mayor Rudolph Giuliani, actress Marisa Tomei, former CBS newsman Ed Bradley, and Dr. Ruth Westheimer have all been called for jury service.<sup>55</sup> A less sensational—but far more important—indication of major change is that within five years of the repeal of New York’s occupational exemptions (and despite numerous predictions to the contrary) more than 7,000 attorneys had not only been called but were actually *selected* to serve on jury panels.<sup>56</sup>

New York’s experience is hardly unique. During the past thirty years, a concerted national effort to eliminate occupational exemptions has been underway.<sup>57</sup> Currently, twenty-five states and the District of Columbia have abolished all occupational exemptions.<sup>58</sup> An additional seven states have

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attorneys believed that they should be entitled to an occupational exemption. See JULIA VITULLO-MARTIN, BRIAN MAXEY & CHRIS CESARNI, FIVE YEARS OF JURY REFORM: WHAT JURORS ARE SAYING 12-13 (2000), available at [http://www.vera.org/publication\\_pdf/juryfinal.pdf](http://www.vera.org/publication_pdf/juryfinal.pdf).

54. 2001 N.Y. REPORT, *supra* note 7, at 8. Other New York counties, including Albany, Erie, Nassau, and Suffolk Counties, reported, in the wake of the repeal of juror exemptions, that over 60% of jurors were serving for the first time. *Id.* The 2001 Report also reveals that members of the legal profession who are no longer exempt from service find jury service particularly valuable, as it offers a view of the legal system from a juror’s seat and provides new perspective.

55. Matthew Goldstein, *Newsletter for Prospective Jurors Issued*, N.Y. L.J., Nov. 25, 1997, at 1. This is happening in other places as well. A more recent report in the *National Law Journal* describes a juror pool in Washington, D.C. that included former Secretary of State Madeline Albright and White House Adviser Karl Rove, both called for jury duty on the same day in the same courtroom. *So Near, and Yet . . .*, NAT’L L.J., July 31, 2006, at 16.

56. 2001 N.Y. REPORT, *supra* note 7, at 34-35 (finding that “lawyers were being selected to serve on juries in almost the same proportions as nonlawyers”).

57. In 1970, the Uniform Jury Selection and Service Act (U.J.S.S.A) was promulgated. UNIF. JURY SELECTION & SERV. ACT §§ 1-2, 13 U.L.A. 437 (1970); see also Sobol, *supra* note 22, at 199-203. In order to ensure that juries would consist of a fair cross section of the community, “[t]he U.J.S.S.A. allows no automatic excuses and exemption[s].” Sobol, *supra* note 22, at 202. Several states, including Idaho, North Dakota, and Mississippi, adopted the U.J.S.S.A. and thereby eliminated exemptions from jury service based solely on occupation. See IDAHO CODE ANN. § 2-211 (2004) (“No qualified prospective juror is exempt from jury service.”); MISS. CODE ANN. §§ 13-5-23, -25 (1999); N.D. CENT. CODE § 27-09.1-10 (1991) (“No qualified prospective juror is exempt from jury service.”).

In 1993, the ABA followed suit with a standard affirming that “all automatic excuses or exemptions from jury service should be eliminated.” ABA STANDARDS, *supra* note 33, at 12. At least seventeen states have adopted or substantially complied with those standards. See Angie Brunhow, *Dodging Jury Duty Gets Harder To Do: Jury Facts for Midland Region Nebraska and Iowa Jury Pools*, OMAHA WORLD HERALD, Mar. 29, 1999, at A1; B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1995); Munsterman, *supra* note 43, at 218 nn.8-9.

58. The following states had no exemptions from jury service as of 2004: Arizona, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Utah, Vermont, Washington, West Virginia, and Wisconsin. BUR. OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 2004, at 223-26 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/>

limited occupational exemptions to elected officials, judicial officers and/or members of the military on active duty.<sup>59</sup> Five states currently extend occupational exemptions in a limited capacity to court and legislative personnel, law enforcement or firefighting personnel.<sup>60</sup> Only twelve states provide exemptions to other types of civilian professionals, and even many of these are extremely limited in scope.<sup>61</sup> In short, blanket occupational exemptions from jury service are no longer common.

In retrospect, in the wake of *Taylor v. Louisiana* and its progeny, it became increasingly difficult to defend occupational exemptions. The old rationales—that professionals had more important things to do, that they were not suited for jury duty because of their expertise, or that they might be ethically precluded from serving—no longer held up.<sup>62</sup> As one commentator noted, occupational exemptions had to be eliminated if jury pools were to be composed of a realistic cross section of society.<sup>63</sup>

To abolish occupational exemptions is one thing; to know what to do with professional jurors when they are called and appear to serve is quite another. The Jury Project, in its otherwise comprehensive report, failed to consider how

sco04.pdf [hereinafter STATE COURT ORG.].

In the federal courts some occupational exemptions remain, but they are very limited. Current federal law exempts only:

(A) members in active service in the Armed Forces of the United States; (B) members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession; (C) public officers in the executive, legislative, or judicial branches of the Government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession, who are actively engaged in the performance of official duties.

28 U.S.C. § 1863(b)(6) (2000).

59. STATE COURT ORG., *supra* note 58, at 223-26 (Connecticut (judicial officers and elected officials), Florida (judicial officers, elected officials, and cabinet officers), Georgia (elected officials and persons with permanent disabilities that prevent service), Maryland (military), Minnesota (judicial officers), New Hampshire (judicial officers and elected officials), and Pennsylvania (military and families of murder victims)).

60. *Id.* (describing the exemptions of Nebraska (judicial officers and law enforcement), Nevada (elected officials and their staff), Rhode Island (elected officials, judicial officers, attorneys, law enforcement, and court staff), South Carolina (exempting “[a]ny person employed within the walls of any courthouse”), and Wyoming (elected officials, police, and firefighters)). In addition, federal courts exempt police and firefighters from jury duty under 28 U.S.C. § 1863(b)(6)(B) (2000).

61. STATE COURT ORG., *supra* note 58, at 223-26 (describing the exemptions of Alaska (teachers in failing schools), Hawaii (attorneys, dentists, doctors, and clergy), Indiana (dentists and veterinarians), Kansas (exempting “[p]ersons required elsewhere for public welfare, health or safety”), Maine (attorneys, doctors, and dentists), Missouri (doctors), Ohio (Amish), Oklahoma (attorneys), South Dakota (corrections personnel and clergy), Tennessee (attorneys, teachers, pharmacists, doctors, sole proprietors, nurses, CPAs, and clergy), Texas (students, caregivers of children under ten, and disabled persons), and Virginia (attorneys and sole proprietors)).

62. As noted *supra* note 40, these opinions did not squarely deal with the constitutionality of occupational exemptions. That issue has not been the subject of litigation.

63. Amar, *supra* note 31 (arguing that “it is perverse that professional and literate citizens are often exempted or struck from the jury pool”); *see also* Behrens & Silverman, *supra* note 41, at 659; McLamey & Silverman, *supra* note 41, at 172-74; Sobol, *supra* note 22, at 196.

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courts should handle persons with professional experience called for jury service. In its zeal to abolish occupational exemptions, the Project brushed aside the argument that professional jurors should not sit in certain cases because of their specialized knowledge. The Jury Project had only this to say on the critical subject:

[O]ccupational exemptions (notably those for doctors and law enforcement officers) are often justified on the ground that these individuals would not be appropriate jurors in particular cases (physicians in malpractice and some tort cases; police officers in criminal cases). Putting aside the dubiousness of this proposition, there are obviously a large number of cases that do not implicate the special training or presumed biases of doctors and police officers, on which they could sit without any problem at all.<sup>64</sup>

But as New York's own experience in the wake of the Jury Project's report suggests, professionals are inundating jury panels in unprecedented numbers, and it is no longer appropriate to treat this issue in such a cursory fashion. Thus, we turn now to a deeper analysis of the problem, starting with an examination of applicable law on the proper role of professionals as jurors.

### II. THE LAW REGARDING PROFESSIONAL JURORS

The recent influx of professionals into jury pools presents scholars and practitioners with two related, though analytically distinct, questions: (1) should professional jurors be stricken for cause, and (2) if not, what instructions, if any, should they be given? This Part treats each issue in turn.

As shall be discussed below, courts have generally not found expertise alone to be grounds for disqualifying a professional from jury service. As a result, professionals are found frequently on juries hearing cases involving their areas of expertise. Courts, however, have been far more divided on the question of how to deal with the risk that professionals will wield disproportionate influence in cases involving their areas of expertise, and some courts have attempted to prohibit professional jurors from speaking about their expertise during deliberations.

#### A. *Challenges*

Attorneys seeking to eliminate professionals from jury panels have only two tools at their disposal: the peremptory challenge and the challenge for cause.<sup>65</sup> Neither is an adequate filter for eliminating professional jurors. The peremptory challenge is limited numerically; the challenge for cause is limited substantively.

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64. THE JURY PROJECT, *supra* note 23, at 32.

65. After receiving a jury summons, a prospective juror typically is placed in a "pool" of eligible jurors. That pool is then examined by the court and the parties through a *voir dire*, in order to determine which members of the jury pool will be selected for a particular case. *See generally* MARDER, *supra* note 10, at 67-100.

### 1. *Peremptory Challenges*

A peremptory challenge is one that generally requires no justification.<sup>66</sup> The only exception is when such challenges are made on a constitutionally prohibited basis such as race or gender.<sup>67</sup> Otherwise, peremptory challenges can be exercised at an attorney's whim. However, such challenges are limited numerically: both sides are typically provided between three and twenty peremptory challenges each, depending on the type of case and its complexity.<sup>68</sup>

Peremptory challenges by no means offer a failsafe method for eliminating all professional jurors from a case. This is for two reasons. First, a lawyer may not want to use such a scarce resource to strike a professional juror, especially when another potential juror might be even more detrimental to the outcome of the case.<sup>69</sup> Conversely, by the time the professional is called for questioning, an attorney may have already exhausted his available peremptory challenges.<sup>70</sup> Second, a juror's proficiency simply may not be evident at the point that peremptory challenges are exercised.<sup>71</sup>

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66. *Id.* at 84 ("Peremptory challenges are the challenges that lawyers exercise to remove prospective jurors from the panel without, at least traditionally, having to explain why."); see also RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 140 (2003) ("Whatever the system, the hallmark of peremptory challenges has been a grant of unfettered and unexplained discretion to the parties.").

67. The leading authority for this proposition is *Batson v. Kentucky*, in which the Supreme Court held for the first time that it was unconstitutional to exercise a peremptory challenge to strike a prospective juror solely because of the juror's race. 476 U.S. 79 (1986); see also 47 AM. JUR. 2D *Jury* § 213 (2006) ("To establish a prima facie case of intentional discrimination in the exercise of peremptory strikes, a defendant must show that: (1) he is a member of a protected group; (2) the prosecutor has removed members of such a group; and (3) the totality of the circumstances gives rise to an inference that the prosecutor excluded jurors based on race.") If discriminatory intent is proven, the stricken juror or jurors are reinstated to the panel, or else jury selection begins anew. *Batson*, 476 U.S. at 89. The holding has been extended to include situations in which the juror strike is based solely on gender. See *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994); see also *Wilsher v. State*, 611 So. 2d 1175 (Ala. Crim. App. 1992); *State v. Alen*, 616 So. 2d 452 (Fla. 1993); Nancy J. Cutler, *J.E.B. v. Alabama ex rel. T.B.: Excellent Ideology, Ineffective Implementation*, 26 ST. MARY'S L.J. 503 (1995); James A. Domini & Eric Sheridan, *Legal Comment, Batson Challenges and the Jury Project: Is New York Ready To Eliminate Discrimination from Criminal Jury Selection?*, 11 ST. JOHN'S J. LEGAL COMMENT. 169 (1995). For a discussion of whether *Batson* should be extended to the use of peremptory strikes based on religion, see David M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139 (2005).

68. See generally 47 AM. JUR. 2D *Jury* § 207 (2006); 50A C.J.S. *Juries* §§ 426, 428 (2006).

69. JURY SELECTION STRATEGY AND SCIENCE § 23:2 (3d ed. 2005); JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY § 3:8 (2005); see also John T. Sullivan, *Deterring the Discriminatory Use of Peremptory Challenges*, 21 AM. CRIM. L. REV. 477, 481 (1984).

70. See, e.g., *Cottrell v. State*, 930 So. 2d 827, 828-29 (Fla. Dist. Ct. App. 2006); *People v. Arnold*, 96 N.Y.2d 358, 361 (N.Y. 2001); *People v. Garrison*, 818 N.Y.S.2d 141, 141 (N.Y. App. Div. 2006); *People v. Grant*, 747 N.Y.S.2d 189, 189 (N.Y. App. Div. 2002).

71. See *infra* notes 225-226 and accompanying text.



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### 2. *Challenges for Cause*

In addition to peremptory challenges, an attorney may seek to exclude professional jurors by challenging the juror “for cause.”<sup>72</sup> Challenges for cause can be premised on one of two grounds. First, the prospective juror may be disqualified because she failed to meet an explicit statutory eligibility requirement for jury service.<sup>73</sup> If a prospective juror does not meet one or more of a state’s eligibility requirements, a challenge for cause will be in order. For example, if a prospective juror is not old enough, not a resident of the state or county, or has a prior felony, he may not meet the statutory requirements for jury duty, and a challenge for cause will be in order.<sup>74</sup> At one time, occupational exemptions worked in the same manner. But in states where occupational exemptions have been abolished, professionals are no longer statutorily ineligible for jury service,<sup>75</sup> and hence, this type of challenge for cause will not work.

More pertinent to this discussion is the second type of challenge for cause—the challenge alleging bias or prejudice.<sup>76</sup> Though the specific terms used may vary, all state and federal courts recognize this type of challenge.<sup>77</sup> Under current law in the state and federal courts, such challenges are considered appropriate when, despite the fact that the prospective juror meets

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72. See, e.g., JONAKAIT, *supra* note 66, at 128-38; MARDER, *supra* note 10, at 50 (noting that a challenge for cause can be used “to remove those prospective jurors who cannot be impartial or who do not satisfy the appearance of impartiality”); see also Ron Spears, *You Don’t Pick Who Serves on Your Jury—You Pick Who Doesn’t*, 93 ILL. B.J. 420 (2005).

73. See, e.g., ABA PRINCIPLES FOR JURIES AND JURY TRIALS princ. 11(B)(1) (2005); see also *id.* at princ. 2(A) (recommending that eligibility requirements should filter out individuals who are less than eighteen years of age, noncitizens, unable to communicate in the English language, or presently serving a sentence for a felony conviction).

74. To qualify for jury service in most states, the prospective juror must be over the age of eighteen, an American citizen, and able to speak and understand the English language. See ABA PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 73, princ. 2(A) (stating that eligibility requirements should include being eighteen years of age, a citizen, able to communicate in the English language, and not a convicted felon who is serving a sentence); THE JURY PROJECT, *supra* note 23, at 27 (noting similar requirements but adding that convicted felons should not be eligible, regardless of whether or not they are presently serving time, nor should individuals who have been summoned for jury duty within the past four years). Another typical eligibility requirement is that a juror cannot be related to one of the parties or attorneys. See, e.g., Commonwealth v. Susi, 477 N.E.2d 995, 997 (Mass. 1985) (ruling that a trial court should exclude jurors because of a relationship to one of the parties).

75. See *supra* notes 50-55 and accompanying text.

76. See *infra* notes 76-90 and accompanying text.

77. See, e.g., 16 ARIZ. R. CIV. P. 47(c) (“Challenges to jurors for cause in civil actions may be taken . . . [if there is] the existence of a state of mind evincing enmity or bias for or against either party.”); ARK. CODE ANN. § 16-33-304(a), (b)(2) (1987) (“The challenge for cause may be taken either by the state or by the defendant . . . Particular causes of challenges are actual and implied bias.”); CAL. CIV. PROC. CODE § 225 (2006) (“A challenge is an objection made to the trial jurors that may be taken by any party to the action . . . A challenge for cause [may be taken], for one of the following reasons . . . including: Implied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror . . . ; or actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality . . .”); see also NEV. REV. STAT. §16.050 (1999).

the statutory requirements for duty, some aspect of her background or life experience may lead her to actively favor one side over the other or make it difficult for her to approach the case dispassionately.

Unlike peremptory challenges, for which no reason need be offered, challenges for cause require an attorney to demonstrate with specificity the prospective juror's "inability to remain fair and impartial."<sup>78</sup> For example, courts will generally agree to strike a prospective juror who demonstrates a racial bias, whether or not he himself is aware of the bias.<sup>79</sup> Jurors who have been "inflamed" by pretrial publicity or who condemn a particular party's lifestyle or mode of dress likewise can be stricken for cause.<sup>80</sup>

To determine if there are grounds for a challenge for cause, the parties or the court<sup>81</sup> have the opportunity to examine the prospective juror and explore the possibility of bias or prejudice.<sup>82</sup> The initial examination to determine eligibility for jury service on a particular panel may include questions about a person's background, including his training and work experience. For instance, in *Meyer v. State*, the Nevada Supreme Court stated that "[d]uring voir dire, prospective jurors may be questioned regarding any knowledge or expertise they may have on an issue to be tried and, based upon their responses, may be the subject of a peremptory or for cause challenge."<sup>83</sup>

While parties are free to explore background training and expertise during voir dire, courts, to date, have refused to find that expertise alone is sufficient grounds for striking a professional juror for cause. The clearest statement of this principle came from the New York Court of Appeals in *People v. Arnold*.<sup>84</sup> In that domestic violence case, defense counsel challenged a prospective juror for cause after she stated during voir dire that she had studied domestic violence topics in college.<sup>85</sup> She opined that her knowledge might be a

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78. 47 AM. JUR. 2D *Jury* §§ 202, 228 (2005); 73A N.Y. JUR. 2D *Jury* § 102 (2003); see N.Y. C.P.L.R. 4108 (McKinney 1992).

79. *Turner v. Murray*, 476 U.S. 28 (1986) (holding that a defendant is entitled to question prospective jurors about possible racial bias); see also Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1605, 1640 (1985) (referring to data from trials showing unconscious bias).

80. See, e.g., *Ham v. South Carolina*, 409 U.S. 524, 529-30 (1973) (Douglas, J., concurring in part and dissenting in part) (pointing out that there may be bias against defendants who have unconventional hair styles).

81. This varies from court system to court system. Some systems allow attorneys to conduct the voir dire of the prospective jurors; others restrict the questioning to the judge but allow the parties to submit proposed questions. See *MARDER*, *supra* note 10, at 74-76 (noting differences on this subject among jurisdictions).

82. See Kirgis, *supra* note 9, at 525-26.

83. *Meyer v. State*, 80 P.3d 447, 459-60 (Nev. 2003); see also *State v. Mann*, 39 P.3d 124, 135 (N.M. 2002) (noting that "venire members who express experiences which would affect their ability to be unbiased can be dismissed through cause challenges during voir dire").

84. 753 N.E.2d 846 (N.Y. 2001).

85. The court rightly questioned whether domestic violence studies were enough to qualify the student as an expert. *Id.* at 851.

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“problem” and suggested she was unsure whether she could remain impartial.<sup>86</sup> The trial court refused to grant the challenge, declining even to ask the juror whether she could remain impartial. The Court of Appeals reversed, holding that, without an assurance of impartiality, the juror should have been struck for cause.<sup>87</sup> But in so doing, it took pains to note that expertise alone would not be enough to strike a prospective juror for cause:

[O]ne of the goals of New York’s jury reform was to eliminate all automatic exemptions from service, bringing to the jury room a wide array of individuals with specialized knowledge and training. [Our cases] should not be read as requiring the trial courts to automatically excuse them.<sup>88</sup>

*Arnold* concerned an individual who would not properly be considered a “professional juror,” as her expertise was limited to courses taken as an undergraduate student.<sup>89</sup> Nevertheless, the court used the case to address the situation of a challenge for cause based on expertise of a professional, and it explicitly held that no challenge for cause should be granted, even if the prospective juror has significant training, so long as the professional juror “unambiguously” and “credibly” states that, despite her expertise, she “will decide the case impartially and based on the evidence.”<sup>90</sup> In other words, expertise alone is insufficient to justify a challenge for cause based on bias so long as the juror credibly affirms that his expertise is no barrier to rendering an impartial verdict.<sup>91</sup> Unless there is additional evidence that the prospective juror’s expertise has caused him to develop predetermined notions of how the case should be resolved, he cannot be stricken for cause.

### 3. *Summary: The Inevitability of Professionals’ Serving on Jury Panels*

Current state and federal law is a poor filter for excluding professional jurors from cases touching on issues involving their expertise. Because of numerical limitations on peremptory challenges and because “for cause” challenges are not granted based on expertise alone, it is inevitable that some professionals will hear cases involving issues related to their expertise.<sup>92</sup> Courts

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86. *Id.* at 849.

87. *Id.* at 855.

88. *Id.* at 854.

89. *See supra* note 9 for a definition of a professional juror.

90. *Arnold*, 753 N.E.2d at 851; *see also* *Meyer v. State*, 80 P.3d 447, 459 (Nev. 2003); *State v. Mann*, 39 P.3d 124, 135 (N.M. 2002) (“We do not believe that because an individual has particular professional experience or is well-educated one can assume that he or she is biased . . .”). This does not mean that the court must take the prospective juror’s word for it. The court must make a credibility judgment. As the Supreme Court of Arkansas stated in *Walton v. State*: “Some opinions and relationships cannot be overcome by a mere recitation by the prospective jurors that they will set aside objectionable factors.” 650 S.W.2d 231, 234 (Ark. 1983).

91. *See also* *Blank v. Hubbuch*, 633 N.E.2d 439 (Mass. App. Ct. 1994) (finding that, absent bias, a challenge for cause to a professional is not proper).

92. Even if, as I propose *infra* Part IV, the law on these challenges were altered to make it possible to strike professionals from panels based upon expertise alone, there are several reasons why

and parties, therefore, must come to terms with that reality and confront the second legal question professional jurors pose: Should professional jurors be instructed not to discuss their expertise with the rest of the jury? Moreover, should verdicts be set aside if professional jurors do insert their expertise into deliberations? Or should professional jurors be treated like all other jurors and be instructed that they can rely upon and discuss their prior knowledge and everyday experience with fellow jurors? We now turn to these questions.

### B. *Regulating Deliberations*

Courts currently have two contradictory methods of dealing with professional jurors who are chosen for cases in which their expertise comes into play. The first method, which I term the “unregulated approach,” allows professional jurors to rely on their professional knowledge and communicate it to fellow jurors, even if such information is not introduced at trial.<sup>93</sup> The only restraint is that the professional juror, just like any other juror, may not conduct experiments or otherwise bring in outside evidence.<sup>94</sup> Under this approach, the professional juror is given no instruction concerning whether or not he should rely on or communicate his professional knowledge to his fellow jurors. Moreover, if the juror does communicate that knowledge during deliberations, it is not considered misconduct and the verdict is not subject to attack on this ground. Thus, under this approach a professional juror can bring his expertise to bear on the evidence *already* introduced at trial.

The second method, which I call the “regulated approach,” seeks to control the professional juror’s use of his expertise during deliberations. A court employing it will generally instruct a professional juror not to communicate any specialized knowledge to other jurors during deliberations, even if he himself uses that knowledge to form an opinion about an issue that arises during deliberations. This creates several practical difficulties for the professional juror. For example, while the professional juror may use his expertise to develop his *own* opinion about the case, he is not permitted to

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professionals would still be likely to find a place in the jury box. First, when an attorney for one side affirmatively wants them to serve and the other side does not challenge, there would be no challenge to a professional juror with expertise in the relevant field. Second, an opposing attorney might be indifferent to the presence of professionals on the jury or may neglect to object. Finally, and as importantly, it is often difficult, if not impossible, to foresee what issues will emerge as critical at trial or what issues capture the attention of the jury during its deliberations at the outset of a case. For this reason, the parties may not even know that a particular expertise will play a role during deliberations when the respective attorneys select the definitive jury. When it dawns on the attorney that in fact juror expertise will be important, it will be too late to challenge the professional juror either peremptorily or for cause. Unavoidably, therefore, jurors with expertise are bound to sit on some juries in situations in which their expertise may sway the jury’s decision. See *infra* notes 165-169, 210-211 and accompanying text.

93. See *infra* notes 109-122 and accompanying text.

94. See *infra* note 115 and accompanying text.

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explain his vote if so doing would reveal his specialized knowledge.<sup>95</sup> If it is later disclosed that the juror violated this instruction, the verdict is vulnerable to attack.

In reviewing these approaches it is important to understand that neither permits a professional juror to independently gather information and use that information to assess the situation by, for instance, visiting a crime scene without the court's permission or independently researching a disputed fact involved in the litigation. Nor would it be proper under either approach for a professional juror to contact a third party to discuss a case.<sup>96</sup> In this Section, I describe both approaches in more detail.

### 1. *The Regulated Approach*

The regulated approach directs trial judges to control the behavior of professional jurors in order to prevent them from injecting specialized knowledge into deliberations. Courts taking this approach view a professional juror's expertise as extraneous information, and thus jurors who introduce such outside evidence are viewed as having engaged in juror misconduct that justifies overturning a verdict. In other words, courts hewing to a regulated approach seek to prevent a professional juror from doing precisely what one might expect she would do: share her relevant life experiences with colleagues on the jury. It is important to note, however, that these courts do not conclude that professional jurors should be prevented from serving in the first place.<sup>97</sup>

*People v. Maragh*, a New York ruling, is one leading example of the regulated approach.<sup>98</sup> In *Maragh*, the defendant was charged with killing his girlfriend by repeatedly striking her in the abdomen, resulting in substantial blood loss.<sup>99</sup> The defendant's theory of the case was that the victim's death resulted from natural causes brought on by an embolism, and he introduced expert testimony to that effect.<sup>100</sup> Two of the jurors were nurses. Together they concluded that, contrary to the views of the defendant's expert, the victim's

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95. See *infra* note 112 and accompanying text.

96. For a comprehensive description of the many ways in which this type of perversion of the jury system can occur, see Gershman, *supra* note 10, at 332 n.93, which describes, *inter alia*, third party contacts, exposure to extra-judicial materials, experiments, and reenactments.

97. See, e.g., *People v. Maragh*, 729 N.E.2d 701 (N.Y. 2000); *People v. Pizarro*, 24 A.D.3d 309, 324-25 (N.Y. App. Div. 2005).

98. 729 N.E.2d 701. For additional cases taking this approach, see, for example, *State v. Thacker*, 596 P.2d 508-09 (Nev. 1979), which found juror misconduct when a cattle-rancher-juror drew on his special knowledge of cattle weight and expressed his views during juror deliberation; *State v. Scott*, 819 S.W.2d 169, 172 (Tex. App. 1991), which held improper expressions of opinion by a electrician juror about electrical shorts; and *State v. Briggs*, 776 P.2d 1347, 1352 (Wash. Ct. App. 1989), which found that a juror who had knowledge about stuttering and expressed his opinion during jury deliberations had committed juror misconduct.

99. *Maragh*, 729 N.E.2d at 703.

100. *Id.*

death could have been caused by beatings. The nurses then shared their theory with the jury panel.<sup>101</sup> The jury convicted.

In a unanimous opinion, the New York Court of Appeals overturned the conviction. The court was troubled by two aspects of the nurses' conduct. First, the court found that, by giving their professional opinions to fellow jurors, the nurses became unsworn witnesses—witnesses the defendant was unable to confront or cross-examine.<sup>102</sup> Second, the court suggested that “[o]ther jurors are likely to defer to the gratuitous injection of expertise and evaluations by fellow professional jurors, over and above their own everyday experiences, judgment and the adduced proofs at trial.”<sup>103</sup>

The *Maragh* court made clear that the conviction-reversing error was not a result of the presence of professional jurors on the panel. Indeed, the court went out of its way to make clear that this holding did not mean that professionals should be excluded from jury service on cases that contain factual issues within their areas of expertise.<sup>104</sup> The court praised the jury reform movement that led to the influx of professionals to juries and underscored that the jury reform process “plainly contemplates that a class of professional jurors should contribute their ‘wisdom and life experiences to the deliberative process.’”<sup>105</sup>

According to the *Maragh* court, the fatal blunder occurred not when the nurses were empaneled, but when they shared their opinion with the rest of the jury.<sup>106</sup> The court identified three factors that, taken collectively, constituted reversible error: the nurse-jurors (1) conducted “personal specialized assessments not within the common ken of juror experience and knowledge” (2) “concerning a material issue in the case,” and (3) communicated that expert opinion to the rest of the jury panel “with the force of private, untested truth as though it were evidence.”<sup>107</sup> Such conduct by any professional juror, the court found, would amount to juror misconduct and provide grounds for reversible error.<sup>108</sup>

In addition to overturning the conviction, the court in *Maragh* imposed a forward-looking remedy, calling on all trial judges to instruct professional jurors that they “may not use their professional expertise to insert facts and evidence outside the record with respect to material issues into the deliberative process.”<sup>109</sup> As a result of *Maragh*, the standard New York jury instructions

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101. One nurse juror told her colleagues on the panel that, in her medical experience, the reported blood loss was consistent with death by beating. The other nurse on the panel “performed personal estimations of the blood volume loss and shared them with the rest of the jury.” *Id.*

102. *Id.* at 705.

103. *Id.* at 704.

104. *Id.* at 705.

105. *Id.* (citing Judith Kaye, *A Judge's Perspective on Jury Reform from the Other Side of the Jury Box*, JUDGES' J., Fall 1997, at 18, 21).

106. *Id.* at 704-05.

107. *Id.* at 705.

108. *Id.*

109. *Id.*

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have been changed, and jurors are now told, per *Maragh*, that they may not draw on any professional expertise in their deliberations with their fellow jurors. As a result, they have essentially been enjoined from sharing their personal experiences and knowledge with fellow jurors. The instruction for civil cases tells professional jurors that “[a]lthough as jurors you are encouraged to use all your life experiences in analyzing testimony and reaching a fair verdict, you may not communicate any personal professional expertise you might have or other facts not in evidence to the other jurors during deliberations.”<sup>110</sup> For professional jurors in criminal cases the instruction is even stronger. In these cases professional jurors are instructed as follows:

Some of you . . . may have something more than ordinary knowledge or experience in a certain area. Indeed, it may be that you have developed a special expertise in a certain area well beyond what an average person would have. If you have such a special expertise, and it relates to a material issue in this case, it would be wrong for you to rely on that special expertise to inject into your deliberations either a fact that is not in evidence or inferable from the evidence, or an opinion that could not be drawn from the evidence by a person without special expertise. The reason it would be wrong to do so is that you must decide this case only on the evidence presented to you in this courtroom. Therefore, with respect to any material issue in this case, you must not use any special expertise you have to insert into the deliberations evidence that has not been presented in this courtroom during the trial.<sup>111</sup>

Support for the regulated approach is found in the writings of such legendary thinkers as Professors Wigmore and Mansfield.<sup>112</sup> Wigmore, the giant among evidence scholars,<sup>113</sup> wrote that jurors should not inject any new fact into the deliberations.<sup>114</sup> He recognized just one exception to this rule: when “the matter in question is one upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all.”<sup>115</sup> Wigmore further cautioned that this allowance was a “narrow” one, strictly limited to “a few matters of elemental experience in human nature,

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110. 1A N.Y. PATTERN JURY INSTRUCTIONS—CIVIL, *supra* note 11, § 1:25A.

111. *Juror Expertise*, *supra* note 15.

112. 9 JOHN HENRY WIGMORE, EVIDENCE § 2570 (Chadbourn Rev. 1981); John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 407 (1985). Neither Wigmore nor Mansfield directly addressed the topic of how to handle professional jurors. However, their writings on jury deliberations more generally imply support for a regulated approach.

113. See Robert P. Burns, *A Wistful Retrospective on Wigmore and His Prescriptions for Illinois Evidence Law*, 100 NW. U. L. REV. 131, 132-33 (2006) (referring to Wigmore as a “magisterial authority” and the author of what has been “often called the greatest legal treatise produced in the Anglo-American world”); cf. WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER (1977); Donald F. Paine, *Wigmore on Evidence*, 39 TENN. B.J. 16 (2003).

114. 9 WIGMORE, *supra* note 112, § 2570.

115. *Id.* Wigmore did not see this as a major concession, because the strict standard he set out was very similar to the concept of judicial notice, which allows a court to take matters of common knowledge in the community as proven facts. See also FED. R. EVID. 201 (Judicial Notice of Adjudicative Facts); 9 WIGMORE, *supra* note 112, § 2570 (“From the point of view of a jury’s duty [notice of the fund of common experience accepted by all] appears as an exception to the rule that they must act only upon what is presented to them at the trial.”).

commercial affairs and everyday life.”<sup>116</sup> In such matters, Wigmore said that it would be permissible for a party to “ask the *jury to refer to their knowledge* upon matters *notorious and unquestioned*,” thus making it “unnecessary for the party to have offered evidence on the matter.”<sup>117</sup> However, Wigmore seemed to acknowledge that the application of this dividing line could prove difficult, noting, “[t]he range of such general knowledge is not precisely definable.”<sup>118</sup>

Professor Mansfield joined Wigmore’s position, coining the phrase “juror notice” to describe the limited circumstance in which jurors, in their deliberations, are permitted to make use of facts known to them before they enter the jury box and hear evidence. For Mansfield, it was permissible for jurors to draw on and discuss information “that a substantial number of people in the community have.”<sup>119</sup> He reasoned that “[t]o require jurors to be completely ignorant of the world and its ways . . . would place an intolerable burden on the adjudicatory process.”<sup>120</sup> But Mansfield was not willing to allow jurors, whether professionals or not,<sup>121</sup> to introduce facts not known by other jurors into the deliberative process. To do this would violate what he called “fair notice.”<sup>122</sup> In other words, the parties would be unaware of the information affecting the jury’s deliberations.<sup>123</sup> Because Mansfield allowed an exception only for common information shared by a substantial portion of the community, lawyers operating under his scheme could anticipate how the jury would deliberate, thereby ensuring that “fair notice” would be provided.<sup>124</sup>

More recently, Professor Paul F. Kirgis also sided with Wigmore and Mansfield, arguing that once professional jurors (whom he describes as “expert jurors”) are empanelled,<sup>125</sup> they should not be allowed to inject their expertise into the jury process. Kirgis proposed that judges enforce this rule in three ways: by carefully screening jurors at voir dire; by using jury instructions such

116. 9 WIGMORE, *supra* note 112, § 2570 (noting that permissible considerations include, for example, “the dangerousness of smoking a pipe in a barn near the straw, the conditions affecting the various kinds of values, [and] the intoxicating nature of a certain liquor” (citations omitted)).

117. *Id.* (emphasis added). Wigmore suggests but does not explicitly say that this would come in the form of an instruction to the jury.

118. *Id.*

119. Mansfield, *supra* note 112, at 407. Mansfield proposed that this standard be enforced during jury selection, during rulings on relevance, in instructions to the jury, and in motions for new trials based upon juror misconduct. *Id.* at 410-19.

120. *Id.* at 395.

121. Like Wigmore, Mansfield never explicitly discussed the problems posed by professional jurors.

122. Mansfield, *supra* note 112, at 397-98.

123. *Id.*

124. *Id.* at 397 (contrasting information about how long it takes to strangle someone to death—which is not shared by the community—with information about the range of vision offered by a rear view mirror, which is shared by the community, and stating that counsel has fair notice that the jury knows the latter but not the former).

125. Kirgis would, however, allow challenges for cause to professional jurors on a standard less stringent than bias. Kirgis, *supra* note 9, at 535.



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as those mandated by the *Maragh* court; and by overturning verdicts whenever a juror has introduced expert opinions into the deliberations and those opinions have had a substantial impact on the verdict.<sup>126</sup> While Kirgis's proposed solution was drastic in scope, it was far more limited in practice: his definition of an expert juror was quite narrow, and, as a result, many "professional jurors" as that term is used in this discussion would not be subject to the restrictions he proposed.<sup>127</sup>

### 2. *The Unregulated Approach*

Courts following the unregulated approach generally allow a professional juror to share expertise with the rest of the jury so long as she does not otherwise engage in misconduct—i.e., by conducting an unauthorized investigation or targeted research about the case while it is sub judice. Under the unregulated approach, jurors are given no instruction concerning whether or not they are permitted to use *or share* professional knowledge in deliberating a case. Moreover, if they do use or share such expertise, the resulting verdict is not subject to attack on that ground.

A representative case for this approach is *State v. Mann*.<sup>128</sup> In *Mann*, the defendant was accused of murdering his six-year-old son with a screwdriver. The defendant father argued that the boy had impaled himself when he tripped in the bathroom late at night.<sup>129</sup> At trial, the defendant called a physicist as an expert witness who testified in support of defendant's contention, concluding that the death was a "freakish accident."<sup>130</sup> One of the jurors who possessed a background in engineering and physics, performed a "fairly simple five-step probability calculation,"<sup>131</sup> and based on that calculation, informed his fellow jurors there was only a one-in-twenty-million chance that the event transpired in the manner described by defendant's expert.<sup>132</sup> After conviction, the defendant moved for a new trial, arguing that this professional juror had improperly injected his expertise into deliberations.<sup>133</sup>

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126. *Id.* at 535-36.

127. *See supra* note 9.

128. 39 P.3d 124 (N.M. 2002).

129. *Id.* at 126.

130. *Id.*

131. *Id.* at 128 (internal quotation marks omitted).

132. *Id.*

133. This juror can be considered a professional juror as I have defined the term, as he drew on his professional background in physics to provide information to his fellow jurors that aided the deliberative process. One jury consultant noted that "the [potential juror] may have an advanced degree in chemistry but be employed as a tire salesperson." JURY CONSULTANT SURVEY, *supra* note 6 (Respondent #22, Question 3). This individual would still be considered a professional juror in a case relying on principles of chemistry. It is important to note that more and more people are obtaining multiple degrees in various, seemingly unrelated fields. A professional juror may rely on information acquired in a former career. For a deeper discussion of the meaning of the term "professional juror" as used in this discussion, see *supra* note 9.

The Supreme Court of New Mexico upheld the conviction, ruling that the professional juror did not engage in misconduct by making these calculations or sharing them with fellow jurors. The court noted that “jurors may properly rely on their background, including professional and educational experience, in order to inform their deliberations.”<sup>134</sup> The court further suggested it would be “inordinately bad policy” to single out for criticism a juror who had “thoughtfully and conscientiously engaged in deliberation,” simply because he used his professional knowledge in doing so.<sup>135</sup> Finally, the court observed that if jury verdicts were subject to impeachment based on the grounds that a professional juror had improperly used his expertise in deliberations, courts would be improperly intruding on the privacy of jury deliberations.<sup>136</sup>

Under New Mexico’s unregulated approach, courts do not seek to control the behavior of professional jurors. Instead, New Mexico courts give only the normal instructions applicable to all jurors—that they should not visit the scene or engage in independent research or fact-gathering about the case. Nor will New Mexico courts set aside verdicts based on professionals’ using their expertise in the deliberations. Other courts have taken this approach as well, ruling that a professional is free to draw on her professional expertise and communicate it to fellow jurors during deliberations.<sup>137</sup>

As with the regulated approach, there is scholarly support for the unregulated position. Professor Charles McCormick,<sup>138</sup> another giant in the field of evidence, reasoned that, in modern America, it is impossible to make the presumption inherent in the Wigmore/Mansfield argument—that citizens share a common base of knowledge: “[I]n an increasingly heterogeneous and highly mobile society, further fractured by class divisions, there may no longer exist a common fund of knowledge shared by the jurors resident in a particular venue.”<sup>139</sup> Therefore, any attempt by the judiciary to regulate jury deliberations based on this assumption would be “questionable at best.”<sup>140</sup>

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134. *Id.* at 132.

135. *Id.* at 133.

136. *Id.* at 135.

137. *See, e.g.*, *State v. Aguilar*, 818 P.2d 165 (Ariz. Ct. App. 1991) (physician-juror stated during deliberations that, based on his professional experience, blackouts did not occur as contended); *In re Malone*, 911 P. 2d 468 (Cal. 1996) (psychologist-juror made statements about reliability of polygraphs); *State v. Lawlor*, 56 P.3d 863 (Mont. 2002) (professional juror explained consequences of a drunk-driving conviction based on her knowledge as a college teacher); *Meyer v. State*, 80 P.3d 447 (Nev. 2003) (nurse-juror stated during deliberation that small bumps on victim’s head could have been caused by hair-pulling); *Borroum v. State*, 8 S.W. 2d 153 (Tex. Crim. App. 1927) (juror, who was in the Army, expressed opinion about the effect on the decedent of a shot by the accused); *Richards v. Overlake Hosp. Med. Ctr.*, 796 P.2d 737 (Wash. Ct. App. 1990) (occupational therapist-juror stated, during deliberations, that a child’s birth defects were caused by the mother’s flu and not medical malpractice); *State v. Heitkemper*, 538 N.W. 2d 561 (Wisc. Ct. App. 1995) (pharmacist-juror gave his opinion about effect of a drug on the witness).

138. 2 MCCORMICK ON EVIDENCE, § 329 (John W. Strong ed., 5th ed. 1999).

139. *Id.*

140. *Id.* McCormick noted Mansfield’s proposition that Wigmore’s common fund idea be enacted

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Professor Richard Fraher also supported the unregulated approach.<sup>141</sup> He argued that because juries are selected from a broadly representative sample of diverse populations, individual jurors can not and should not be weeded out because they have specialized information not shared by the majority of others who are likely to serve as jurors in a particular case. For this reason, he argued that jurors should be allowed to bring their own experiences and knowledge into the jury deliberations.<sup>142</sup> To do otherwise, he suggested, would run counter not only to the goal of obtaining a representative jury, but also to Supreme Court holdings in cases like *Taylor v. Louisiana* that opened jury service to women and minorities.<sup>143</sup>

### C. Summary

Under current law, jurors with professional training, even those who possess expertise in a field dealt with at trial, cannot be kept off juries simply because of their expertise. However, there is a split about what to do when professionals are chosen as jurors. One school of thought holds, as did the *Maragh* court, that professionals should check their professional knowledge base at the door.<sup>144</sup> They may draw on their training and experience in reaching their own conclusions, but they may not share this knowledge with their fellow jurors. The other school of thought permits professionals who are chosen for jury duty to share their special knowledge with their colleagues on the jury, as long as they do not engage in outside research, inspection, or other forms of jury misconduct.

To date this debate, at least in scholarly circles, has proceeded without consultation with experts in jury deliberations. For this reason, I sought the views of professional jury selection consultants. What they had to say is revealing and interesting. The next Part deals with their responses.

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and preserved by courts through voir dire practices, jury instructions, and responses to motions for a new trial. McCormick rejected the proposition as coming "out of academe." *Id.* He suggested that lawyers will resist employing the common fund concept. *Id.* ("The parameters of the jury fund of common data may be vague precisely because trial lawyers find themselves embarrassed to insist upon bright-line rules when they themselves regularly employ summations to expose jurors to non-evidence facts masquerading as rhetorical hypothesis. What with voir dire examinations and challenges being available to exclude from juries anyone privy to information in excess of the local common denominator, any eccentric scenarios which do occur may simply be chalked up to self-inflicted hardship upon the part of counsel.") (citation omitted)).

141. Richard M. Fraher, *Adjudicative Facts, Non-Evidence Facts and Permissible Juror Background Information*, 62 IND. L.J. 333, 346-47 (1987).

142. *Id.* at 347.

143. *See id.* at 353 ("Our constitutional jurisprudence takes very seriously, at least on a theoretical level, the notion that this 'judgment of the community' must be pronounced by jurors drawn from a cross-section of society, without systematic discounting of minority voices . . . . Both the appearance of justice and the substantive functions of the jury require the law to protect the operation of the jury against overreaching judicial intrusions.").

144. At least to the extent that they might communicate ideas from that knowledge base to their juror colleagues.

## III. SURVEY OF JURY CONSULTANTS

In recent years litigators, including those in high-profile cases,<sup>145</sup> have increasingly turned to consultants for assistance in choosing juries that will be favorable to their cases.<sup>146</sup> These consultants, who make a living—and indeed are often handsomely paid for—advising parties how to choose juries, are necessarily well-versed students of the jury system.<sup>147</sup> And, as one might expect, they have thoughts and insights on the role professional jurors do—and should—play. To be sure, jury consultants have a unique perspective: their primary interest is in empanelling a jury favorable to their clients and not necessarily in finding the best or fairest jury in any general sense. For this reason, many consultants may desire to retain flexibility in the law because doing so gives them a tool with which to aid their clients in the selection of the jury that they want. Nevertheless, because jury consultants are by the nature of their work students of the jury process, their insights are valuable. To date, however, those insights have not been incorporated into scholarly discussion of the topic.

To explore jury consultants' views of the role of professional jurors, I sent a questionnaire to all publicly listed members of the American Association of Trial Consultants.<sup>148</sup> The questionnaire asked respondents to address, first,

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145. Jury consultants have helped pick juries in some of the most publicized cases of the past decade. For instance, Howard Varinsky picked the jury that convicted Martha Stewart. Renowned jury consultant Jo-Ellan Dimitrius helped select the jury that acquitted Michael Jackson of his 2005 child molestation charges. See Troy Roberts, 48 Hours Mystery: The Jury Consultants In High-Profile Cases, *Human-Behavior Experts Run The Show*, (June 2, 2004), <http://www.cbsnews.com/stories/2004/06/02/48hours/main620794.shtml>; see also Deidre Silva, *Specialized Skills Assist Attorneys in Jury Selection*, *PUGET SOUND BUS. J.*, Aug. 5, 2005, available at <http://www.bizjournals.com/seattle/stories/2005/08/08/focus17.html>.

146. Although jury consultants were first used in highly political trials in the 1970s, they have become commonplace in both civil and criminal trials. Maureen E. Lane, Note, *Twelve Carefully Selected Not so Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 *SUFFOLK U. L. REV.* 463, 463 (1999). Having grown rapidly over the past two decades, the jury consultation industry now provides a wide variety of services, ranging from selecting the jury to actual trial strategy. *Id.* at 463. In particular, jury consultants conduct “community attitude surveys, juror investigations, in-court assessment of juror nonverbal behavior, group dynamic analysis, focus groups, mock trials, and shadow juries,” in order to predict the outcome of a case and to advise attorneys on the best way to present evidence at trial. *Id.* at 472; see also MARDER, *supra* note 10, at 101-04; John W. Clark III, *The Utility of Jury Consultants in the Twenty-First Century*, 42 *CRIM. L. BULL.* 3 (2006).

147. The jury consulting business is a “booming industry.” See *Developments in the Law, Jury Selection and Composition*, 110 *HARV. L. REV.* 1443, 1463 (1997). Jury consultants use a range of social science techniques, including focus groups, mock juries, community attitude surveys, and “shadow juries” to determine what might be the most favorable jury for their clients as well as how to influence the jury chosen. *Id.* at 1463-65. Consultants using these techniques maintain that they are able to predict “with greater than ninety percent certitude the outcome of trials before the evidence has been heard.” Jeremy W. Barber, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 *AM. CRIM. L. REV.* 1225, 1232 (1994).

148. The American Association of Trial Consultants is the leading trade organization in the field. For more information on the Association and its membership, see Am. Soc’y of Trial Consultants, <http://www.astcweb.org/content/File/06-07%20App%20Separate%20Pages.pdf> (last visited Mar. 1, 2007).

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whether they had encountered professional jurors on cases in which they worked; second, whether they thought that it was possible to structure the system so as to eliminate professional jurors from serving in cases touching on their expertise; and third, whether, if they did serve, these jurors were influential in the jury's deliberations.<sup>149</sup> I received twenty-nine completed responses.<sup>150</sup>

Although the results were not scientifically gathered or conclusive,<sup>151</sup> they are nevertheless revealing for two reasons. First, they suggest broader trends and views among jury consultants. Second the written responses provide rich anecdotal evidence to support many of the problems and solutions to those problems discussed in this Article.<sup>152</sup>

Their responses, based on their personal experiences, suggest three general trends. First, professionals do, in fact, often sit on jury panels in cases involving their expertise. Second, professionals cannot entirely be prevented from serving on juries considering matters within their expertise. Third, professional jurors *can* play a critical role in jury deliberations. I explore those responses in greater detail below.

### A. *Professionals Are Sitting on Jury Panels in Cases Involving Their Expertise*

The survey results provided strong first-hand evidence that professionals often serve as jurors in cases in which their areas of expertise coincide with disputed issues. The majority of respondents reported they had been personally

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149. The survey also sought information about whether the law regarding professional jurors should be changed to allow challenges for cause or to abolish the gagging of professional jurors. The full text of the questionnaire, along with the compiled results, is reproduced *infra* Appendix. The originals are on file with the author.

150. The survey was sent to the 116 members of the Association listed on its web site in July 2004. Responses were received from 29, for a response rate of 25%. The questions and the tabulation of the responses to each are set out in full in Appendix, and the originals are on file with the author.

151. The survey was comprised of ten yes/no questions, three of which had subparts, each followed by a space for unstructured response and explanation. This format proved advantageous in many respects. It offered busy professionals a relatively painless way to respond (although, as it turns out, many voluntarily chose to write detailed explanations to their yes/no responses). More importantly, the format gave these experts—who are likely to view trial strategy as a highly nuanced matter—a chance to frame issues in their own terms, rather than in terms preconceived by the researcher. Thus, although the survey did not produce complex statistical data, it likely produced more robust data than would have been possible through a more structured, numerical survey. The small number of potential respondents likewise made this method preferable. As to the response rate, there is no way to know whether the characteristics of those who responded are representative of the organization. However, there does not appear to have been a significant self-selection bias, because respondents were divided over contentious questions such as whether to challenge professional jurors for cause, *see infra* notes 209-220 and accompanying text, but largely united over equally contentious questions such as whether the *Maragh* instruction is appropriate, *see infra* notes 226-241 and accompanying text. All respondent names have been kept confidential.

152. Many respondents took the time to write extensive comments to the survey questions, as they were invited to do. I set out many of the relevant portions of those responses in this Section.

involved in such cases.<sup>153</sup> Several respondents indicated that they believed this to be a common occurrence in American trials. As one respondent noted: “Over the past 25 years, I have participated in probably several hundred cases as either a trial lawyer or a trial consultant where a juror has some experience in the technical issue in the case.”<sup>154</sup> Another commented that professionals sit on “too many cases to list.”<sup>155</sup> Still another stated that “[i]n every IP case tried in Santa Clara County, there are several jurors in the pool with science/engineering backgrounds.”<sup>156</sup>

According to the survey responses, professional jurors sat in all sorts of civil and criminal cases. Consider the following examples respondents offered:

- a pediatrician sitting in a capital murder case involving medical evidence;<sup>157</sup>
- an insurance claims representative serving in an insurance case;<sup>158</sup>
- engineers serving in a concrete saw safety case;<sup>159</sup>
- a tort law professor sitting in a tort case;<sup>160</sup>
- “jurors [who] had experience in reviewing or creating contracts” sitting in a “high level contracts” case;<sup>161</sup>
- a junior grade civil engineer sitting on a jury in a railroad crossing fatality case that turned on evidence relating to the engineering of safety devices at railroad crossings;<sup>162</sup>
- an “[o]il company worker who worked off shore on a rig sitting on a case about how an oil company moves oil”;<sup>163</sup> and
- nurses in medical malpractice cases.<sup>164</sup>

#### B. *Professionals Cannot Wholly Be Prevented from Serving on Juries in Cases that Involve Their Expertise*

The consultants’ responses to the survey strongly suggest that it is very difficult to purge professional jurors from cases touching on their areas of expertise.<sup>165</sup> That difficulty lies in the fact that, as some respondents observed,

153. The full text of the survey, as well as the compiled results are reproduced *infra* Appendix.

154. JURY CONSULTANT SURVEY, *supra* note 7 (Respondent #26, Question 1). One respondent asserted that “[m]any professional liability cases (i.e., product liability, medical malpractice, contractor liability, admiralty, etc.) are heard by jurors with some expertise and/or experience in the related fields.” *Id.* (Respondent #14, Question 1).

155. *Id.* (Respondent #18, Question 1).

156. *Id.* (Respondent #25, Question 1).

157. *Id.* (Respondent #2, Question 1).

158. *Id.* (Respondent #3, Question 1).

159. *Id.* (Respondent #5, Question 1).

160. *Id.* (Respondent #9, Question 1).

161. *Id.* (Respondent #17, Question 1).

162. *Id.* (Respondent #26, Question 1).

163. *Id.* (Respondent #1, Question 1).

164. *Id.* (Respondent #9, Question 1).

165. Although a majority of respondents thought that challenges for cause ought to succeed, only 55% of respondents thought that expert jurors realistically could be screened out using challenges for cause and peremptory challenges. See Jury Consultant Survey—Final Results, reproduced *infra*

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“even under the best voir dire circumstances,” it can be difficult to detect professional expertise that might be relevant to the case.<sup>166</sup> Respondents suggested at least three reasons why identifying such expertise can be difficult. First, restrictive voir dire practices may make it hard to delve into a potential juror’s expertise. For example, one respondent explained, “the [potential juror] may have an advanced degree in chemistry, but be employed as a tire salesperson.”<sup>167</sup> Second, as one jury consultant noted, some jurors “are very secretive,” making it hard to discover their expertise no matter how careful the selection process.<sup>168</sup> Third, even when professional jurors do not try deliberately to conceal their expertise, it might nevertheless remain undisclosed because “prospective jurors may or may not understand what technical expertise would come into play and inquiry during the voir dire may or may not reveal what expertise a juror will bring to a case. Even under the best voir dire conditions, it is difficult to assess expertise . . . .”<sup>169</sup>

### C. Professional Jurors Can Play a Critical Role in Jury Deliberations

The jury consultants who responded to the survey also reported their belief that professionals who sit on jury panels play an important, often pivotal, role in jury deliberations. They offered numerous examples of cases in which they believed professional jurors swayed the jury’s deliberations.<sup>170</sup> For example, one consultant described a capital murder case in which medical testimony was critical. The consultant claimed that, after the close of the case, he learned that a pediatrician sitting on the jury believed the medical evidence did not support the State’s case and “convinced seven other jurors during the deliberations” to

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Appendix A (Question 4) [hereinafter Survey—Final Results]. A solid 41% stated that it was not realistic to think this goal could be achieved. *Id.* Moreover, on examining the responses, it is unclear whether the 55% who thought that professionals could be removed were talking about particular cases or the system as a whole.

166. *Id.* (Respondent #6, Question 4). Another respondent said much the same thing, opining that it was “[n]ot black and white in many cases” whether or not the expertise of a juror will become relevant to the deliberations. *Id.* (Respondent #6, Question 2).

167. *Id.* (Respondent #22, Question 3); *see also id.* (Respondent #28, Question 4) (“Most people have the potential to become a ‘perceived expert’ depending on the nature of the case and the nature of the jurors’ expertise.”). In fact, in response to the survey question, “would you prefer a jury of highly educated individuals that may be better able to grasp the subject matter,” 52% said yes. Survey—Final Results, *supra* note 165 (Question 9).

168. *Id.* (Respondent #5, Question 4).

169. *Id.* (Respondent #6, Question 4); *see also id.* (Respondent #29, Question 4) (stating that the system can’t exclude everyone who has “expertise” in some areas); *id.* (Respondent #15, Question 4) (“[I]f the potential juror is a neurosurgeon, has years of experience and admits to how his profession is affected by lawsuits, the likelihood for a challenge [for] cause arise. However, if the potential juror works in a hospital, but as an administrative assistant, illustrating how her work experience has affected her view of medical malpractice cases could be harder to prove.”); *id.* (Respondent #17, Question 4) (“It would be impossible to draw the line at how much expertise created an expert. Some people . . . were expert by virtue of their own studies.”).

170. The survey did not ask respondents to report whether or not these jurors were given any special jury instructions not to share their expertise with fellow jurors during deliberations.

vote to acquit.<sup>171</sup> Another jury consultant described a case in which a diesel mechanic used his knowledge in a manner that “controlled the case.”<sup>172</sup> One wrote that she had been involved in a patent infringement case in which a juror with a finance background was the “driving force in developing a strategy for analyzing the damages.”<sup>173</sup>

The responses suggested the basis for the problem is not just that professionals would share their expertise. Rather, the concern was that the expertise itself would lend the professional juror an air of authority that could prove decisive in deliberations. There is “always a ‘risk’ that the expert juror will be the leader in deliberations,” one respondent suggested. “Other jurors will look to them because of their expertise.”<sup>174</sup> This sentiment was echoed by another respondent, who wrote that “[r]egardless of the extent and accuracy of their expertise such ‘experts’ will be looked to by other jury members for their knowledge.”<sup>175</sup>

In sum, the survey of jury consultants provides strong support for the notion that professionals do serve in cases touching on their expertise. Despite careful attempts at screening professionals out, it is virtually impossible, under existing law, to eliminate all such jurors from serving or playing an oversized role in deliberations.

#### IV. RECOMMENDATIONS

The demise of occupational exemptions is a welcome development. The elimination of exemptions has spread the responsibility for jury duty more fairly throughout the population and given true meaning to the “fair cross section” requirement imposed by the Constitution. After all, well before the jury reforms of the 1990s, jury duty was understood to be the obligation of all American citizens.<sup>176</sup> But while the elimination of occupational exemptions has

171. JURY CONSULTANT SURVEY, *supra* note 7 (Respondent #2, Question 1) (suggesting that not all of the jurors were persuaded by the pediatrician, and noting that the trial resulted in a hung jury).

172. *Id.* (Respondent #5, Question 1).

173. *Id.* (Respondent #6, Question 1); *see also id.* (Respondent #25, Question 1) (“[T]he risk is too high that a juror’s knowledge” will give the juror “disproportionate influence on other jurors and the outcome of the case.”).

174. *Id.* (Respondent #15, Question 2).

175. *Id.* (Respondent #20, Question 2); *see also id.* (Respondent #21, Question 2) (“Everyone else will listen to them and if they are not correct you are *dead*.” (emphasis added)); *id.* (Respondent #8, Question 2) (stating that an expert “tips the scales”); *id.* (Respondent #7, Question 2) (stating that an expert juror may become foreperson, and that expert jurors “have increased influence on deliberations”); *id.* (Respondent #6, Question 6) (“In patent cases, in particular, where technical issues come into play, technical expertise can be influential.”); *id.* (Respondent #7, Question 7) (“Jurors naturally look to the expert for leadership, even if expert didn’t share basis of position.”); *id.* (Respondent #9, Question 3) (“There is no way to keep your personal experience from your thought process and it is very difficult not to influence other jurors if they become aware of your experience.”).

176. *See, e.g.,* Thiel v. S. Pac. Co., 328 U.S. 217, 224 (1946) (“Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked . . . .”); *see also* MARDER, *supra* note 11, at 13 (“[J]ury service is a badge of citizenship.”). A recent study indicates that modern juries have more



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been a positive development, it has raised a difficult challenge for the American legal system: how should professional jurors be integrated into jury service? As many have suspected, as case law suggests, and as the survey of jury consultants confirms, professional jurors can play a pivotal role in deliberations when they sit in cases that implicate their areas of expertise.<sup>177</sup>

In confronting the challenges posed by professional jurors, current judicial approaches simultaneously do too little and far too much. They do too little by not allowing parties to challenge for cause professional jurors whose professional backgrounds intersect with an issue or issues in the case. As a result, they permit too many professionals to serve on juries in cases in which there is strong reason to suspect their presence will threaten the fairness of a trial. Meanwhile, in jurisdictions that adopt the “regulated approach” and attempt to “gag” professional jurors, the courts simultaneously do far too much. Gaggling instructions rob professional jurors of the ability to participate fully and meaningfully in jury deliberations. For this reason the instructions are not only unfair, they are—as several of the surveyed jury consultant experts pointed out—unenforceable, impractical, and may even have unintended effects on the deliberations.<sup>178</sup> As a result, professional jurors are liable to end up “bound and gagged”—bound, that is, to serve on cases in which their specialized knowledge is implicated, but prevented from using that knowledge openly or effectively.

I propose the paradigm be reversed. Rather than indiscriminately opening the jury box to professionals, as the current law does, courts should expand the range of permissible uses for challenges for cause and require trial judges to strike professional jurors whose expertise alone renders their service improper. Conversely, courts should remove the muzzle imposed on professional jurors who nevertheless do find themselves empanelled on cases involving their expertise.

Though at first glance these two proposals may appear to be in tension, they are not. Challenges for cause are the only way to effectively screen professional jurors from cases in which they may have unwarranted and undue influence. But once a juror finds his way on to a panel, a gagging instruction is likely to be ineffective and may actually undermine the deliberative process. These proposals treat the problem at its root but refrain from imposing a cure that is worse than the disease.

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educated people serving on them than was previously thought. Jury duty, it seems, is becoming an obligation that well educated people are not escaping. Levin & Emerson, *supra* note 26, at 327-28.

177. We do not know the exact dimensions of the phenomenon. As discussed *supra* note 22, more research is needed on the impact of professional jurors on jury deliberations.

178. For a summary of the jury consultant’s views on these subjects, see *infra* notes 236-239 and accompanying text. Because it may prove impossible for professional jurors to follow the *Maragh* instruction even if they desire to, the standard legal presumption that jurors follow instructions, see, e.g., *United States v. Olano*, 507 U.S. 725, 740 (1991), is misplaced here.

A. *Challenges for Cause Should Be Expanded To Include a Challenge for Cause Based on Expertise Alone*

The law should be changed so that professional expertise touching on an essential trial issue would, in and of itself, be sufficient cause to strike a prospective juror.<sup>179</sup> This would be a major change. Current law requires more than just the confluence of a prospective juror's professional expertise and the issues in the case at hand before a trial court generally will grant a challenge for cause. For the challenge to succeed, the professional must admit to, or be demonstrated to suffer from, a bias toward one side or the other, such that the juror could not be impartial.<sup>180</sup> The case law and available data suggest that under this approach, professional jurors often find their way onto panels on which their status affords them undue influence over trial outcomes.<sup>181</sup> My first proposal, then, is meant to remedy the very real possibility that professional jurors routinely exert undue influence over trial outcomes.

The proposal, however, is subject to the criticism that it will be difficult for courts to define and identify "professional" jurors. Admittedly, creating a bright line test that is readily applicable in all cases would prove difficult. To implement my proposal, courts will need to flesh out the contours of the term. But that does not mean that courts are totally at sea in making this determination, nor is it beyond the ability of the judiciary to craft a workable set of guidelines. Courts often are called upon to make even more difficult judgments.<sup>182</sup>

Certainly if the juror's area of expertise touches on a topic that one party intends to call an expert witness to address, that juror should be considered a professional juror for that particular case and subject to challenge. That rule

179. I am not the first legal commentator to make a recommendation of this kind. Kirgis argues that "judges can and should play a role at this [the voir dire] stage by granting challenges for cause in cases where a juror's expertise clearly encroaches upon material issues in the case." Kirgis, *supra* note 10, at 535. However, Kirgis' recommendations are limited to professionals who would qualify as expert witnesses under the Federal Rules of Evidence. As I have argued throughout, this definition is too narrow. See, e.g., *supra* note 9; *infra* notes 181-190 and accompanying text. For others recommending challenges for cause to professionals, see Fisher, *supra*, note 19; and Moore & Gaier, *supra* note 17 at 4 (arguing that medical personnel should be challenged for cause on medical malpractice cases).

180. For a discussion of the law regarding challenges to professional jurors for cause, see *supra* notes 76-96 and accompanying text.

181. See, e.g., *People v. Arnold*, 753 N.E.2d 846 (N.Y. 2001) (noting that expertise alone would not be sufficient grounds for a challenge for cause); see also *infra* notes 192-208 and accompanying text (discussing the views of jury consultants).

182. Cf. *Shaffer v. Heitner*, 433 U.S. 186, 186 (1977) (noting the difficulty but not impossibility of developing intelligible standards for determining when a defendant has "minimum contacts" with a forum state for the purposes of asserting jurisdiction over that defendant); see also *Crawford v. Washington*, 541 U.S. 36, 68 n.10 (2004) (noting that when a court announces a new standard and does not provide a comprehensive definition there will be "interim uncertainty" until subsequent court decisions fill in the blanks); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) ("[T]he judicial power is often difficult in its exercise."); *Connick v. Myers*, 461 U.S. 138, 150 (1983) (noting that although it is "difficult" to apply the First Amendment to a case involving employee speech, the court must make the effort).

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should apply even if the juror would not qualify as an expert himself. For example, the nurses in *Maragh* had expertise in the area involved in the case and were credentialed. Even though it is doubtful that they had enough experience or training to be qualified as expert witnesses,<sup>183</sup> they should nevertheless be considered professional jurors.

It is hard for lay jurors to overcome professional expertise as thus defined. As one professional who served on a jury reflected immediately after her experience, it is hard for lay jurors not to “honor [the professional juror’s] opinion as the Gospel.”<sup>184</sup> Hence, the determinative question is not whether a juror possesses merely unique knowledge; the issue is what the *likely effect* of that knowledge will be on jurors who do not have it. If the juror with outside knowledge is a professional, then we know the odds are high that the jury will accord that knowledge undue weight, and hence the prospective juror should be stricken.

This does not mean, however, that this “novel use of the challenge for cause”<sup>185</sup> will allow challenges for cause in any case in which a juror has unique knowledge. This is not the intention of the proposal. Indeed, there is a critical difference between a layperson’s idiosyncratic knowledge and a professional’s expertise. Professional jurors, as I use the term, have acquired specialized knowledge based on training and experience. That training, in turn, conveys an entitlement to enhanced credibility. Therefore, it is likely that in most cases the professional will be *credentialed*—his expertise, in other words, will have been previously recognized by some body that licenses or regulates professionals.

Professional knowledge is generally backed by an institutional imprimatur (why else do professionals frame and hang degrees?). Indeed, professional knowledge is deliberately—and often elaborately—constructed as differing qualitatively from the knowledge achievable through life experience alone. Moreover, professional expertise is typically linked with social standing and prestige. For these reasons, professional jurors acting as unsworn witnesses

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183. See generally *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (describing the standard for admitting expert testimony at trial).

184. Susan M. Karten, Letter to the Editor, *Lawyers as Jurors: Not Such a Good Idea*, N.Y.L.J., July 25, 2006, at 2. Sometimes professional jurors themselves are aware of their influence and take steps to minimize it. For example, an acquaintance of mine is a distinguished, silver-haired Mississippi attorney. Last year, he was called for jury duty and empanelled. As deliberations began, his fellow jurors asked him what to do. As my acquaintance tells the story, he knew this was an important moment. If he said so much as a single word about the case, jury deliberations would be over before they began. So instead he told his companions to deliberate without him and that when they had an idea about what the right result was to let him know. They did as he asked, and after a few hours of deliberations reported back to him. He agreed with their proposed result and the jury, now unanimous, returned to the courtroom to deliver its verdict without the professional juror’s ever uttering a word about the evidence in the case.

185. Kirgis, *supra* note 10, at 535.

pose a greater risk than lay witnesses with specialized knowledge.<sup>186</sup>

On the other hand, unique knowledge possessed by nonprofessional jurors is both a readily distinguishable and a wholly desirable part of the jury system. Indeed, ideally a jury *pools* the community's experiences and wisdom in order to determine critical issues at trial—this is one of the anchoring visions of late-twentieth-century jury reform. The jury system has power largely because jurors do bring unique and differing sets of life experiences to the table. By definition, these life experiences contain some sort of specialized knowledge in the sense that other jurors who have not had these experiences do not share that knowledge.<sup>187</sup>

Indeed, depictions of jury deliberations in popular culture demonstrate how drawing on this kind of personal knowledge can dramatically alter a trial's outcome. *Twelve Angry Men*,<sup>188</sup> for example, focused on a jury's deliberation in a murder case involving a young Latino defendant in the late 1950s. Several jurors use examples drawn from their unique personal backgrounds and experiences to persuade fellow jury members that the prosecution's witnesses are not credible, thereby changing the fate of a defendant facing the death penalty from near certain conviction to sudden acquittal. During the course of deliberations, Juror Number Eight tells his colleagues about the acoustics of New York City tenement apartments and what can and cannot be heard through the walls.<sup>189</sup> Juror Number Five describes for his colleagues the angle at which thugs stab people with switchblade knives.<sup>190</sup> In a sense, these jurors were acting as unsworn witnesses. But as the story so powerfully demonstrates, their use of their own specialized knowledge is a critical and inherent part of the jury system itself. It is neither possible nor desirable to have a system in which human beings are asked to decide contested issues of fact without the possibility that they will draw on their own past experiences to accomplish the task. As a wise judge once said, "It would be naive to suggest that individual jurors leave all their preconceptions, values, and insights on the doorstep when they enter the jury room. Indeed, we encourage jurors to bring their experiences to bear during deliberation."<sup>191</sup>

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186. See Levin & Emerson, *supra* note 26, at 334.

187. For an extensive catalog of examples, see Shipley, *supra* note 19.

188. REGINALD ROSE, *TWELVE ANGRY MEN: A PLAY IN THREE ACTS* (1955). *Twelve Angry Men* was originally broadcast on television on CBS on September 20, 1954, and was made into a film in 1957. *TWELVE ANGRY MEN* (Metro-Goldwyn-Mayer 1957); see also Phoebe C. Ellsworth, *One Inspiring Jury*, 101 MICH. L. REV. 1387, 1388 (2003) ("The jury in *Twelve Angry Men* is the embodiment of this ideal, the jury at its finest.").

189. ROSE, *supra* note 188, at 34.

190. *Id.* at 61. Of course there are other aspects to this famous story that are not quite as pure. For example, one juror produces an exact replica of the murder weapon that he purchased and then brought into the jury room. *Id.* at 23. This is exactly the type of outside experimentation and evidence that ought to be prohibited, regardless of whether or not a professional is gagged.

191. See *Bulger v. McClay*, 575 F.2d 407, 412 (2d Cir. 1978) (Kaufman, C.J.); see also Ellsworth, *supra* note 188, at 1407 (endorsing the view that all jurors have different life experiences, perspectives,

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The change advocated for here accords with the detailed jury consultant feedback, which suggests that the respondents would advise clients to seek to strike professional jurors.<sup>192</sup> One consultant used particularly colorful language to make the point: “I would ask the attorneys to raise bloody hell about such a juror even if I thought they would tend to be on our side. Jury selection is an art; it is not Las Vegas slot machine in my opinion. Expert jurors are less predictable than lay people.”<sup>193</sup>

And the majority of respondents said that when a professional serves in a case implicating her area of expertise, the professional usurps the role of the expert witness.<sup>194</sup> One respondent who felt strongly about the issue noted that:

[E]xpert jurors have the potential of becoming the critiquers/reviewers of fact. The other jurors would look to them as the expert. I have seen it happen many times during mock trials. If jurors do not know who to believe, they will look to a fellow jury member, who has either the education or experience, for guidance.<sup>195</sup>

Another made a similar point, arguing that “it isn’t fair to either side” when a professional juror serves in a case involving her expertise.<sup>196</sup> “[The case] should be decided on the merits of fact and . . . not by someone ‘who [the other jurors] may feel [is] . . . an expert.’”<sup>197</sup> Many consultants expressed

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and even biases—few are blessed (or cursed) with a sterile “impartiality”—and that the counterbalancing and juxtaposition of these different points of view results in a jury that is “far more thorough, more accurate, and more fair than a jury of twelve impartial clones could ever hope to be”).

192. Survey—Final Results, *supra* note 165 (Question 3). One should approach this result with caution. From analyzing the responses, it is apparent that many of the respondents did not understand this to be a normative question. That is, an undetermined number of respondents may have answered this question in the affirmative, not necessarily because they believed that the law should be changed so as to allow challenges for cause based solely on a juror’s expertise, but rather because they believed that, in reality, a trial judge would do so regardless of the appellate court’s standard. *See, e.g.*, JURY CONSULTANT SURVEY, *supra* note 6 (Respondent #24, Question 2) (“[You m]ust go for a cause challenge because the expert will not be cross examined . . . . [It’s a]n unfair advantage.”); *id.* (Respondent #1, Question 2) (“[B]etter not to gamble, always try for cause . . . . If you are wrong [about the expert] you lose for sure.”); *id.* (Respondent #2, Question 3) (“Most experts have come to the point where their experiences have led to [this] opinion. Opinion can often be bias . . . .”).

193. *Id.* (Respondent #22, additional comments).

194. *Id.* (Question 10).

195. *Id.* (Respondent #15, Question 10); *see also id.* (Respondent #3, Question 10) (“[I have learned] through many focus groups and mock trials [that] this is a common occurrence when ‘experts’ are on the panel.”); *id.* (Respondent #18, Question 10) (“I’ve seen it happen over and over. Not only do they express opinions—other jurors weigh their opinions as more persuasive.”); *id.* (Respondent #23, Question 10) (“This is especially a concern if the juror disagrees with the expert.”); *id.* (Respondent #25, Question 10) (“[I] would be more worried the expert juror would introduce and influence others with his/her own theory of the case.”); *id.* (Respondent #1, Question 10) (“It happens all the time! I would bet money on it.”); *id.* (Respondent #12, Question 10) (“If a jury were truly comprised of peers—i.e., if a police officer were tried by a panel of all police officers; a truck driver charged with DWI tried by all truck drivers; a pharmacist charged with diluting meds tried by all pharmacists—then okay; but otherwise I am afraid of ‘expert jurors’ as I am of ‘stealth’ jurors.”); *id.* (Respondent #7, Question 10) (“In an era when jurors allowed to take notes/ask questions, expert juror role even more pronounced.”); *id.* (Respondent #9, Question 3) (“There is no way to keep your personal experience from your thought process and it is very difficult not to influence other jurors if they become aware of your experience.”).

196. *Id.* (Respondent #21, Question 3).

197. *Id.* (Respondent #21, Question 3); *see also id.* (Respondent #15, Question 9) (“[A]t times, the more ‘expert’ jurors have stronger opinions and critique the information too much causing them to miss

apprehension that professional jurors essentially become witnesses—but witnesses who cannot be cross-examined.<sup>198</sup> For this reason, one jury consultant stated that it is better not to “gamble.”<sup>199</sup> In the words of yet another, “[o]ne can never be certain whether the ‘expert’ will be for you or against you, and I would hate for them to be against me.”<sup>200</sup> Such comments underscore the risk that nonprofessional jurors may consider a professional juror’s opinion sacrosanct, and that they will “take the word”<sup>201</sup> of the professional juror, even if at trial one of the parties presented a credible expert witness with a contrary point of view.<sup>202</sup>

Not all respondents entirely supported the position I have staked out here.<sup>203</sup> Some felt that, “[e]xpertise alone will not bias a juror and even can help them understand highly technical issues.”<sup>204</sup> Others even saw a positive virtue in having professionals serve on juries in which their expertise was involved. One suggested that in complicated cases involving dueling experts,

the message.”).

198. *See id.* (Question 10).

199. *Id.* (Respondent #1, Question 2)

200. *Id.* (Respondent #20, Question 2). It is not surprising, then, that the majority of respondents said they would advise their clients to challenge—through a peremptory challenge or a challenge for cause—a prospective juror with expertise in subject matter relevant to the trial. *Id.* (Question 2).

201. *Id.* (Respondent #10, Question 7).

202. This accords, not incidentally, with the findings of social psychologist Stanley Milgram in his classic “shock experiments.” *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974). In that seminal work Milgram found that—when human subjects were asked to administer harmful or even potentially fatal shocks to other humans, simply in order to participate in what the subjects believed was an experiment concerning memory and cognition—they routinely deferred to direction provided by an “experimenter” in a white lab coat. The results cut across class and gender lines. One of the most striking findings from the Milgram study was the power of the experimenter in the white lab coat (i.e., “the professional”). Milgram’s work, of course, does not prove that nonprofessional jurors will be blindly deferential to professional jurors. The interaction between professionals and lay individuals constitutes its own complex field of study, and there are glaring differences between the Milgram test and the jury room scenario. However, the Milgram experiment does provide an interesting insight into how, when one individual is set up as an expert during a sustained face-to-face interaction with a nonexpert, that “professional” can wield considerable influence.

203. Survey—Final Results, *supra* note 165 (Question 3). A sizable minority (38%) thought that a challenge for cause on this basis could not be granted and probably would not be granted. For those who agreed with my position (59%), explanations varied. *See* JURY CONSULTANT SURVEY, *supra* note 6 (Respondent #24, Question 3) (“Challenge for cause is appropriate since there is a reasonable doubt as to fairness.”); (Respondent #3, Question 3) (“Absolutely. Most judges already do this routinely and would be very surprised to hear that some of their colleagues do not. Good questioning by the court can easily identify these ‘experts’ and dismiss them.”); *id.* (Respondent #9, Question 4) (“Judges should be very lenient in excusing such jurors for cause.”); *id.* (Respondent #25, Question 4) (“We can eliminate such jurors . . . with peremptories and for cause—we get rid of most”).

204. *Id.* (Respondent #17, Question 3). Another said that “Everyone is entitled to use his or her own personal life experience in deliberations. I am not afraid of this phenomenon and no one should be.” *Id.* (Respondent #13, Question 10); *see also id.* (Respondent #20, Question 3) (“I don’t think expertise per se is reason enough to warrant a cause challenge except in extreme circumstances. Jurors come to court with a variety of experiences and knowledge and this is a strength of our system.”); *id.* (Respondent #6, Question 4) (“[S]ometimes a case may benefit from a skillful juror who has some basic and maybe even advanced understanding of the issues.”); *id.* (Respondent #14, Question 7) (“In any case, a knowledgeable juror is preferable to an ignorant, incurious one who will not [or] cannot assimilate evidentiary nuances.”).

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“a neutral person who understood the subject, but did not lean either way on the outcome, would be an asset to the jury and the court.”<sup>205</sup>

It is possible that these dissenting views from consultants merely reflect the reality that, depending upon the case and the individual juror, consultants may wish to have discretion to place a favorable professional with relevant expertise on the jury.<sup>206</sup> Therefore, some jury consultants may not support a change in the law to allow professional jurors to be challenged for cause based simply on their expertise, because that would limit a consultant’s flexibility in choosing jurors most helpful to his client’s position. One consultant’s comments support this theory directly: “[It] is not a black and white issue. [It d]epends entirely upon the case issues involved and the experience that the expert [has].”<sup>207</sup> Another noted candidly that “[h]ow I would treat an ‘expert’ juror . . . depends on . . . whether or not my client would benefit from the expert juror’s knowledge and viewpoints and . . . if the expert is unfavorable, whether or not this juror is ‘worse’ than the other jurors being considered for exclusion.”<sup>208</sup> Hence, even among those who would not endorse challenges for cause, there is widespread recognition that the opinions of professional jurors can be central to the resolution of a case.

### B. *Professionals Who Are Chosen for Jury Service Should Not Be Gagged*

Tightening the law on challenges for cause in the manner discussed above would go a long way toward screening professional jurors from cases in which they ought not serve. It would also be the most efficient way to regulate professional jurors. As one commentator has noted, “[b]ecause it imposes the

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205. *Id.* (Respondent #26, Question 3); *see also id.* (Respondent #14, Question 7) (“In any case, a knowledgeable juror is preferable to an ignorant, incurious one who will not [or] cannot assimilate evidentiary nuances.”); *id.* (Respondent #10, Question 3) (“Expertise alone should not be the determining factor in the court deciding to remove a juror for cause.”); *id.* (Respondent #17, Question 2) (same); *id.* (Respondent #20, Question 3) (“Jurors come to court with a variety of experiences and knowledge and this is a strength of our system.”); *id.* (Respondent #23, Question 3) (“[I]f the potential juror admits bias that cannot be set aside, the potential juror should be excluded for cause. The expertise alone is not sufficient grounds for a cause challenge. The potential juror must be irresolvably biased.”); *id.* (Respondent #25, Question 3) (arguing that courts should only allow challenge for cause if there is bias that “we can articulate to support the cause; e.g., the prospective juror used to work for us or our opponent, [or] does business with one of the partners”).

206. On this point, 28% of the respondents said that they wouldn’t do anything if they thought their client might benefit. Approximately one-third said that how they would respond would depend very much on the situation. Survey—Final Results, *supra* note 165 (Question 2).

207. *Id.* (Respondent #6, Question 2).

208. *Id.* (Respondent #10, Question 2); *see also id.* (Respondent #23, Question 10) (“I would be worried if the expert juror had unfavorable opinions. However, I would not be worried if I felt that the expert juror was favorable to my client.”). This may also explain why, when respondents were asked whether or not they would feel comfortable having an expert juror rely on his or her expertise, the responses were ambiguous. Only 21% unequivocally said yes, they would feel comfortable. Survey—Final Results, *supra* note 165 (Question 6). In addition, when asked whether they would prefer having a highly educated person who may be better able to grasp the subject matter than a less educated juror, 52% said yes, only 10% said no, and 31% said it would depend. *Id.* (Question 9).

least cost, one of the best places to begin regulating juror expertise is before the jury is empanelled.”<sup>209</sup>

However, regularizing challenges for cause would not be a panacea. No matter how diligently judges use the proposed powers to disqualify professionals, some professionals will wind up serving on cases within their areas of expertise. Attorneys in some cases will not wish to challenge professionals; in other cases, attorneys will simply fail to consider the dangers of having professionals on the jury. Some jurors will intentionally hide their expertise; others will fail to disclose an area of special knowledge because they do not realize that it will be central to a case.<sup>210</sup> The importance of key issues will not always be clear during voir dire, either to attorneys or to potential jurors.<sup>211</sup> In short, even under my proposed reform, unchallenged professionals would occasionally sit on juries dealing with issues within the zone of their specialized knowledge.

The question that remains, then, is whether such jurors should be subject to a *Maragh*-type limiting instruction, mandating that a professional juror refrain from using his expertise during deliberations. My answer is no: once bound to serve on a jury, the professional juror should not be gagged. Enough is known about the negative effects of gagging professional jurors to recommend the practice be abandoned outright as a well-intended but ineffective and intrusive attempt to control a jury’s deliberations.<sup>212</sup>

A major difficulty with the *Maragh* instruction is that jurors who are given such a directive likely will not obey it. One law professor recently remarked about instructions generally that “[a]lmost all researchers agree that juries do well at determining the facts, but very poorly at understanding the law as given to them in the judge’s instructions.”<sup>213</sup> This is not because professional jurors, as a class, are willfully disobedient, but rather because a gagging instruction is wildly at odds with the broader instructions all jurors receive, which make clear that their overriding responsibility is to deliberate.<sup>214</sup>

Moreover, the *Maragh* instruction may be impossible to follow. One of the

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209. Kirgis, *supra* note 9, at 535.

210. Gershman, *supra* note 10, at 334-36.

211. See *supra* notes 165-169 and accompanying text.

212. Nevertheless, further research into the effects of experts on jury deliberations is needed. As this Article demonstrates, not enough is known about the actual effect of professionals on jury deliberations.

213. Ellsworth, *supra* note 190, at 1403 (collecting citations). For a general discussion of the social science data on the difficulty that jurors have in following instructions, see Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677 (2000). But see MARDER, *supra* note 11, at 124 (“Although there are many shortcomings with judicial instructions . . . they nevertheless have a constraining effect on jurors and are a way in which a judge exercises some control over the jury both during trial and deliberations.”).

214. ABA PRINCIPLES FOR JURIES AND JURY TRIALS princ. 15 (2005) (noting the importance of “effective and impartial deliberations”).



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primary ways jurors deliberate is by comparing their personal experiences with the evidence they hear at trial.<sup>215</sup> If the evidence squares with their experience, they are more likely to credit it; if it does not, they are more likely to discredit it.<sup>216</sup> If a juror is a professional, it stands to reason that the professional will draw on personal experiences she has had as a professional. As one professional recently noted concerning her own experiences as a juror: “in the end there can be no question that your expertise and training stays with you at every moment of the experience. It is in your blood, it is in your bones.”<sup>217</sup> Professor McCormick made the same point beautifully when he observed that “[j]urors do not think evidence; jurors think about the evidence and to think at all requires a person to draw on his or her experience.”<sup>218</sup>

It has been argued that even an impracticable instruction can be useful because it puts the juror on notice that they should be cautious about the potential problem their expertise might cause.<sup>219</sup> But this reasoning overlooks two dangers. First, charging a jury to do something that a court knows it will not—indeed, cannot—do fosters cynicism and disrespect for the judiciary and the law. Second, post-verdict disclosures indicating that instructions were not followed can lead to wasteful litigation, as the losing party will naturally seek to undo the jury’s verdict, and a delegitimization of the jury system more generally. These high costs cannot be justified by the principle of giving notice for notice’s sake.

Finally, consider what would happen if a professional juror *did* attempt to meticulously follow the *Maragh* instruction. When the professional juror uses her expertise to form her opinion about an issue in the case, the instruction simply cannot work, as the professional juror’s silence will communicate to the jury the forbidden information as clearly as would an affirmative disclosure. In attempting to follow the gagging instruction, a professional will essentially be forced to refuse to deliberate: while they know why they reached a particular conclusion, they will be prevented from explaining their decision to the rest of the jury.<sup>220</sup> In complying with one instruction, they will be violating another.

This is precisely what would have happened in the *Maragh* case had the

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215. See, e.g., SUNWOLF, PRACTICAL JURY DYNAMICS: FROM ONE JUROR’S TRIAL PERCEPTIONS TO THE GROUP’S DECISION-MAKING PROCESS 269-95 (2004).

216. *Id.*

217. Karten, *supra* note 184.

218. MCCORMICK, *supra* note 138, § 327.

219. Kirgis, *supra* note 9, at 528.

220. *Steele v. State*, 446 N.E.2d 353, 354 (Ind. Ct. App. 1983) (“The oath given to a jury prior to the commencement of a trial is not a mere formality. It is intended to impress upon the jury its solemn duty to carefully deliberate on the matter at issue.”); 47 AM. JUR. 2D *Jury* § 192 (2006); see also Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 226 n.113 (2005) (quoting an ABA model jury charge as stating: “It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment.”).

instruction been given and followed.<sup>221</sup> Recall that in that case two nurses sat on the jury. They agreed, based on their experience as nurses, that a key expert witness for the defense was not credible.<sup>222</sup> Had the *Maragh* charge been given, they would not have been allowed to share the basis for their views with the rest of the jury.<sup>223</sup>

But their silence nevertheless would have communicated the information the *Maragh* court wished to suppress. Moreover, by denying fellow nonprofessional jurors the right to engage the nurses in a discussion of their views, it is possible that the *Maragh* instruction would have enhanced the “mystique” of the professional jurors’ choices.<sup>224</sup> Silence removes any opportunity for lay jurors to independently evaluate the thinking process of the professional juror in their midst which is the very reason why courts instruct jurors to deliberate with one another. And if two or more members of a relevant profession shared the same jury panel—as actually happened in *Maragh*—a gagging instruction removes the opportunity for them to air and resolve differences.

An imagined transcript of such a deliberation in a *Maragh*-type case illustrates this point. Recall that one of the central issues in *Maragh*, a homicide case, was blood loss. Imagine the dialogue which might ensue in such a case should a nurse, sitting on the jury, think that the defendant’s expert was not believable:

*Nurse Juror*: I vote to convict. I don’t believe the defendant’s expert.

*Lay Juror #1*: Really? I thought he was very sincere and very credible. He told us that given the amount of blood loss that the victim sustained this wasn’t a murder, but a death by natural causes. I am inclined to believe him and vote to acquit. Tell me why you don’t believe him.

*Nurse Juror*: I can’t.

*Lay Juror*: Why not?

*Nurse Juror*: The judge said I can’t tell you.<sup>225</sup>

*Lay Juror #2*: You don’t have to. I think I understand—you have worked with trauma patients, right?

*Nurse Juror* (after a considerable pause): Yes.

*Lay Juror #3*: So you have seen cases of people who were killed and had the same

221. Of course the instruction was not given in *Maragh*, but that is the reason why the conviction was reversed.

222. *People v. Maragh*, 729 N.E.2d 701, 703 (N.Y. 2000).

223. *Id.* The *Maragh* instruction does not assert mind control but, if complied with, it forces a professional to refrain from disclosing his or her opinion when it is based on professional information. A professional might take his expertise into his own considerations, but he cannot verbalize such thoughts to the rest of the jury.

224. Nor is this solely a question of deference. Silence may heighten the importance of the *assumed* expertise or *perceived* sincerity of a professional juror, because fellow jurors will not be able to hear the professional juror’s reasoning and will thus be left to draw their own conclusions.

225. Here, the juror refers to the now-standard *Maragh* instruction. See *Juror Expertise*, *supra* note 17 (“[W]ith respect to any material issue in this case, you must not use any special expertise you have to insert into the deliberations evidence that has not been presented in this courtroom during the trial.”).

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amount of blood loss as the victim here?

*Nurse Juror*: I can't answer that question.

*Lay Juror #2*: Say no more.

In a scenario like this, lay jurors could easily conclude from the nurse's silence—silence required if the nurse is to comply with the *Maragh* instruction—that the nurse disbelieves the expert because of her specialized medical knowledge, as surely as they would know had she actually said it. Moreover, the other jurors would have to accept or reject the nurse's professional opinion without any further discussion, and jurors who have questions about the expert witness doubtlessly would be inclined to accept it.<sup>226</sup> The instruction here will have done no good and might even do unnecessary harm.

The jury selection process is the proper stage to take aggressive action to eliminate the danger to a fair trial. It is the critical time for weeding out professional jurors who may later overwhelm lay jurors' abilities to express their own independent thinking. But once that stage has passed, we enter the time when the jury is asked to engage in the "sometimes mysterious" process of determining the truth.<sup>227</sup> This is the time when courts must proceed with a "light touch."<sup>228</sup> Any interference with the jury's deliberative process is fraught with danger and should not be undertaken unless there are compelling reasons for doing so.

The problems with a *Maragh*-type instruction were also amply reflected in the sometimes blunt but well-reasoned comments from professional jury consultants. In the survey, jury consultants were asked whether or not they considered the *Maragh* instruction to be effective. An overwhelming majority said that it was not.<sup>229</sup> They reasoned that even the most conscientious professional juror would not know how to follow the *Maragh* instruction. One consultant wrote:

[J]urors have difficulty determining what they have learned as an expert . . . [t]hat would fall outside the purview of the trial. How easily can they determine when the evidence touches upon some of their expertise and when it does not . . . ? We put them in a very difficult position [when we ask them to make this determination].<sup>230</sup>

Another commented bluntly: "Face the fact that, instructed or not the [professional] juror will share [and] rely on knowledge; it's human

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226. And here, of course, "lay" jurors include professionals who have no expertise in the relevant area. Indeed, it would be interesting to study whether other professionals might actually defer more to a relevant professional than would jurors without professional degrees. After all, the very essence of professional training is deference to specialized knowledge. In short, this is by no means a question of intelligence—as Professor Amar would have it, *see supra* note 31—nor even of relative educational attainment. Rather, it is a question of the cache of specialized training.

227. Kirgis, *supra* note 9, at 535.

228. *Id.*

229. Survey—Final Results, *supra* note 165 (Question 7).

230. JURY CONSULTANT SURVEY, *supra* note 6 (Respondent #3, Question 7).

dynamics.”<sup>231</sup> A third consultant stated that, “As a psychologist, my opinion would be that jurors cannot realistically deny their own expertise or biases. It is a sham to think that they can, and asking them to do so perpetuates the sham.”<sup>232</sup> And a fourth consultant explained: “Everyone brings all of his or her life experience to the courtroom as a juror. To artificially restrict a juror from using any or all of his or her knowledge is ridiculous.”<sup>233</sup>

Intriguingly, several respondents suggested that, as in the imagined transcript of the deliberations in *Margagh*, even if it were followed, the instruction would prove ineffective. These respondents reasoned that if a professional juror conscientiously observed the *Maragh* instruction, he might simply remain silent at a critical point in the deliberations. Ironically, the professional juror’s silence could actually serve to heighten his influence, because as far as other jurors are concerned he is relying on “secret evidence.”<sup>234</sup> In this scenario, the professional juror would hold a good deal of sway, but there would be no open discussion among jurors to allow fallacies in his thinking to come out, or, indeed, to allow him to express his own conflicts or doubts. As one respondent noted, “[j]urors naturally look to experts for leadership, even if [the] expert didn’t share [the] basis of [his] position.”<sup>235</sup>

Not every respondent, however, shared this critique of *Maragh*.<sup>236</sup> One respondent suggested that, “The more technical the case, the more important [it is] that the juror rely solely on evidence presented during the trial . . . . [The *Maragh* instruction asks them to] pay attention to the facts as presented.”<sup>237</sup> Another respondent called it “the least malignant choice we have.”<sup>238</sup> Writing in a similar vein, yet another respondent noted that the *Maragh* instruction “at

231. *Id.* (Respondent #25, Question 5); *see also id.* (Respondent #14, Question 7) (arguing that the instruction will not work because one cannot control a jury after it is selected); *id.* (Respondent #25, Question 7) (“It is the very rare juror who would deliberate without using his/her knowledge as the basis for their opinion.”).

232. *Id.* (Respondent #17, Question 5); *see also id.* (Respondent #1, Question 8) (“The instruction is just useless of course.”).

233. *Id.* (Respondent #13, Question 6); *see also id.* (Respondent #9, Question 7) (“certainly not always”); *id.* (Respondent #13, Question 7); *id.* (Respondent #15, Question 5) (“I would be skeptical that the juror would actually follow this instruction. . . .”); *id.* (Respondent #17, Question 7) (“Jurors will still use their background to argue forcefully—and probably logically—for their conclusions. They will just hide or not cite themselves as a reference.”); *id.* (Respondent #20, Question 7) (“[A]s a rule, jury instructions are generally ineffective, particularly limiting instructions.”); *id.* (Respondent #23, Question 10); *id.* (Respondent #29, Question 7) (“Don’t know, but doubt it from what I’ve seen. Jurors regularly disregard instructions of all kinds.”).

234. *Id.* (Respondent #5, Question 7); *see also id.* (Respondent #16, Question 7) (“I think it sets up dynamics that are negative and divisive. Jurors wonder why the juror doesn’t share information like others do.”).

235. *Id.* (Respondent #7, Question 7).

236. Thirty-four percent of the consultants said they would allow the expert to rely on expert knowledge and share it with their fellow jurors. Survey—Final Results, *supra* note 165 (Question 5).

237. *Id.* (Respondent #17, Question 7); *see also id.* (Respondent #1, Question 7) (“I totally agree with persons not sharing with other jurors . . . . [The juror should rely on] testimony and facts not his/her own experiences.”).

238. *Id.* (Respondent #12, Question 7).

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least puts them [professional jurors] on notice” about what they cannot do even if they may not follow the instruction precisely.<sup>239</sup> However, the supporters of gagging jurors were in a clear minority,<sup>240</sup> and as argued above, I believe the majority view of the jury consultants is the correct one.

Finally, it is worth noting that there is no inconsistency between the two proposals advanced here. The first proposal seeks to rid jury panels of professional jurors *before* the trial starts. The second proposal accepts the reality that the time for weeding out professional jurors is before trial: once that stage has passed, and once the jury is asked to deliberate, courts must proceed with a “light touch.”<sup>241</sup> “Freedom of debate,” Justice Cardozo warned, “might be stifled and independence of thought checked if jurors were made to feel that arguments and ballots were to be freely published to the world.”<sup>242</sup> As I have demonstrated, because a gagging instruction is ineffective and unduly intrusive, there is no justification for invading the province of the jury by seeking to control the behavior of some of its members.

### CONCLUSION

Although the presence of professionals in the jury box is a healthy development, it is necessary to recognize that, in certain cases, that presence can threaten the deliberative process. The law in this area is currently inadequate. It does too little to restrict professionals from serving on panels on which their expertise could compromise deliberations, but too much to restrict professionals’ ability to serve productively as jurors once they are empaneled.

The proposals outlined here would represent a substantial step forward in our ability to manage the presence of professional jurors. If these suggestions were implemented, the vast majority of professionals would serve only in cases in which they posed little danger of interfering with deliberations—cases not

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239. *Id.* (Respondent #4, Question 8) (“I think jurors *try* to do what judges tell them to do.”); *see also id.* (Respondent #7, Question 8) (“[T]here is an intentional and conscientious effort to follow instructions.”); *id.* (Respondent #13, Question 8) (“They do their best, just as you would. Most try to follow instructions. Only rogue jurors deliberately try not to.”); *id.* (Respondent #26, Question 8) (“It is human nature to take notice of something that someone instructs you NOT to notice. However, jurors will always try to follow a trial judge’s instructions. Just because they take notice of something that they were instructed to ignore does not mean that they will be persuaded by it.”).

240. *See Survey—Final Results, supra* note 165 (Question 7).

241. Kirgis, *supra* note 9, at 535.

242. *United States v. Thomas*, 116 F.3d 606, 619 (2d Cir. 1997) (quoting *Clark v. United States*, 289 U.S. 1, 13 (1933) (Cardozo, J.)). Judge Cabranes, writing for the Second Circuit, elaborated on this point when he noted that

[a]s a general rule, no one—including the judge presiding at the trial—has a “right to know” how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror. The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system . . . the disclosure of the substance of jury deliberations may undermine public confidence in the jury system and poses a threat to adjudicatory finality.

*Id.* at 618 (citations omitted).

involving factual issues within the zone of their expertise. At the same time, in the event that professionals did serve in cases related to their expertise, courts would avoid the inappropriate regulation of the deliberative process.

Moderation and humility should guide our work here, both in making changes to the law, and evaluating the role the law should play in governing jury deliberations. As with medicine, the first rule of legal reform ought to be: “first, do no harm.”

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### APPENDIX: JURY CONSULTANT SURVEY RESULTS

**The survey had 29 total respondents. Not all answers tally to 100%, as not all respondents answered every question.**

#### Question 1:

Have you ever been involved in a case or cases in which there was a technical issue that a potential member of the jury had some background in either professionally or through education?

Yes: 22 (76%)

No: 6 (21%)

No response: 1 (3%)

If you answered yes to question 1, in the space below briefly describe the case or cases. We are interested in such details as what was the technical issue, the juror's background knowledge, and how did you choose to deal with the juror?

#### Question 2:

Whether or not you have had this issue, if you were confronted with a situation in which there is an "expert" on the jury venire, what would you advise your client to do?

##### (a) Challenge for cause

Yes: 18 (62%)

No: 5 (17%)

Depends: 6 (21%)

##### (b) Peremptory challenge

Yes: 16 (55%)

No: 2 (7%)

Depends: 9 (31%)

No response: 2 (7%)

##### (c) Not challenge the juror because you feel the potential juror may actually benefit your client if allowed to rely on professional knowledge

Yes: 8 (28%)

No: 11 (38%)

Depends: 6 (21%)

No response: 4 (14%)

##### (d) Not challenge for another reason?

Yes: 2 (7%)

No: 13 (45%)

Depends: 8 (28%)

No response: 6 (21%)

#### Question 3:

If there was a challenge for cause, what do you feel would be the best response

on the part of the court?

(a) Grant a challenge for cause

Yes: 17 (59%)

No: 7 (24%)

Depends: 3 (10%)

No response: 2 (7%)

(b) Not grant a challenge for cause, and force the party to use a preemptory challenge

Yes: 11 (38%)

No: 9 (31%)

Depends: 4 (14%)

No response: 5 (17%)

Please explain your answer:

Question 4:

Do you think it is possible, realistically, to exclude such “expert” potential jurors from being chosen?

Yes: 16 (55%)

No: 12 (41%)

No response: 1 (3%)

If so what is the possibility and how could it be realized?

Question 5:

If, despite any challenges, an “expert” juror was on the panel, what do you think would be the best way for the court to deal with deliberations?

(a) Allow the “expert” juror to rely on expert knowledge, and share this knowledge with the rest of the jury during deliberations

Yes: 10 (34%)

No: 18 (62%)

No response: 1 (3%)

(b) Instruct the “expert” juror not to rely on his expert knowledge at all

Yes: 7 (24%)

No: 16 (55%)

No response: 6 (21%)

(c) Allow the juror to rely on expert knowledge, but instruct the juror not to share the knowledge with the rest of the jury during deliberations

Yes: 9 (31%)

No: 15 (51%)

No response: 5 (17%)

Question 6:

If an expert juror were chosen, would you feel comfortable having the expert juror rely on his or her technical background?

Yes: 6 (21%)

No: 19 (65%)

No response: 4 (13%)

Would your answer depend on the kind of case?

Yes: 12 (41%)

No: 16 (55%)



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Depends: 1 (3%)

If you answered yes above, what kind of case or case do you have in mind?

### Question 7:

Do you feel that a jury instruction that provides that a juror with special expertise may rely upon specialized knowledge to form their own opinion but specifies that the juror cannot share that opinion with their fellow jurors is effective?

Yes: 6 (21%)

No: 22 (76%)

No response: 1 (3%)

Please explain your answer above:

### Question 8:

In your experience do you feel jurors pay more attention to a matter that a judge instructs them to ignore?

Yes: 15 (52%)

No: 10 (34%)

Depends: 1 (3%)

No response: 3 (10%)

Please explain your answer:

### Question 9:

If you were asked to consult on a case that involved a technical issue, would you prefer a jury of highly educated individuals that may be better able to grasp the subject matter?

Yes: 15 (52%)

No: 3 (10%)

Depends: 9 (31%)

No response: 3 (10%)

Please explain your answer:

### Question 10:

Would you be worried that during deliberations such a juror would usurp the role of an expert witness who testified at trial?

Yes: 20 (69%)

No: 6 (21%)

Depends: 2 (7%)

No response: 1 (3%)

Explain your answer:

