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# Peer Review: Navigating Uncertainty in the United States Jury System

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*This Article examines American prosecutors' approaches to uncertainty during voir dire. At different points during trial preparation—and during jury selection itself—lawyers draw on multiple interpretive systems to make sense of ordinary citizens. Taking Assistant United States Attorneys in a federal jurisdiction in the Northeast United States as a case study, and drawing on ethnographic research, I focus on three systems prosecutors alternately (and sometimes simultaneously) use to evaluate jurors: (1) probabilistic and evaluative analogies, (2) juror-types generated from the details of criminal cases, and (3) local knowledge stemming from prosecutors' relationships and experiences outside of the courtroom. I show how each interpretive approach renders an inherently unpredictable process (voir dire) and unknown people (prospective jurors) intelligible. I conclude by underscoring the value of ethnographic research to studies of prosecutorial strategy and the legal profession.*

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*“[T]he way in which we see, what we pay attention to, and how, is not empirically ordained; that, ineluctably, depends on a prior conceptual scaffolding, which, once the dialectic of discovery is set in motion, is open to reconstruction.”<sup>1</sup>*

#### INTRODUCTION

Karen, a former defense attorney, described selecting a jury for a case in which a police officer was charged with murder.<sup>2</sup> She began by explaining a proposition—or “ism,” as she called it—that “most” defense attorneys use to pick juries. Namely, defense attorneys excuse jurors who are friendly with—or related to—law enforcement agents.<sup>3</sup> But Karen did not subscribe to this *ism*. Instead, she prided herself on her instincts and said that in her career as a public defender she had only lost a single case. “I just *know* people,” she explained to me.<sup>4</sup> “I can tell just by looking at them. It’s all about going with your gut.”<sup>5</sup>

Karen recalled one prospective juror who responded to a question by stating that her spouse worked as a police officer. According to conventional wisdom, this made the juror unattractive to a defense attorney on the assumption that her husband’s job might prejudice her in favor of the State. “Most defense attorneys would have kept this woman off, no questions asked,” Karen explained.<sup>6</sup> “But when I looked at her—there was something about her. She had sunken cheeks and dark circles under her eyes—like someone who had been a smoker for a long time. I could also tell, just from looking this lady in the eye—this was a woman who really hated her husband . . . . And I could see she had been miserable for many years.”<sup>7</sup> When the trial ended, as the jury filed out, the same juror waited for Karen in the

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1. Jean Comaroff & John Comaroff, *Ethnography on an Awkward Scale: Postcolonial Anthropology and the Violence of Abstraction*, 4 *ETHNOGRAPHY* 147, 164 (2003).

2. Interview with KC, Former Pub. Def., in N.Y.C., N.Y. (Dec. 9, 2012) (on file with author).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

hallway and said, “[y]eah, that cop’s a guilty piece of shit.”<sup>8</sup> According to Karen, this was a juror who “knew that police officers lie.”<sup>9</sup>

In the United States, lawyers (like Karen) evaluate and select jurors as part of a process called *voir dire*. During *voir dire*—or jury selection, as it is colloquially known—people are summoned to state or federal court to be assessed for possible placement on a jury. In theory, lawyers’ evaluations of jurors are meant to determine who among them can fairly and impartially examine evidence in a case. But in practice, much imaginative work goes into this selection process. The focus of this Article is the jury selection process that unfolds in federal criminal trials. In this setting, the law grants both defense attorneys and prosecutors opportunities to excuse jurors without offering reasons for their decisions—a technique called exercising a peremptory challenge.<sup>10</sup> Though prosecutors are prohibited from dismissing a juror based explicitly on her race, ethnicity, or gender, peremptory challenges are rarely challenged or scrutinized in practice.<sup>11</sup> That is, lawyers’ assessments of jurors remain private, off-the-record, and a routine part of impaneling a jury before trial.

The jury system—and *voir dire* in particular—injects an inherently unpredictable, human variable into the United States justice system. As one lawyer put it, “It’s way out of your control . . . I couldn’t tell you what my own family members would do in certain cases, let alone people I’ve met for five minutes.”<sup>12</sup> This uncertainty is compounded by the fact that *voir dire* often fails to elicit informative or even decipherable responses from prospective jurors.<sup>13</sup> Acquittals in nonviolent drug prosecutions raise concern that jurors will disregard the judge’s instructions on the law, a practice referred to as jury nullification. If jurors set aside the law in favor of their own intuitions about justice, the argument goes, laws may not be enforced uniformly.<sup>14</sup> And idiosyncrasies in particular judges’ *voir dire* practices can make the process feel only more uncertain—leading one Assistant United States Attorney (AUSA) to liken it to trying to predict the future.<sup>15</sup>

8. *Id.*

9. *Id.*

10. *See* FED. R. CRIM. P. 24(b).

11. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 97 (2007).

12. Interview with CG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States. (July 8, 2013) (on file with author).

13. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505–06 (1965); Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, CT. REV., Spring 1999, at 10, 10; Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451, 455 (1991).

14. *Sparf v. United States*, 156 U.S. 51, 73–74 (1895) (citing *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545)).

15. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1184–86 (2003). *See generally* LANGUAGE IN THE JUDICIAL PROCESS (Judith N. Levi & Anne Graffam Walker eds., Law, Society, and Policy Ser. No. 5, 1990); Conversation with BQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the

Returning to the scene at the beginning of this Article, one can appreciate the creative intermingling of social and legal judgment that contributes to lawyers' interpretive and evaluative work during voir dire. For the nearly thirty-two million Americans summoned for jury service each year, voir dire may be a person's only formal contact with a judge and attorneys in a courtroom.<sup>16</sup> And unlike most everyday interactions and conversations, it is decidedly an encounter with strangers. Karen's approach to interpreting a prospective juror during jury selection raises several issues that this Article will address, in turn. First, to what extent are juror-types—such as *jurors who are friendly with or related to law enforcement agents*—salient in lawyers' thinking? How does the significance of such categories change—in meaning or importance—from case to case? Second, to the extent that attorneys feel they “just know people” despite the uncertainty attendant to this process, what kind of knowledge is this? And where does it come from?

This Article draws on ethnographic research conducted between 2013 and 2017 with federal prosecutors. During this period, I interned as a lawyer and doctoral researcher in multiple United States Attorney's Offices in a federal district in the Northeast. The data for this article was collected through 132 semi-structured interviews with AUSAs, participation in twenty-five jury selection proceedings, and sixty related meetings. I have changed names and, in one instance, individuated details about a case. Though the conventional wisdom is that judges predominantly conduct federal jury selection,<sup>17</sup> the jurisdiction I studied permits attorneys to propose supplemental questions for jurors and conduct follow-up questioning at sidebar. Despite many prosecutors' observation that federal jury selection is a “low information” process (e.g., judges have discretion to limit the number and nature of questions asked of jurors) they eagerly gathered and interpreted the information that was available to them.<sup>18</sup> And this research shows that prosecutors did not view themselves as passive actors during jury selection.

My central argument is that prosecutors rely on multiple interpretive resources as they seek to compose a jury based on the attributes of jurors. Here, Clifford Geertz's term “symbol system” is instructive.<sup>19</sup> As Geertz conceives of them, symbol systems allow us to comprehend and impose definition on the world around

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northeast United States. (Apr. 13, 2015); Interview with BZ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States. (July 3, 2013) (on file with author).

16. GREGORY E. MIZE, PAULA HANNAFORD-AGOR, & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT* (2007), <http://www.ncsc-jurystudies.org/State-of-the-States-Survey.aspx>

17. Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI-KENT L. REV. 927, 931 (2015).

18. See e.g., Author's participation in jury selection meeting in the northeast United States. (Sept. 11, 2016) (referring to jurors who provided little information as “blank slates”, “a mystery”, and “unknown” though forming impressions based on their media consumption, occupations and places of residence, to name a few examples).

19. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 104 (1973).

us.<sup>20</sup> Rather than approach these systems as bounded sets of “norms, rules, principles, [or] values,” he describes them as “distinctive manner[s] of imagining the real.”<sup>21</sup> In the context of voir dire, lawyers’ interpretive systems aid in their ascription of meaning and identities to prospective jurors.

I pay particular attention to three systems that prosecutors draw on—by their own accounts—in the real time practice of, and reflection on, voir dire: (1) probabilistic and evaluative analogies; (2) juror-types that prosecutors generate from the details of particular criminal cases; and (3) social and local knowledge from prosecutors’ personal relationships and experience outside the courtroom. Though the use of each interpretive system reflects prosecutors’ shared impulse to impose order on an uncertain and unpredictable legal process, I show how distinct systems facilitate distinct ways of “conceptualis[ing] persons.”<sup>22</sup> I then examine prosecutors’ approaches to evaluating jurors, focusing on the conceptions of justice that each entails. I conclude by suggesting that prosecutors’ approaches to making sense of jurors are one means by which they negotiate their professional identities. This ethnographic study is a key first step toward understanding how uncertainty informs legal technique during jury selection and the implications of lawyers’ varying attempts to translate people into (purportedly) known entities.

## I. CREATING ORDER BY ANALOGY

Courtroom studies are a major theme of recent anthropological writing on law.<sup>23</sup> And prosecutorial strategy is an emergent subject of study.<sup>24</sup> But an ethnographic study of lawyers’ assessments of jurors during voir dire has yet to be

20. *See id.*

21. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 173 (1983).

22. *See* Marilyn Strathern, *Conclusion* to DEALING WITH INEQUALITY: ANALYSING GENDER RELATIONS IN MELANESIA AND BEYOND 278, 285 (Marilyn Strathern ed., 1987).

23. *See* JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 37–38 (2d ed. 2005); JOHN M. CONLEY & WILLIAM M. O’BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 23–24 (1990); SUSAN F. HIRSCH, PRONOUNCING AND PERSEVERING: GENDER AND THE DISCOURSES OF DISPUTING IN AN AFRICAN ISLAMIC COURT 15 (1998); GREGORY M. MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH RAPE TRIAL 3–4 (2001); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 1 (1990); KWAI HANG NG, THE COMMON LAW IN TWO VOICES: LANGUAGE, LAW, AND THE POSTCOLONIAL DILEMMA IN HONG KONG 79 (2009); JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 66–67 (2008); BARBARA YNGVESSON, VIRTUOUS CITIZENS, DISRUPTIVE SUBJECTS: ORDER AND COMPLAINT IN A NEW ENGLAND COURT 2–3 (1993).

24. *See generally* RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS (2011); Gerhard Anders, *Contesting Expertise: Anthropologists at the Special Court for Sierra Leone*, 20 J. ROYAL ANTHROPOLOGICAL INST. 426, 426–44 (2014); Tom Southerden, *This Side of Silence: Human Rights, Torture and the Recognition of Cruelty*, 35 HUM. RTS. Q. 259, 259–64 (2013) (reviewing TOBIAS KELLY, THIS SIDE OF SILENCE: HUMAN RIGHTS, TORTURE AND THE RECOGNITION OF CRUELTY (2012)).

undertaken by an anthropologist. Though the real time assessments of federal prosecutors are admittedly difficult for social scientists and lawyers to access, ethnographic attention to jury selection offers a unique window into the complexity of everyday practices of discrimination both in and out of the courtroom. It also complicates approaches to jury selection that reduce prosecutors to a single “type,” or reduces their interpretive work to explicit (or unconscious) instrumental uses of inflexible stereotypes.<sup>25</sup>

This Section will examine prosecutors’ use of analogies in their approaches to jury selection; the AUSAs I interviewed and worked with often made sense of jurors with reference to analogous actors and circumstances. As a feature of everyday thinking, analogies—or perceptions that two things are alike—encode taken-for-granted assumptions about the way “human beings order their world.”<sup>26</sup> In the same way analogies allow lawyers to fill in legal and factual “gaps” with reference to the similar “legal categories” in distinct cases,<sup>27</sup> prosecutors drew on analogies to reconcile gaps in knowledge during voir dire. In his writing on “law as culture,” Lawrence Rosen described the interpretive power of analogies as “central to the creation of thought and to binding diverse categories into a manageable whole.”<sup>28</sup> Distinct types of analogies or metaphors, in his view, help make sense of unfamiliar people and things across distinct societal domains:

To speak of one’s body as a “temple,” home as a “castle,” intellectual life as a “marketplace of ideas,” or equality as “a level playing field” is far more than mere wordplay: Such metaphors connect what we think we know with what we are trying to grasp, and thus unite, under each potent symbol those diverse domains that must seem to cohere if life is to be rendered comprehensible.<sup>29</sup>

Analogies and metaphorical language, in other words, are “grounded in our experiences in the world,” integrally connected to the way we structure these experiences.<sup>30</sup>

Of interest, here, is not the *fact* that lawyers rely on analogical reasoning, which is not in dispute, but the implications of the particular types of analogies they draw on to make sense of jurors. In this section, I suggest that two types of analogies are salient in prosecutors’ thinking and practice during voir dire: *probabilistic* and *evaluative* analogies. Probabilistic analogies treat voir dire as a process of risk-minimization and jurors as commensurable and measurable entities. Prosecutors

25. See VIDMAR & HANS, *supra* note 11, at 87; see also Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 298–302 (2005).

26. See MARY DOUGLAS, *HOW INSTITUTIONS THINK* 65 (Routledge & Kegan Paul Ltd 1987) (1986); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 748 (1993).

27. ANNE LISE RILES, *COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS* 191 (2011).

28. LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 9 (2006).

29. *Id.*

30. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 119 (1980).

who subscribed to this analogical mode conceived of the individuating aspects of jurors' humanity, at least theoretically, as beside the point.<sup>31</sup> Voir dire, in this risk-taking register, was a de-temporalized exercise of calculation. Those who invoked evaluative analogies, in contrast, conceived of jurors as complex and agentive; prosecutors likened their interpretive work to qualitative practices (drawn from distinct social domains) that invited a holistic assessment of the juror-as-person.<sup>32</sup> Voir dire, in this evaluative register, was a dynamic, interactive, and fundamentally relational process that unfolded in real time.

Some anthropologists who take legal knowledge and technique as a subject of study stress the reductive potential of analogical reasoning. In Geertz's view, for example, a defining feature of legal reasoning is its tendency to "skeletonize" facts, "narrow[ing] moral issues to the point where determinate rules can be employed to decide them."<sup>33</sup> The translation of human characteristics into legally intelligible (and actionable) interpretations during voir dire thus involves a "necessary make-believe," or an act of "'holding other things equal' because to include all those other things would be to make computation impossible."<sup>34</sup> This process of human translation resonates with Annelise Riles's description of "standardization" as a set of "techniques for cutting off, excluding, or purifying complexity so as to render values universally calculable" offering the "possibility of certain forms of equivalence."<sup>35</sup> In her linguistic analysis of first-year law school contracts courses, Elizabeth Mertz observed a similar process of reduction—or flattening—as people were abstracted, by analogy, into legal categories that would be comparable across cases.<sup>36</sup>

The ethnographic study of voir dire, however, suggests that analogical approaches to making sense of jurors do not necessarily flatten human complexity. Evaluative analogies, in particular, create a space for engagement with jurors in all of their intricacy and difference. As we explore both instantiations of the analogy, I pay particular attention to the kind of knowledge each mode makes possible—or renders invisible. As I note at the end of this Section, evaluative and probabilistic analogies not only help prosecutors make sense of prospective jurors, but help them

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31. Interview with CB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author); Interview with CB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author); Interview with BG, Ass't U.S. Att'y, U.S. Att'y's Office in the northeast United States (June 25, 2013) (on file with author).

32. Interview with AT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 19, 2013) (on file with author); Interview with DH, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 17, 2013) (on file with author); Interview with CQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013) (on file with author).

33. GEERTZ, *supra* note 19, at 170.

34. F.G. BAILEY, *THE TACTICAL USES OF PASSION: AN ESSAY ON POWER, REASON, AND REALITY* 18 (1983).

35. RILES, *supra* note 27, at 58–59.

36. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 100, 115 (2007).

make sense of the uncertainty and unpredictability that characterize their *own* positions in the process.

### A. Probabilistic Analogies

A number of prosecutors, including those who invoked juror-types or social knowledge, conceptualized jury selection in statistical terms. Prosecutors who subscribed to the logic of these statistical—or probabilistic—analogs evinced a view of lay decision-makers as possessing characteristics and holding opinions that could be quantified and compared with others.<sup>37</sup> Jurors believed to hold aberrational views were often characterized as *outliers*, and jurors' opinions were conceptualized as lying on a spectrum between “extremes.”<sup>38</sup> Jurors with extreme and erratic opinions, in these prosecutors' view, came to voir dire with fixed and inflexible perspectives (that frequently aligned them with or against the defendant) leaving them incapable of examining evidence with an “open mind.”<sup>39</sup>

Though some prosecutors who eliminated extremes—or outliers—felt they reduced the risk that an erratic juror might influence others during deliberation, other prosecutors acknowledged the possibility that such jurors might be replaced by people with *more* erratic opinions.<sup>40</sup> As a result, though outliers were frequently identified and dismissed from jury pools, prosecutors often took the possibility of outliers in the remaining venire of unquestioned jurors into account, as any one of them could occupy a challenged juror's seat.<sup>41</sup> To some, this sense of serendipity made voir dire feel like a “game of probabilities” or a process of “play[ing] the

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37. Interview with CB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author); Interview with BG, Ass't U.S. Att'y, U.S. Att'y's Office in the northeast United States (June 25, 2013) (on file with author); Interview with CG, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author); Interview with DG, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 17, 2013) (on file with author); Interview with DH, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 17, 2013) (on file with author); Interview with DN, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 18, 2013) (on file with author); Interview with DT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author); Interview with BU, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 1, 2013) (on file with author).

38. See sources cited *supra* note 38.

39. Interview with CG, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (“I think the goal is to eliminate the people who are never going to rule in your favor—never going to come with an open mind. Beyond that, it's way out of your control.”) (on file with author).

40. Interview with DA, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 15, 2013) (on file with author); Interview with AT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 19, 2013) (on file with author); Interview with CV, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States. (July 12, 2013) (on file with author).

41. Interview with AL, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (Jan. 13, 2014) (on file with author); Interview with CN, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013) (on file with author); Interview with BX, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author).

odds,” as prosecutors attempted to evaluate and limit risk.<sup>42</sup> Prosecutors who took this concern seriously were often reluctant to exhaust their peremptory challenges on the chance an unknown juror might be a harbinger of extreme or outlying views.<sup>43</sup> Jurors who provided “common sense”—or relatable—responses to questions during voir dire, in contrast, were deemed “known entities.”<sup>44</sup>

One prosecutor explained his strategy during jury selection as a process of “gett[ing] rid of the outliers—both [prospective jurors] who you see as being really pro-government, and [the juror] who you see as someone who couldn’t find it in their conscience to find guilt.”<sup>45</sup> Other indices of extreme or outlying opinions for prosecutors included strong views about a defendant’s race, individuals who did not “believe in the presumption of innocence,” and those who have had “negative experiences with law enforcement.”<sup>46</sup> Some prospective jurors said, explicitly, that they did not “trust the government for anything.”<sup>47</sup> In many cases, these jurors’ responses came across as “radical,” “on the margins,” “wacky,” “weird,” or “kind of off” relative to those of an “average” citizen.<sup>48</sup> As another prosecutor explained it, the outlier juror may be “so opinionated [that it] won’t make a difference what is presented,” as the juror will be “drive[n]” to a particular verdict during deliberation and fail to consider the evidence.<sup>49</sup>

As a locus of uncertainty, some prosecutors characterized voir dire itself as an outlier in a criminal justice system that would otherwise have a single, certain, and just outcome of conviction.<sup>50</sup> That is, a number of prosecutors implicitly associated

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42. Interview with DA, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 15, 2013) (on file with author); Interview with CN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with CX, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 12, 2013) (on file with author).

43. Interview with AZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (“You don’t want to be in a position where you’re stuck with a juror [who] you don’t have the option of getting rid of.”) (on file with author).

44. Interview with AC, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (May 18, 2013) (on file with author).

45. Interview with BG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 25, 2013) (on file with author).

46. Interview with CQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013 & Jan. 6, 2014) (on file with author).

47. Interview with BB, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author).

48. Interview with DC, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 16, 2013) (on file with author); Interview with BE, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with CQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with AT, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 19, 2013) (on file with author); Interview with DT, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 19, 2013) (on file with author).

49. Interview with BR, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author).

50. Interview with BB, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with DH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the

certainty—in their assessments of jurors and case preparation more broadly—with justice.<sup>51</sup> “We don’t walk into court unless we know we have all the evidence,” one prosecutor explained; “that’s why conviction rates are sky high . . . the only variable—the only outlier—is the jury. You never know what a jury’s going to care about.”<sup>52</sup> Echoing this sentiment, another prosecutor explained that he could convince jurors beyond a reasonable doubt “but for a crazy outlier, someone to subvert the process.”<sup>53</sup> This feeling stemmed from his confidence in the strength of his cases.<sup>54</sup>

Similarly explicit (or implicit) references to outliers appear in the text of legal opinions that purport to give definition to the concept of juror “impartiality,” and the function of peremptory challenges during voir dire. In her writing on rationales that justify the use of peremptory challenges, Marianne Constable notes the pervasiveness of a “language of statistics, the sifting of ‘outliers’ believed to skew results.”<sup>55</sup> In addition to invoking the statistical metaphor of the outlier, other prosecutors referred to risk-based analogies to make sense of jurors. Some of these probabilistic analogies related voir dire to games of chance or a process of managing risk.

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northeast United States (July 17, 2013) (on file with author); Interview with BK, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 27, 2013) (on file with author).

51. Interview with CH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 8, 2013) (on file with author); Interview with EJ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 26, 2014) (on file with author); Interview with AL, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 14, 2013) (on file with author); Interview with AU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 19, 2013) (on file with author).

52. See sources cited *supra* note 51.

53. Interview with BQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author).

54. Interview with BC, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with BD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with BO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 27, 2013) (on file with author); Interview with BS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author); Interview with AU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 19, 2013) (on file with author); Interview with BU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author); Interview with AW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author); Interview with DN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 7, 2015) (noting the importance of “ferret[ting] out people who may not be able to hold back sympathies for someone. We have a ridiculously strong case. . . I have almost *too much* evidence. I can’t show them 45 videos, but have to pick the highlights.”) (on file with author); Interview with BV, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author); Interview with AZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author).

55. See MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 37 (1994).

One prosecutor likened jury selection, for example, to “counting cards.”<sup>56</sup> As the prosecutor struck jurors who “favor[ed] the defense,” he believed the overall pool would “tend” in the direction of jurors who were “more educated, and willing to analyze [evidence].”<sup>57</sup> Peremptory challenges, in this view, were used to excuse jurors who fell on the “extreme ends of prosecutors’ and defense attorneys’ preferences.”<sup>58</sup> Other prosecutors likened jury selection to gambling.<sup>59</sup> One prosecutor explained with a smile that the process is nothing more than a crapshoot, and that his colleagues often joked that they ought to just keep the first twelve people seated in the box.<sup>60</sup> Others likened voir dire to horseracing.<sup>61</sup> Following the logic of this analogy, prosecutors were less worried about seeing their “first pick juror” win a seat in the jury box than they were about removing problematic jurors. One prosecutor explained, “[i]f there are eight horses in a race and I can eliminate four, I have a better chance. This doesn’t mean I’ll always be right, but if I am right a significant percentage of the time I will have an advantage over the course of time.”<sup>62</sup> Just as individuals who handicap races assign greater “weight” to horses depending on skill, some prosecutors assigned value to prospective jurors based on their projected behavior during future deliberations. In each of these analogies, jurors were cast as unpredictable variables that prosecutors managed by removing those who were particularly disfavored.

Prosecutors’ references to certain jurors as outliers created a sense that people could be conceptualized as “extremes” that could be “weeded out.”<sup>63</sup> The remaining

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56. Interview with BY, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 2, 2013) (on file with author).

57. Interview with BY, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 2, 2013) (on file with author).

58. Interview with BG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (Jan. 6, 2014) (on file with author); Interview with BY, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 2, 2013) (on file with author).

59. Interview with AC, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (May 18, 2013) (characterizing jury selection as a “crapshoot”) (on file with author); Interview with CE, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 8, 2013) (on file with author); Interview with CF, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 8, 2013) (on file with author); Interview with CM, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with CW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 12, 2013) (on file with author).

60. Interview with CW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 12, 2013) (on file with author).

61. Interview with AG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013) (on file with author); Interview with AI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013) (on file with author); Interview with EJ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 26, 2014) (on file with author); Interview with AW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author).

62. Interview with AG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013) (on file with author).

63. Interview with AL, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 14, 2013) (on file with author); Interview with CQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the

jurors, by this logic, represented a “broad middle range of people”—individuals who were “not too hot or too cold,”<sup>64</sup> “neither here nor there,”<sup>65</sup> “neutral,”<sup>66</sup> or “nondescript.”<sup>67</sup> The hope, at least, was that once outliers had been removed, prosecutors would be left with a pool of people who, in their view, would be more receptive to the evidence presented to them, and less likely to “carry undue weight during deliberations.”<sup>68</sup> A pool of citizens who, in other words, might be “boring,” “middle-class,” and live in the suburbs.<sup>69</sup> In the description of one prosecutor, these individuals might “go to work every day, have 2.5 kids, drive a Ford Taurus, and have a white picket fence.”<sup>70</sup> And once the “X factor you can’t control” was eliminated, these more average citizens were presumably left behind.<sup>71</sup> Keeping with this statistical logic, jury selection took the form of a process of *de*-selection.<sup>72</sup> The image of the juror that resulted was that of an abstracted, measurable being with limited agency, who exists outside of time. Jurors emerged, in this analysis, as discursive functions of *lawyers*’ adeptness at making sense of them.

### B. *Evaluative Analogies*

Evaluative analogies had the benefit of capturing human attributes and behavior that probabilistic and risk-minimizing idioms rendered invisible. Where probabilistic approaches to jurors collapsed multiple human attributes into abstract assessments of a juror’s risk, evaluative analogies invited attention to the juror as a living, breathing, and changing person with a character that transcended the information they provided in verbal responses to questions. Of course, distinctions between probabilistic and evaluative analogies were not always clear-cut. A card

northeast United States (July 11, 2013) (on file with author); Interview with BS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author).

64. Interview with CO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with BU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author).

65. Interview with EN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 8, 2013) (on file with author).

66. Author’s participation in jury selection meeting in the northeast United States (Sept. 11, 2016).

67. Interview with EO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 8, 2013) (on file with author).

68. Interview with BG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 25, 2013) (on file with author); Interview with DN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author).

69. Interview with B.Z., Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 3, 2013) (on file with author); *see also* BONNIE URCIUOLI, *EXPOSING PREJUDICE: PUERTO RICAN EXPERIENCES OF LANGUAGE, RACE, AND CLASS* 28 (Waveland Press 2013) (1996) (discussing “generic” middle class).

70. Interview with BZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 3, 2013) (on file with author).

71. *Id.*

72. Interview with BS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (“I’m looking to eliminate.”) (on file with author).

game like poker, for instance, may seem—at first glance—to fall in a category with other games involving risk. But one prosecutor saw the game—and specifically the practice referred to as a “tell” where the quality of a player’s hand is inadvertently revealed by his or her facial expression—as a helpful, qualitative analog to assessing a juror’s honesty. He explained that, “If they’re taking too long to answer a question—or formulating an answer—if they’re not looking at the judge, they’re clearly not engaged. And it’s easier to lie when you’re not engaged.”<sup>73</sup> Though poker games certainly involve risk calculation, a good player will draw on subtle observations of his opponent’s behavior as well. As guides for thought and action, prosecutors did not reduce analogies like the poker game to single interpretive approaches.

Here, I will highlight two evaluative analogies deployed by prosecutors: (1) a job interview, and (2) meeting a possible mate for the first time. Despite the distinct social contexts they index, both analogies are attentive to jurors’ humanity, and to the particular interpretive relationship that emerges between the lawyer and layperson during *voir dire*. First, each analogy enlarges the bounds of relevant juror characteristics. The prospective juror, in other words, emerges in detail. Salient characteristics might include, for instance, her “demeanor” (including whether a juror appears to be paying attention to the judge), “grooming,” personality (introverted? reticent? alert? upbeat?), style of dress, “body language” (does the juror have her arms crossed?), the way she “carries herself” while approaching sidebar for questioning, and her choice of reading materials.<sup>74</sup>

Other bases of prosecutors’ impressions came from observing prospective jurors’ “comfort” or “uncertainty” in answering questions, including their “tone changes” or “pauses.”<sup>75</sup> And still others were attentive to the nature of prospective

73. Interview with BS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 17, 2013) (on file with author).

74. Interview with AG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013) (on file with author); Interview with BG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 25, 2013) (on file with author); Interview with DH, Ass’t U.S. Att’y, U.S. Att’y’s Office in the northeast United States (July 17, 2013 & June 19, 2014) (“You can tell in a minute—are [prospective jurors] meek, mild-mannered . . . it’s the way they answer questions. Are they muttering—or do they seem alert, upbeat? Are they comfortable in their own skin? It’s like—what do you do if you walk into a room with people you don’t know? You walk in, make eye contact, put your hand out and say, ‘Hi, I’m Charlie.’ If you can walk into a room and do that, you have your shit together.”) (on file with author); Interview with CN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with DN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with CQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with AS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 19, 2013) (on file with author); Interview with DU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 20, 2013) (on file with author); Interview with BY, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 2, 2013) (on file with author).

75. Interview with DH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 17, 2013) (on file with author); Interview with DI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast

jurors' interactions with each other.<sup>76</sup> Is a prospective juror a “complete loner” (referred to, by some, as a “lone wolf”) or does she seem “anti-social”? These attributes sometimes led prosecutors to worry a juror would feel uncomfortable deliberating with others—or have a personality that would not “mesh” with the rest of the group.<sup>77</sup> If, however, prospective jurors established a rapport with one another—became “fast friends” or appeared “comfortable together”—prosecutors sometimes felt inclined to keep groups together.<sup>78</sup> This is because some thought amiable jurors would be inclined to collaborate and reach a verdict.<sup>79</sup> If a prosecutor were to challenge one while keeping another of these friendly jurors, he or she worried the remaining juror might begrudge the government for separating them.<sup>80</sup>

Evaluative analogies also had the benefit of capturing a juror's behavior *over time* rather than rely on a more instantaneous or “snap characterization” of a particular, aberrational response.<sup>81</sup> The “job interview” analogy articulated by another prosecutor captured this well. This prosecutor first noticed whether a prospective juror made eye contact with the lawyers and judge.<sup>82</sup> Likening voir dire to the way an employer might scrutinize a job candidate, the prosecutor explained that he

like[s] to watch the person get up from the pew and watch them get their stuff together as they walk up and take their seat [in the jury box]. How do

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United States (July 18, 2013) (on file with author); Interview with EJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 26, 2014) (on file with author).

76. Interview with AZ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author).

77. Interview with DE, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 17, 2013) (on file with author); Interview with DG, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 17, 2013) (on file with author); Interview with AK, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 14, 2013) (on file with author); Interview with AL, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 14, 2013) (on file with author); Interview with DS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author); Interview with AW, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author); Interview with AY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author); Interview with CY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 15, 2013) (on file with author).

78. Interview with BO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author); Interview with AZ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author); Interview with AY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author).

79. Interview with BS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (on file with author).

80. Interview with BO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author); Interview with AZ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author).

81. Interview with AT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 19, 2013) (on file with author).

82. Interview with DH, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 17, 2013) (on file with author); Interview with CQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013) (on file with author).

they walk? How do they carry themselves? . . . Are they dragging their feet? Keeping their head down as they approach the box? Are they confident?<sup>83</sup>

The “right type of person,” in this prosecutor’s view, was a juror who seemed able to “make a decision and stick with it”—just as the right kind of job candidate might communicate confidence through eye contact, a firm handshake, and by speaking clearly.<sup>84</sup>

Another prosecutor analogized voir dire to the process of meeting a potential romantic partner for the first time. At first glance, he explained, you might notice a person “smiled at you,” or judge that person based on his “clothes, demeanor, [and] grooming.”<sup>85</sup> Likewise, when a prospective juror “comes in [wearing] a pair of slacks and a button-down shirt and decent enough shoes and they’re on jury duty, they give me a sense of a person who takes seriously their stake in the community” and “clearly cares.”<sup>86</sup> At the point a prospective juror (or possible mate) begins to speak, a different set of assumptions may come into play. Due to confusion about the questions being asked—or the unfamiliar (courtroom) setting—a person who might otherwise be a competent, capable juror may leave a negative impression. Similarly, a man in a bar might find the setting “uncomfortable” or act strangely due to nervousness.<sup>87</sup> And like a person on a blind date, a juror may be pegged as a particular type of person based entirely on superficial, physical characteristics.<sup>88</sup> In both cases, by their own accounts, prosecutors considered the possibility that a desirable juror might respond to questioning in an *un*characteristic manner. Assessments of jurors in such instances were slowed (if not deferred), and some jurors, like ordinary people lawyers claim to know in everyday life, were given the benefit of the doubt.

As we will see, legal typifications, local knowledge, analogies, and statistical metaphors gave prospective jurors an aura of legibility in an otherwise uncertain process. Each system brought with it a series of interpretive resources with which prosecutors could grapple with the uncertainty of voir dire and the limits of their knowledge about prospective jurors. Inevitably, however, there remained

83. Interview with DH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 17, 2013) (on file with author).

84. Interview with DH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 17, 2013) (on file with author).

85. Interview with AG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013); Interview with BQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (Oct. 4, 2014) (likening an interaction with a prospective juror to dating experiences in college).

86. Interview with AG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013) (on file with author).

87. Interview with AG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013) (on file with author).

88. Interview with AC, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (Oct. 2, 2015) (“Every time you look at someone you can say—you can go this way or you can go that way. I’ve kind of settled down, but before, when I was dating—people would hear my job and see I had blonde hair and think I was Ann Coulter. But I get it. People have nothing else to go on.”) (on file with author).

jurors whom prosecutors could not make sense of. Jurors who fell outside of intelligible categories—or whose opinions and characteristics could not easily be narrativized—were often designated “crazy.”<sup>89</sup> These crazy or out-of-category jurors lacked familiar identifying characteristics, and were often dismissed by prosecutors peremptorily.

Some prosecutors went so far as to suggest that one of their primary strategies—or “rules of thumb”—during voir dire was to keep “crazy people” off the jury.<sup>90</sup> Of course, what conferred this aberrational status on a juror was subject to debate. Here, once again, prosecutors described an instinctive and intuitive process. “Well you don’t want crazy people,” one prosecutor explained, “but there’s no way to tell, really. You just ask a million questions and the crazy pops out.”<sup>91</sup> Other prosecutors conceded the process lends itself to the “worst kind of stereotyping”<sup>92</sup>—a process of seeking people who seem “off,” “unhinged,” “loony,” or “lunatic” and therefore must be “weeded out.”<sup>93</sup> In these cases the bounds of human legibility were thrown into sharp relief. To the extent that lawyers “impose system on an inherently untidy experience,” it is perhaps unsurprising that these between-category moments caused particular discomfort.<sup>94</sup>

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89. Interview with BI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 26, 2013) (on file with author); Author’s participation in jury selection meeting in the northeast United States (Sept. 11, 2016).

90. *See e.g.*, interview with DG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 7, 2013) (on file with author); Interview with BJ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 26, 2013) (on file with author); Interview with CO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with AP, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 18, 2013) (on file with author); Interview with BQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author).

91. Interview with BI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 26, 2013) (on file with author).

92. Interview with AD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 11, 2013) (on file with author); Interview with DG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 17, 2013) (on file with author).

93. Interview with AS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 19, 2013) (on file with author); Interview with BS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author); Interview with AZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author).

94. MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO 4 (1966).

## II. JUROR-TYPES

The process of category-creation extends beyond legal practice; people categorize and interpret the world with an eye toward ordering the disorderly.<sup>95</sup> In this Section, I examine prosecutors' use of iconic "types" as shorthand for the ways jurors' social characteristics align (in their own understandings) with different analytical abilities and/or orientations to crime and punishment. During jury selection this is the most visible system of category-creation, as it involves the construction of type-creating schemes for jurors that are specific to particular types of federal criminal cases, and draws on information explicitly elicited from citizens during a period of open court questioning. Common examples of juror-types that emerged in this research are presented in Table 1, including—for example—jurors' ideas about privacy, politics, and their perceptions of law enforcement agents.

The particular juror-types imputed to prospective jurors often drew on aspects of jurors deemed more or less salient depending on the particular facts of a case and on the characteristics of the parties and witnesses involved. Some prosecutors viewed these types as a "checklist" of "topics to think about" in particular cases.<sup>96</sup> And some referred to them from "day one" of case preparation.<sup>97</sup> Although none of the juror-types presented in Table 1 alone shaped a prosecutor's impression of a juror, these categories made recurrent appearances in prosecutors' descriptions of their decision-making as they formulated case-specific questions to submit to judges in advance of *voir dire*.<sup>98</sup>

When a juror's occupation aligned her with a particular juror-type, prosecutors sometimes decided to strike her without explanation, using a peremptory challenge. Occupational types that were particularly worrisome to prosecutors included

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95. See DOUGLAS, *supra* note 26, at 58; MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* xix–xx (Routledge Classics 2002) (1966); GEERTZ, *supra* note 21, at 46.

96. Interview with AM, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 18, 2013) (on file with author).

97. Interview with CI, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author).

98 Author's participation in jury selection proceedings, in the northeast United States, (Feb. 28, 2017).

students,<sup>99</sup> social workers,<sup>100</sup> accountants,<sup>101</sup> nurses,<sup>102</sup> engineers,<sup>103</sup> teachers,<sup>104</sup> people who worked in print/television news media,<sup>105</sup> avid watchers of crime-solving television shows,<sup>106</sup> and prospective jurors who were eager to be excused.<sup>107</sup>

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99. Interview with DE, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 17, 2013) (on file with author); Interview with DF, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 17, 2013) (on file with author); Interview with AM, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 18, 2013) (on file with author); Interview with BT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (on file with author); Interview with CW, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author); Interview with CY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 15, 2013) (on file with author).

100. Interview with CB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author); Interview with BD, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author); Interview with CM, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013) (on file with author); Interview with BO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author); Interview with CR, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013) (on file with author); Interview with BW, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 2, 2013) (on file with author); Interview with BX, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 2, 2013) (on file with author); Interview with AY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author); Interview with AZ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author); *cf.* Interview with CJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author).

101. Interview with BO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author).

102. Interview with AL, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 14, 2013 & Jan. 7, 2014) (on file with author); Interview with DQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 19, 2013) (on file with author); Interview with DT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author); Interview with AX, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (Jan. 13, 2014) (on file with author).

103. Interview with EB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (Jan. 16, 2014) (on file with author); Interview with BO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author).

104. Interview with BE, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author); Interview with CF, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author); Interview with CM, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013) (on file with author); Interview with DT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author).

105. Interview with DJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 18, 2013) (on file with author).

106. Interview with BD, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author); Interview with BI, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 26, 2013) (on file with author).

107. Interview with CB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author); Interview with BG, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 25, 2013) (on file with author); Interview with BJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 26, 2013) (on file with author); Interview with AM, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 18, 2013) (on file with author); Interview with EP, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 20, 2015) (on file with author); Interview with BS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast

Prosecutors said they worried that anxious jurors would spend more time looking at the clock than listening to the evidence,<sup>108</sup> and angry jurors might “take out” their frustration on the prosecutors for “wasting time” bringing the case in the first place.<sup>109</sup>

The use of juror-types was complicated by cases in which jurors implied that they trusted law enforcement agents implicitly. During voir dire, a question like “Would you be more likely to trust a police officer?” sometimes led to a juror’s dismissal on the assumption she would not be able to fairly and impartially assess evidence from lay witnesses.<sup>110</sup> Nonetheless, drawing on their own colloquial understandings of the status ascribed to FBI agents and police officers, some prosecutors disputed the value of this question (and juror-type) altogether. “The real answer [to the question of whether a law enforcement officer is more likely to tell the truth],” one prosecutor explained, “is probably *yeah*. They know more than anyone what the penalties are for lying, and they probably instruct people every day about them.”<sup>111</sup> Others perceived the phrasing of this question as “tilted”—suggesting a single, socially acceptable response (“no, I would listen to all testimony before passing judgment,”) rather than soliciting a more reflexive and therefore truthful answer.<sup>112</sup>

Prosecutors also often disagreed about the relevance and salience of particular juror-types.<sup>113</sup> And some challenged the very notion that a single category should lead a prosecutor to draw conclusions about a juror.<sup>114</sup> As one prosecutor put it:

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United States (June 28, 2013) (on file with author); Interview with BQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author); Interview with CQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with AW & BU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (noting that they would also dismiss jurors who seemed *overeager* to serve as jurors) (on file with author); Interview with AX, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 20, 2013) (on file with author); Interview with BY, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 2, 2013) (on file with author).

108. Interview with BG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 25, 2013) (on file with author); Interview with CQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author).

109. Interview with DK, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with BS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author).

110. Interview with BG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (Jan. 6, 2014) (on file with author).

111. Interview with BJ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 26, 2013) (on file with author).

112. Interview with CX, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 12, 2013) (on file with author).

113. See MURRAY EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* 4 (1988); Interview with CA, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 3, 2013) (on file with author).

114. Interview with BD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with BG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 25, 2013) (on file with author); Interview with DN, Ass’t U.S. Att’y,

“the conservative guy who watches Fox news and whose uncle is the police chief—you might see him and think he’s the perfect juror, when what you *really* want is the social worker.”<sup>115</sup> And how could one conclude that the presence of a drug user in a person’s family would make that person sympathetic to a defendant rather than angry about the destructive potential of illegal drugs?<sup>116</sup> In this vein, one prosecutor recalled that over the course of voir dire he noticed that a juror’s last name was the same as a judge known to give lenient sentences to convicted drug dealers.<sup>117</sup> When the prosecutor inquired about this coincidence, the juror confirmed that she was this judge’s daughter.<sup>118</sup> Rather than excuse her on the assumption she might share her father’s philosophy, the prosecutor kept her on the jury, and felt his open-mindedness was vindicated when the jury returned a guilty verdict.<sup>119</sup> Indeed, for any category a prosecutor could construct, colleagues had counter-arguments and alternative categories ready at hand.<sup>120</sup> And many tales of conviction by unlikely juror-types circulated, reminding prosecutors to interrogate their assumptions about particular occupations or attributes.<sup>121</sup> Though juror-types varied in meaning and significance, they were systematically invoked as points of departure for further judgment.

Other juror-types emerged through the combination of distinct attributes. A juror who watched Fox news, listened to Rush Limbaugh, or had law enforcement work experience—for example—might be typified as a juror with politically conservative views.<sup>122</sup> But the meaning of a “conservative” designation differed among prosecutors. Though some approached the prototypical conservative juror as likely part of a “law and order establishment” that wanted to increase “stability”

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U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with BU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author).

115. Interview with AD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 11, 2013).

116. Interview with DA, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 15, 2013) (on file with author).

117. Interview with AD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 11, 2013) (on file with author).

118. Interview with AD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 11, 2013) (on file with author).

119. Interview with AD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 11, 2013) (on file with author).

120. Interview with DJ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author).

121. Interview with BU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author).

122. Interview with BB, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with AD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 11, 2013) (on file with author); Interview with BF, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 25, 2013) (on file with author); Interview with CZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 15, 2013) (on file with author).

in communities by deterring crime,<sup>123</sup> others claimed that today, conservative jurors might be “skeptical about government programs” or government interference with their private lives.<sup>124</sup> Indeed, one prospective juror’s reference to his disapproval of the National Security Agency’s (NSA) collection of cell phone data precipitated concern among prosecutors that ordinary citizens were actively reconfiguring their attitudes toward (or associations with) the government.<sup>125</sup> As the meanings of juror-types shift over time, it is possible that the attribution of some identities to jurors will fall out of alignment with systems that previously sustained prosecutors’ reality claims. Under these circumstances, a juror-type might begin to look more like a stereotype that forecloses inquiry or “limit[s] knowledge” than a “shorthand expression” of characteristics likely to “clump together.”<sup>126</sup> The knowledge prosecutors created about jurors was thus subject to change, corresponding to shifts in contemporary politics and, correspondingly, the influence of partisanship on prosecutors’ formulations of jurors’ identities.

In some cases, it was the juror who tried to manage a prosecutor’s interpretation of her—or at least the type that would be imputed to her. Jurors who wished to be excused from jury duty, for example, were sometimes motivated to alter the judge and attorneys’ “definition” of their situations—or the typifications drawn on to supply rationales for their dismissal.<sup>127</sup> Peter Berger and Thomas Luckmann’s description of “interference” is a helpful analogue to this process, as both involve attempts by individuals to control others’ impressions of them.<sup>128</sup>

A *voir dire* interaction I observed in 2013 illustrates the process by which prospective jurors proposed juror-types for themselves that were contested by judges. In this case, the judge explicitly reframed a prospective juror’s objection to the trial schedule so that he would fit into a juror-type that would authorize his excusal:

123. Interview with CM, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author).

124. Interview with BG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (Jan. 6, 2014) (“[C]onservative doesn’t mean what it used to” and today may signal a person who “doesn’t like wiretaps, or investigations that look like entrapment.”) (on file with author); Interview with CZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 15, 2013) (on file with author).

125. Author’s participation in jury selection proceedings in the northeast United States. (Jan. 6, 2014).

126. LAWRENCE ROSEN, *BARGAINING FOR REALITY: THE CONSTRUCTION OF SOCIAL RELATIONS IN A MUSLIM COMMUNITY* 27 (1984).

127. *See e.g.*, Author’s participation in jury selection proceedings, in the northeast United States, (Sept. 13–Sept. 14, 2016) (in which juror presents himself to judge as someone who can not consider opinions that are contrary to his own due to his upbringing); *see also* Author’s participation in jury selection proceedings, in the northeast United States, (April 13, 2015) (in which the Judge comments that she expects jurors will present newfound work conflicts with jury service despite omitting them from their written questionnaires).

128. *See* PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 29 (Irvington Publishers 1980) (1966); *see also* IRVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 15 (reissue 1990).

*Prospective Juror:* My problem is I have a lot of bills to pay—including paying my own rent . . .

*Judge:* I see. And are you self-employed?

*Prospective Juror:* Yes . . . I work for myself.

*Judge:* So, while you're a juror, you have no other source of income?

*Prospective Juror:* No, sir.<sup>129</sup>

Here, the juror's effort to influence the judge's perception of his situation (and need to be excused from jury service) was reinforced by the judge's ascription of the status of "self-employed" to him. This interaction offers glimmers of the malleability of juror-types like "self-employed" and the judge and jurors' interactive capacity to redefine such types.<sup>130</sup> Indeed, for a prospective juror who was unable to participate in jury service, it might be advantageous to exploit the negotiability of her identity in this context.<sup>131</sup>

#### A. *Ambiguity of Juror-Types*

Despite the appearance of order conferred by juror-types, the process of attributing opinions and intentions to others is an inherently uncertain enterprise. And prosecutors' willingness to impute states of mind to jurors is not without its risks. Philosopher Amelie Oksenberg Rorty, for instance, warns us of our tendency to overvalue our imputations of particular characteristics or intentions to others, "treating a relatively recessive intention as if it were dominant."<sup>132</sup> During voir dire, the uncertainty of these interpretations may be magnified. "When there are important issues at stake for us," Rorty explains, "we tend to abstract and decontextualize our interpretations, overweighting any partial presentation that might affect us."<sup>133</sup> Thus, where prosecutors framed pretrial discussion with phrases like "[a]n ideal juror will" in reference to a single juror-type—Rorty might urge caution.<sup>134</sup> That is, juror-types function as one instrument among many, which—to borrow Peter Berger and Thomas Luckmann's poetic phrasing—"cuts a path through a forest and, as it does so, projects a narrow cone of light on what lies just ahead."<sup>135</sup> In one prosecutor's view, the juror-type *victim of a similar crime* illustrated

129. Author's participation in jury selection proceedings, in the northeast United States (Mar. 3, 2013).

130. HIRSCH, *supra* note 23 at 3, 9; ROSEN, *supra* note 126 at 19, 27, 29.

131. See JOHN L. COMAROFF & SIMON ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT 37, 39–40 (1981) (Comaroff and Roberts illustrate the strategic negotiability of rank and status in a manner that resonates with American lawyers' negotiation of jurors' identities); ROSEN, *supra* note 126 at 19, 27, 29.

132. Amelie Oksenberg Rorty, *Understanding Others, in* Other Intentions: Cultural Contexts and the Attribution of Inner States 203, 217 (Lawrence Rosen ed., 1995).

133. *Id.*

134. Interview with AW, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author).

135. BERGER & LUCKMANN, *supra* note 132, at 42; ELINOR OCHS & LISA CAPPS, LIVING NARRATIVE: CREATING LIVES IN EVERYDAY STORYTELLING 213–14 (2001).

the limits of categorical thinking. “You’d think on first blush prosecutors would want people who are victims of crime off [the jury] because they hate criminals,” the prosecutor explained, but “a lot of people might be more scared a defendant would come after them. You don’t know how it cuts.”<sup>136</sup>

Prosecutors also interpreted the responses of jurors who fell between discrete juror-types. What might it mean, for example, that a prospective juror in a healthcare fraud case was married to a man who interviewed for a job in the defendant’s medical practice?<sup>137</sup> Or, in a sexual assault case, that a prospective juror’s wife was sexually harassed at a party while they were on vacation?<sup>138</sup> In the absence of a clearly delineated juror-type—or as a means of complementing preexisting types—a number of prosecutors drew on social and local knowledge about places and people with whom they were already familiar. After all, there were many more “facts”<sup>139</sup> to be gleaned from jurors’ language and behavior than a single classificatory scheme could assimilate. Prosecutors claimed that they found hints of jurors’ attitudes by observing their tone of voice, body language, and descriptions—all of which, prosecutors said, shed light on how they felt about the experiences they recounted.<sup>140</sup>

Interestingly, some lawyers reconciled contradictory ideas about particular jurors by relying on the broader knowledge systems with which jurors were associated. Jurors who described themselves as holding religious beliefs or practicing law themselves, for example, were typified on the basis of these sense-making systems.<sup>141</sup> Prospective jurors who were trained lawyers were particularly controversial. Some prosecutors felt that lawyers would make poor jurors no matter “what type of law they practice,” regardless of individuating circumstances or characteristics.<sup>142</sup> For those who said they “kick[ed] lawyers off,” they worried

136. Interview with AW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author).

137. Author’s participation in jury selection proceedings, in the northeast United States, (Sept. 12, 2013).

138. Author’s participation in jury selection proceedings, in the northeast United States (Jul. 9, 2013).

139. Interview with BV, Ass’t U.S. Att’y, U.S. Att’y’s Office, in N.E. (July 20, 2013) (on file with author).

140. Interview with CP, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author).

141. Author’s participation in jury selection meeting in the northeast United States. (Sept. 11, 2016).

142. Interview with CF, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 8, 2013) (on file with author); Interview with DJ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with AL, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 14, 2013) (on file with author); Interview with DO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with EO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 8, 2015) (on file with author); Interview with DS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with CT, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 12, 2013) (on file with author); Interview with AU, Ass’t U.S. Att’y,

lawyers would dominate deliberations, or be viewed by others as having excessively influential opinions.<sup>143</sup> Others worried that even when cases lay outside a lawyer's area of expertise, misremembered or exaggerated details from a juror's legal education might lead deliberation down irrelevant paths.<sup>144</sup> One prosecutor recalled a case, for example, in which he felt a juror supplemented the judge's legal instructions with his own "contrary" instructions that influenced deliberations.<sup>145</sup> In another case, a colleague believed the holdout juror, who was a lawyer, misrepresented the meaning of strict liability to the rest of the jury in a felony murder case.<sup>146</sup> In other instances, prosecutors worried that jurors who were lawyers might "nitpick," "dissect" their cases, or decide they would "not convict no matter what."<sup>147</sup>

Others, however, were attentive to jurors' specific practice areas. One prosecutor, for example, chose a juror who practiced maritime law, noting that his field did not involve knowledge of the criminal justice system, but positioned him to value the legal process and know a thing or two about evidence.<sup>148</sup> In this case, the prosecutor was satisfied that the benefits of legal knowledge outweighed the risk of a lawyer overpowering others' thinking.

Another juror-type encompassed individuals who identified themselves as religious—and specifically, as Jehovah's Witnesses.<sup>149</sup> For some, strict religious

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U.S. Att'y's Office, in the northeast United States (June 19, 2013) (on file with author); Interview with BY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 2, 2013) (on file with author).

143. Interview with BD, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) ("We worry a good deal—most of us kick lawyers off—the theory goes that they're going—you don't want to have any one person dominating the result—a lawyer will dominate result because he's on his own turf and therefore is confident and sure.") (on file with author); Interview with BG, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 25, 2013) (on file with author); Interview with BJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 26, 2013) (on file with author); Interview with BR, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (noting that lawyers "may have tendency to be so opinionated that it won't make a difference what's presented—they'll reach a conclusion and drive the jury.") (on file with author); Interview with DS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author); Interview with CT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author).

144. Interview with BZ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author).

145. Interview with DJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 18, 2013) (on file with author).

146. Interview with DE, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 17, 2013) (on file with author).

147. Interview with BZ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author); Interview with DO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author); Interview with AL, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 14, 2013) (on file with author).

148. Interview with AX, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author); Author's participation in jury selection meeting in the northeast United States. (Sept. 11, 2016).

149. Interview with DB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States

observance led to the immediate dismissal of a prospective juror.<sup>150</sup> As one prosecutor put it: “Boom, they’re out.”<sup>151</sup> Another prosecutor who selected a Jehovah’s Witness as a juror recalled being warned by his colleagues that she would not be able to “sit in judgment” of others.<sup>152</sup> This inspired the prosecutor to do his own research on the topic. He learned that although there is a “strain of thought” among Jehovah’s Witnesses that the Bible “preclude[s] you from judging,” there was no consensus in the community.<sup>153</sup> In the opinion of this prosecutor, the Jehovah’s Witness juror-type required serious qualification.<sup>154</sup> Implicit in some prosecutors’ ambivalence about religious jurors and those with legal training was a sense of the power of these knowledge systems and their preclusion of competing ideas. Nonetheless, prosecutors’ contrary experience and personal research sometimes caused ideas about the monolithic nature of particular knowledge systems to collapse.

The resources with which prosecutors assimilated unstable and uncertain juror-types were complemented by other techniques that were aimed at decoding opaque human behavior. The following section takes up another interpretive strategy: local and social knowledge aimed at making sense of prospective jurors.

### III. SOCIAL KNOWLEDGE

Though prosecutors often entered the courtroom with particular juror-types in mind, efforts to instantaneously categorize jurors were quickly destabilized by the complexity of the people they faced. This complexity was only compounded by prosecutors’ attention to jurors’ nonverbal responses to voir dire questions. In this Section, I analyze prosecutors’ use of everyday social knowledge to make sense of prospective jurors. Irrespective of their experience picking juries, nearly every

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(July 16, 2013) (on file with author); Interview with CE, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 8, 2013) (on file with author); Interview with DN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 16, 2013) (on file with author); Interview with AZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author).

150. Interview with AU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 19, 2013) (on file with author); Interview with AY, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author).

151. Interview with AZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); *cf.* Interview with CE, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (May 8, 2015) (on file with author); *cf.* Interview with BS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (in which a prospective juror’s religiosity made her *more* attractive to a prosecutor) (on file with author); *see also* Interview with DC, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (Feb. 25, 2015) (noting that despite a religious prospective juror’s suggestion that she would have difficulty sitting in judgment of another person, her participation on a grand jury in the past suggested that “clearly she’s not so religious that she couldn’t put it aside”) (on file with author).

152. Interview with AL, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 14, 2013) (on file with author).

153. *Id.*

154. *Id.*

prosecutor with whom I spoke explicitly or implicitly drew on social knowledge, often explaining their reliance on instincts and intuitions to aid their interpretation of jurors. Here, I focus on the forms of social and local knowledge that constitute these intuitions by lawyers' own accounts.

As a practical matter, prosecutors understood themselves to be collecting a series of "facts" about jurors during voir dire, which some enumerated on post-it notes and arranged in manila folders to mirror the seats in a jury box.<sup>155</sup> These shorthand notes were meant to refresh prosecutors' memories of particular jurors and were kept on file.<sup>156</sup> And prosecutors feverishly took notes during voir dire, as open court questions elicited quick responses (and, sometimes, elaboration) by jurors.<sup>157</sup> During breaks, case agents and paralegals were often invited to share, in whispers, their own thoughts about prospective jurors. And in some cases, characteristics of counties were imputed to jurors who inhabited them.<sup>158</sup> But prosecutors said that they gleaned as much about jurors from the way they answered questions as they did from what jurors said.<sup>159</sup> With this broader lens on jurors'

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155. Interview with CB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author); Interview with DC, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 16, 2013) (on file with author); Interview with AJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 14, 2013) (on file with author); Interview with DN, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 18, 2013) (on file with author); Interview with EN, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2015) (on file with author); Interview with EO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2015) (on file with author); Interview with DS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author); Interview with BV, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 1, 2013) (on file with author); Interview with AX, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author); Interview with AY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author); *cf.* Interview with CE, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (May 8, 2015) (on file with author).

156. Interview with BG, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 25, 2013) (on file with author).

157. Interview with DH, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 17, 2013) (on file with author); Interview with BS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) ("You barely have time to look at them, trying to take down the answers") (on file with author); Interview with BV, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 1, 2013) (on file with author).

158. Interview with DP, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author); Interview with DS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author); Interview with DU, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 21, 2013) (on file with author); Interview with BW, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 2, 2013) (on file with author); Interview with BY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 2, 2013) (on file with author).

159. Interview with EJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 26, 2014) (on file with author); Interview with AM, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 18, 2013) (on file with author); Interview with CP, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013) (on file with author); Interview with DT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author);

speech and behavior, juror-types that otherwise seemed determinative to lawyers felt less certain, appeared more ambiguous, and created space for multiple interpretations. Under these circumstances, legal expertise required prosecutors to flexibly navigate multiple and simultaneous meanings.

When prompted to explain how they approached this fact-gathering and interpretive process, many prosecutors said they relied on their instincts.<sup>160</sup> One prosecutor explained that after his first trial, the principle he subsequently “lived by” when picking jurors was:

[I]f, for whatever reason, I get a gut feeling that a person is just not going to be a good juror, I get rid of that person. I just don’t want that person sitting on the jury because it’s going to be in *my* mind that that person is the trouble-maker.<sup>161</sup>

Prosecutors who shared this view worried that their own preoccupation with a juror could be a distraction. A more senior prosecutor, for example, cautioned a colleague who felt a juror was “looking at him funny” that if he “ha[d] reservations” he would likely “kick himself all through the trial.”<sup>162</sup> He emphasized, however, that though these characteristics offered “insight,” the process was not a “science”—an oft-

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Interview with AW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author).

160. Interview with DA, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 15, 2013) (on file with author); Interview with DC, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 16, 2013) (on file with author); Interview with CH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 8, 2013) (on file with author); Interview with DH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 17, 2013) (on file with author); Interview with DI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with DJ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with DK, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with DM, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with BO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 27, 2013) (on file with author); Interview with CO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with DO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with DQ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with DS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with DT, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with BU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author); Interview with DU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 21, 2013) (on file with author); Interview with BV, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author); Interview with AW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author); Interview with AZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author).

161. Interview with DI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author).

162. Interview with BO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 27, 2013) (on file with author).

repeated mantra among lawyers in the office.<sup>163</sup> One came to identify troublesome jurors, in other words, not by learning *voir dire* but by *doing* it.<sup>164</sup> And prosecutors acknowledged that their assessment practices conformed to a system that was social—not scientific—in nature.<sup>165</sup>

Defendants, too, were invited to draw on their intuitions about prospective jurors. Despite the fact that jury selection is legally within the province of lawyers, defense attorneys often invited their clients to pay attention to the jury pool and weigh in if there were particular jurors they “didn’t like,” created a “bad vibe,” or prompted negative “feelings” or “intuitions.”<sup>166</sup> Prosecutors, too, sometimes felt a “kind of simpatico”—or as though they “hit it off” with a juror—even when their trial partners did not.<sup>167</sup> In some cases, a prosecutor’s perceived rapport with a juror trumped her partner’s reservations—suggesting that instincts were sometimes trusted even when they were not shared.<sup>168</sup>

At first glance, one might be inclined to view “intuitive,” “gut,” or common sense approaches to jury selection as *uncertain* due to their apparent subjectivity.<sup>169</sup> But the intervention of social and local knowledge made prosecutors feel all the more confident that their intuitions were grounded in the social experiences they navigated every day. Indeed, a feeling of uncertainty itself could be a “reason to get

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163. Interview with DA, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 15, 2013) (on file with author); Interview with DI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with DL, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with AM, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author); Interview with CM, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with AS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with AW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author); Interview with AZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (“It’s not brain surgery.”) (on file with author); Interview with BZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 3, 2013) (on file with author).

164. Interview with CH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 8, 2013) (on file with author); Interview with CO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with BV, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author).

165. Interview with DI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author).

166. Author’s participation in jury selection proceedings, in the northeast United States, (Jun. 10, 2013); Author’s participation in jury selection proceedings, in the northeast United States, (Aug. 14, 2013); Author’s participation in jury selection proceedings, in the northeast United States (Sept. 9, 2014); Author’s participation in jury selection proceedings, in the northeast United States, (Mar. 3, 2015); *cf.* Author’s participation in jury selection proceedings, in the northeast United States, (Jan. 6, 2013).

167. Interview with BD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author).

168. Interview with BS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author).

169. Interview with BV, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author).

rid of someone.”<sup>170</sup> Some prosecutors explained the process as one of reading people.<sup>171</sup> Prosecutors’ particular knowledge about people, places, and cultural norms thus informed their understanding of the speech, behavior, and appearance of jurors the way knowledge of grammar, context, and genre might aid in the interpretation of a text. Prosecutors, in other words, used common sense and everyday encounters with different people to help make sense of prospective jurors.<sup>172</sup>

But how did prosecutors acquire this social and local knowledge? In advance of jury selection, some prosecutors tried to anticipate the concerns of laypeople by using partners, parents, grandparents, colleagues, friends, and acquaintances as proxy jurors.<sup>173</sup> One prosecutor explained: “My parents are typical jurors, so I go through and say ‘what do you think of this? That? And this matter?’ and [I] see *their* reactions.”<sup>174</sup> Here, a few examples are illustrative. One case involved the sexual assault of a middle-aged woman who had fallen asleep on an interstate bus.<sup>175</sup> The lead prosecutor sought insight into the minds of prospective jurors by informally surveying family and friends at a barbecue. She discovered that many people had difficulty accepting the possibility a woman could continue to sleep as a stranger groped her.<sup>176</sup> This window into friends’ concerns, in her view, allowed her to anticipate the concerns of future, imagined jurors.<sup>177</sup> As a result, she actively sought

170. Interview with AM, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 18, 2013) (on file with author).

171. Interview with BD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with DI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with DK, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author); Interview with CR, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with DU, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 20, 2013) (on file with author).

172. Interview with AG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013) (on file with author); Interview with DI, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013) (on file with author).

173. Interview with CH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 8, 2013) (on file with author); Interview with AM, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (Jan. 28, 2014) (on file with author); Interview with DP, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with DS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with DT, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with DV, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author); Interview with CW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 12, 2013) (on file with author); Interview with AY, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author).

174. Interview with DS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author).

175. Interview with DV, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author).

176. *Id.*

177. *Id.*

older, married, female jurors who might better empathize with the victim's exhaustion and unawareness of male attention.<sup>178</sup>

Other prosecutors said they drew on the intuitions of their parents,<sup>179</sup> a ten-year-old son,<sup>180</sup> and colleagues<sup>181</sup> as surrogate jurors. One of the benefits of this polling approach was the insight it offered into the range of responses a prosecutor could anticipate to a particular witness or alleged crime. And to the extent that prosecutors imagined an ideal juror for a particular case, this image could be informed—or filled in—by individuals they knew.<sup>182</sup> In some cases, prosecutors engaged in the imaginative exercise of personally identifying with a prospective juror's perspective. In the context of a tax case, for example, an attorney conceded that tax matters were “confusing,” explaining, “I don't want jurors thinking—gosh—I don't remember if something I wrote on *my* taxes is wrong.”<sup>183</sup> Here, the prosecutor drew on local knowledge of Americans' perceptions of and relative familiarity with “tax rules,” compared, say, with areas of criminal law that likely lay outside of their personal experience, such as violent crime.<sup>184</sup> He thus imputed to jurors the relatable instinct of worrying that the complexity of tax law might render anyone a criminal, injecting *un*reasonable doubt into a prosecution.

Prosecutors sometimes drew on personal knowledge of individuals who shared salient characteristics in common with prospective jurors. Having family members in academia who were “somewhat distrustful of the government,” for instance, gave one prosecutor pause about seating professors on a jury.<sup>185</sup> On the basis of having a middle-aged cousin who was a “jaded” social worker, another prosecutor explained that her instinct was to get rid of the “young ones” with “stars in their eyes about how they're going to cure the world” in favor of older, more experienced social workers who have “beaten their head[s] against the wall.”<sup>186</sup>

Another prosecutor cited her sister's experience serving on a jury to substantiate her intuition that third-grade teachers are “so damn naïve” and “not

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178. *Id.*

179. Interview with DT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author).

180. Interview with AY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author).

181. Interview with CH, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author).

182. Interview with CH, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author).

183. Interview with AT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 19, 2013) (on file with author).

184. *Id.*

185. Interview with CM, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013) (on file with author).

186. Interview with BD, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author).

realistic about what's happening in the streets."<sup>187</sup> Though her sister was ultimately convinced that the defendant should be convicted of illegally selling firearms, her sympathy for the defendant's relatively minor role in the crime (compared with his accomplices who pleaded guilty) substantiated the prosecutor's intuition that teachers might feel sorry for defendants.<sup>188</sup> Another prosecutor recalled her trial partner's insistence that a prospective juror be kept on the panel despite her apparently adamant religiosity.<sup>189</sup> Her trial partner said, "We're keeping her. She's my great aunt . . . she's tough and suffers no fool of heart."<sup>190</sup>

One interaction between trial partners was particularly suggestive of the prevalence of a social logic that placed proxy jurors alongside decision-making prosecutors. It was a humid, midsummer day, and fifty-five people had finished completing a written questionnaire.<sup>191</sup> The case involved the sale of illegal drugs, and two AUSAs—Matt and Lisa—were allotted a one-hour lunch break to discuss their reactions to the jury pool before questioning the same jurors at sidebar.<sup>192</sup> In this case, because the prospective jurors had filled out a written questionnaire, the prosecutors had never seen or interacted with them in person.<sup>193</sup> "Ok, juror number thirty-six," Matt said, "forty-three years old . . . male . . . and an elementary school teacher. I'll give him a three because he reminds me of my brother."<sup>194</sup> He wrote "Tom" across the top of the juror's questionnaire—circling the number three, which on his one-to-ten scale made him an undesirable juror, but not necessarily worth challenging peremptorily.<sup>195</sup> "I'm putting 'Tom'—my brother's name—even though you won't know what that means . . ."<sup>196</sup> Here, a prosecutor's reference to his sibling became shorthand, supporting an unfavorable assessment of a person he knew little about. Like the prosecutor's brother, the juror was a teacher. And no other details were necessary.

Likening herself to a casting director, another prosecutor drew on her knowledge of social norms to assess jurors' television habits.<sup>197</sup> If a young juror—for example—claimed her favorite television show was the 1980s comedy, *The Golden Girls*, the prosecutor deemed this a dramatic departure from where the juror

187. Interview with CE, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author).

188. *Id.*

189. Interview with BS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (on file with author).

190. *Id.*

191. Interview with AI & AV, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 24, 2013) (on file with author).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Interview with CR, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 11, 2013) (on file with author).

“should be” in terms of her media preferences.<sup>198</sup> This sort of juror, she explained, was “a weirdo” and “not the norm.”<sup>199</sup> Other prosecutors drew conclusions about prospective jurors’ conformity to social expectations with reference to the clothing they wore during jury selection.<sup>200</sup> This sort of “on your feet assessment” led some prosecutors to conclude that wearing t-shirts decorated with a peace sign or a marijuana leaf, for example, could be read as anti-authoritarian symbols<sup>201</sup> and a sign that a juror lacked “respect” for the formality of the courtroom.<sup>202</sup>

The accumulation and use of social knowledge was not limited to jury selection. Even after jury selection was complete, social knowledge about jurors often continued to inform prosecutors’ approaches to trying cases. Several experienced prosecutors, for instance, explained their practice of weaving details about jurors’ occupations into their opening and closing statements as a means of establishing a rapport with them. One prosecutor explained, “if I can keep you awake with references to hockey, you may still disagree, but you’ll be paying attention.”<sup>203</sup> Other prosecutors explicitly constructed legal arguments using analogies that would resonate with particular jurors.<sup>204</sup> Federal prosecutors with past experience trying cases in state court were particularly confident in their ability to identify jurors with their own knowledge repertoires accurately, and made use of this knowledge throughout the trial.<sup>205</sup>

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198. *Id.*

199. *Id.*

200. Interview with BC, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with CR, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author).

201. Interview with BC, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with CN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 11, 2013) (on file with author).

202. Interview with AG, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013) (on file with author); Interview with CN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); Interview with CR, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 11, 2013) (on file with author); *Cf.* Interview with AD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 12, 2013) (on file with author); Interview with AZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 12, 2013) (on file with author).

203. Interview with DN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (Jul. 18, 2013 & Jun. 24, 2015) (on file with author); Interview with BT, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (Jun. 28, 2013) (on file with author).

204. Interview with DN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013 & Aug. 12, 2015).

205. Interview with DH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 17, 2013) (on file with author); Interview with DN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 18, 2013 & Aug. 12, 2015) (on file with author); Interview with DP, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 19, 2013) (on file with author); Interview with BT, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author); Interview with AY, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013 & Feb. 27, 2015) (on file with author).

The very process of *trying* a case sometimes led to the reinforcement or revision of interpretations of jurors. Intuitions about particular juror-types, for instance, were sometimes strengthened in cases that resulted in a defendant's acquittal. One prosecutor recalled a case in which he resisted striking a juror who was "all over the place, asking random questions."<sup>206</sup> After the jury acquitted the defendant, he said he should have known she would be a problem, recalling that he had been uncertain about her from the beginning.<sup>207</sup> Another prosecutor recalled a healthcare fraud case in which he selected a juror who worked as a nurse and biller because he thought her familiarity with the "healthcare process" would help her understand the evidence in the case.<sup>208</sup> After the trial ended in a hung jury, he regretted this decision. During jury selection for the retrial of the case, a hardened impression of the "nurse" juror-type was reinforced in his thinking.<sup>209</sup> Looking back, he explained, he "never should have kept a nurse on the jury when you have a doctor as a defendant."<sup>210</sup> He cited what he maintained was a longtime belief that nurses resented their subordinate positions to doctors—a social fact he drew from his own interactions with nurses.<sup>211</sup> During preparation for the retrial, he attributed this sentiment to a supervising attorney whose sister (a doctor) corroborated this impression with first-hand experience.<sup>212</sup> Here, once again, social knowledge intervened and created the conditions of its continued relevance. Though lawyers could not be sure that a particular juror was responsible for a particular outcome, unfavorable verdicts sometimes reinforced intuitions about jurors that might have been disregarded during jury selection. And as we have seen, social knowledge sometimes hardened into firm principles that circulated in conversation.

#### CONCLUSION

This Article has examined prosecutors' divergent approaches to rendering the unpredictable business of jury selection more orderly, manageable, and certain. Parts I–III examined the extent to which prosecutors deploy qualitative and quantitative analogies, juror-types, and social knowledge to make sense of jurors during *voir dire*.

This research also suggests that prosecutors' assessments of jurors rendered their *own* professional identities more certain. That is, in assessing jurors, prosecutors simultaneously negotiated their own sense that they were satisfying

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206. Interview with AS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author).

207. *Id.*

208. Interview with AW, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author).

209. *Id.*

210. *Id.*

211. *Id.*

212. Interview with AL, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (Jan. 13, 2014) (on file with author).

their professional imperative to seek justice.<sup>213</sup> To the extent that the prosecutors I spoke with felt “100% convinced of a person’s guilt”<sup>214</sup> and that they were dealing with “overwhelming,”<sup>215</sup> “clear-cut,”<sup>216</sup> “straightforward,”<sup>217</sup> “connect-the-dots,”<sup>218</sup> or “way too much” evidence,<sup>219</sup> they reiterated the paramount importance of identifying “fair” and “intelligent” jurors who would “do the right thing.”<sup>220</sup> Prosecutors’ certainty about the evidence in their cases, in other words, translated into confidence that a juror who could comprehend the evidence would invariably reach a just result. In some instances, prosecutors explicitly linked their certainty about their cases to the contention that “*any* juror will do.”<sup>221</sup>

As this analysis demonstrates, an ethnographic approach to voir dire can capture the textured, diverse, and often overlapping interpretive practices prosecutors draw on to manage an uncertain dimension of their work. Ethnographic research has the advantage of illuminating aspects of jury selection—and juror interpretation—that might otherwise be taken for granted or “underappreciated even, by the lawyer him- or herself.”<sup>222</sup> In thinking about voir dire, Riles’s notion of the “back office”<sup>223</sup> is a useful metaphor; there is much about voir dire—and juror evaluation in particular—that renders it analogous to the justice system’s bracketed, backstage space.

213. See, e.g., 63C AM. JUR. 2D *Prosecuting Attorneys* § 1 (2013).

214. Interview with CH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 8, 2013) (on file with author); Interview with CM, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 11, 2013) (on file with author).

215. Interview with BT, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author).

216. Interview with AF, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 13, 2013) (on file with author).

217. Interview with AL, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 14, 2013) (on file with author).

218. Interview with AX, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author).

219. Interview with DN, Ass’t U.S. Att’y, U.S. Att’y’s Office, in N.E. (July 18, 2013) (on file with author).

220. Interview with BD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author); Interview with DH, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 17, 2013) (on file with author); Interview with BS, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 28, 2013) (on file with author); Interview with BV, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 1, 2013) (on file with author); Interview with AW, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 20, 2013) (on file with author); Interview with AZ, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 21, 2013) (on file with author).

221. Interview with CD, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (July 3, 2013) (on file with author); Interview with AK, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 14, 2013) (on file with author); Interview with AL, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 14, 2013) (on file with author); Interview with BO, Ass’t U.S. Att’y, U.S. Att’y’s Office, in the northeast United States (June 27, 2013) (on file with author).

222. RILES, *supra* note 27, at 13, 135.

223. See *id.* at 10.

To this end, the anthropological study of jury selection may play a part in unwinding,<sup>224</sup> opening up—or democratizing—legal knowledge practices that are otherwise hidden from public view. This, of course, is no easy task. It involves confronting the fact that lawyers’ approaches to interpreting jurors are often tacit, differ from one another, and draw on order-creating systems that may, superficially, seem unrelated to the task at hand. The particular conceptions of jurors expressed by my interlocutors were never inevitable, and the process of re-conception was one of continuously confronting and imagining alternatives.<sup>225</sup>

Neglecting the insights of on-the-ground research in favor of conceptions of prosecutors as unreflective and monolithic, or the juror-types they deploy as inflexible, would yield an incomplete picture of how prosecutors assess jurors in real time. This call to re-examine lawyers’ meaning-making systems is hopeful, as the ethnographic insights that illuminate these practices have a “regenerative capacity” and “build up the conditions from which the world can be apprehended anew.”<sup>226</sup>

The stakes are high if our current analytical tools for making sense of *voir dire* produce a flattened picture of the intricate strategies and narratives that constitute it. As the “stuff of planners’ dreams” and a frame for the “contours of the possible,” theories can shape practice.<sup>227</sup> Like the attributes of human jurors, social theories must be “continuous[ly]” decoded, “not consciously noticed,” and in a state of constant correction and adjustment.<sup>228</sup>

We may not be able to “know peoples’ real hearts and souls”—as one prosecutor put it—but as lawyers and anthropologists, we know more than we think we do.

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224. *Id.* at 148; Annelise Riles, *Real Time: Unwinding Technocratic and Anthropological Knowledge*, in *FRONTIERS OF CAPITAL: ETHNOGRAPHIC REFLECTIONS ON THE NEW ECONOMY* 86, 101 (Melissa S. Fisher & Greg Downey eds., 2006).

225. EDELMAN, *supra* note 113, at 130; David Graeber, *Debt, Violence and Impersonal Markets: Polanyian Meditations*, in *MARKET AND SOCIETY: THE GREAT TRANSFORMATION TODAY* 106, 112 (Chris Hann & Keith Hart eds., 2009).

226. MARILYN STRATHERN, *THE GENDER OF THE GIFT: PROBLEMS WITH WOMEN AND PROBLEMS WITH SOCIETY IN MELANESIA* 19 (Gilbert H. Herdt et al. eds., 1988).

227. RILES, *supra* note 27, at 120, 148.

228. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 10 (Richard Nice, trans., Cambridge University Press 1977) (1972).

Table 1: Examples of Recurrent Juror-Types

Case Characteristics	Juror Characteristics
Undercover law enforcement agents or consensual recordings	Views about a person's right to privacy <sup>229</sup>
The illegal possession of firearms	Membership in the National Rifle Association <sup>230</sup> Perception of the necessity of forensic evidence <sup>231</sup> Perception that law enforcement agents are trustworthy because of their position <sup>232</sup>
Illegal drugs	Experience with illegal drugs <sup>233</sup> Negative perception of drug laws <sup>234</sup>

229. Interview with BC, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author); Interview with BL, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author); Interview with AM, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 18, 2013) (on file with author); Interview with BQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (on file with author); Interview with AW, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 20, 2013) (on file with author); Interview with CX, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author); Interview with BZ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author).

230. Interview with CE, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author); Interview with BN, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author); Interview with BP, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author); Interview with BS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (on file with author); Interview with CV, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author).

231. Interview with DP, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author); Interview with CQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013 & Jan. 6, 2014) (on file with author); Interview with CT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author); Interview with BU, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 1, 2013) (on file with author); Interview with CV, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author); Interview with BY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 2, 2013) (on file with author).

232. Interview with CX, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author).

233. Interview with BN, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author); Interview with AZ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author).

234. Interview with DB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 16, 2013) (on file with author); Interview with BC, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author); Interview with AP, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 18, 2013) (on file with author); Interview with CV, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author).

Confidential informant with criminal history	Perception that a person who committed a crime cannot be trusted <sup>235</sup>
Political corruption	Experience as elected official or negative attitude towards politicians <sup>236</sup> Participation in political campaigns <sup>237</sup> Use of social media to follow and/or comment on politics. <sup>238</sup>
Tax fraud	Subject to audit by Internal Revenue Service <sup>239</sup> Negative perception of federal tax laws <sup>240</sup>
White collar crime	Ownership of small business <sup>241</sup>
Lawful searches	Subject to search by law enforcement agents <sup>242</sup>

235. Interview with CB, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author); Interview with DC, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 16, 2013) (on file with author); Interview with BE, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author); Interview with CE, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author); Interview with BF, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 25, 2013) (on file with author); Interview with CF, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author); Interview with AK, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 14, 2013) (on file with author); Interview with BL, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author); Interview with DN, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 18, 2013) (on file with author); Interview with BQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (on file with author); Interview with CT, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author); Interview with CW, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 12, 2013) (on file with author); Interview with BY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 2, 2013) (on file with author).

236. Interview with BF, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 25, 2013) (on file with author).

237. Author's participation in jury selection meeting in the northeast United States. (Sept. 11, 2016).

238. *Id.*

239. Interview with BH, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 26, 2013) (on file with author).

240. Interview with DO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author).

241. Interview with BO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 27, 2013) (on file with author); Interview with AS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 19, 2013) (on file with author).

242. Interview with AM, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 18, 2013) (on file with author); Interview with BQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (on file with author); Interview with CQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 11, 2013) (on file with author); Author's participation in jury selection proceedings, in the northeast United States (Jun. 10, 2013).

Illegal reentry	Personal or familial experience with deportation <sup>243</sup> Strong feelings about U.S. immigration policy <sup>244</sup>
Mortgage fraud	Homeownership <sup>245</sup> Experience with foreclosure <sup>246</sup>
Child pornography	Views about internet privacy <sup>247</sup>
High-profile defendant	Exposure to media <sup>248</sup>
Non-English speaking witness	Reliance on personal vs. interpreter translations <sup>249</sup>
Computer hacking	Expertise or training related to computers <sup>250</sup>
Sexual assault	Victim of, witness to, or accused of committing a sex crime <sup>251</sup>
Child abuse	Views about corporal punishment <sup>252</sup> Experience with discipline <sup>253</sup>

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243. Interview with DS, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 19, 2013) (on file with author).

244. *Id.*

245. Interview with BC, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author); Interview with DD, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 16, 2013) (on file with author); Interview with CH, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 8, 2013) (on file with author).

246. Interview with AP, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 18, 2013) (on file with author).

247. Interview with BQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (on file with author).

248. Interview with DJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 18, 2013) (on file with author).

249. Interview with BD, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 21, 2013) (on file with author).

250. Interview with CD, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 3, 2013) (on file with author); Interview with AJ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 14, 2013) (on file with author).

251. Interview with BI, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 26, 2013) (on file with author); Interview with EN, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 8, 2015) (on file with author); Interview with EO, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 8, 2015) (on file with author); Interview with EP, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (July 20, 2015) (on file with author).

252. Interview with AY, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (Mar. 2, 2015) (on file with author).

253. Interview with BQ, Ass't U.S. Att'y, U.S. Att'y's Office, in the northeast United States (June 28, 2013) (on file with author).