To Tell the Truth: Voir Dire in the Age of Neuroscience*

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To tell the truth, the goal of voir dire examinations in jury selection has remained unchanged for centuries. Voir dire, meaning "to speak the truth"[1], is an ancient practice for assessing jurors' potential partiality. In the 1760s, William Blackstone discussed voir dire in his Commentaries[2] and described the right to challenge jurors "*propter affectum*[3], for suspicion of bias or partiality".[4] He lauded the practice as part of the greatness of English law. It is equally important in the law of the United States.

While the ultimate goal of voir dire is the same as it was 250 years ago, it is important to employ modern voir dire strategies in this day and age. Because neuroscience confirms that jurors' preexisting attitudes and preferences influence their decision-making[5] and we recognize implicit bias exists,[6] it is crucial to employ the best techniques that enable judges and attorneys to identify jurors' biases.

Several practices assist in making voir dire successful, from the use of supplemental juror questionnaires to not rehabilitating obviously biased jurors.

Supplemental Juror Questionnaires

Although technically not part of voir dire, supplemental juror questionnaires ("SJQs") that supplement (or replace) the standard court form provide great assistance in identifying jurors who may be partial and unfair to a litigant. They are used in State and Federal courts across the country in all types of cases, from intellectual property matters to personal injury suits.[7] Jurors tend to tell the truth more in SJQs than in open court in front of a judge.

Typically, SJQs ask for some background information, such as education and occupation of the juror and spouse or partner, and sometimes strange but potentially revealing questions (e.g., what bumper stickers are on your vehicle). More importantly, though, they focus on questions that are specifically correlated to unfavorable attitudes for each litigant.

Attitudes are greater predictors of verdicts than are demographic information.[8] For instance, a civil defendant has reason to be concerned about a juror who harbors the belief that if a case makes it to court, the defendant must have done something wrong.

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Such a question on an SJQ would be beneficial to that defendant. A personal injury plaintiff might ask about a belief in caps or limits on damages. A party challenging a patent might ask about a belief that the Patent and Trademark Office's determinations are complete proof of validity.

Some questions might be open-ended, while others might be phrased in agree/disagree statements. Questions might also require an answer on a scale, as in strongly agree to strongly disagree. Others might offer a choice between two to four alternative opinions about a subject.

SJQs are particularly helpful when a litigant is a minority or the case or the parties relate to a sensitive subject about which some people may have strong views. In a case involving a minority member, one question might be about negative experiences with people of that group. In a case involving child sexual abuse, it is important to ask whether the juror or someone close has been the victim of sexual abuse. In these cases, it is important to permit jurors to mark questions as private and afford them an opportunity to explain outside the hearing of other jurors.

SJQs can range from one page to several and have varied formats, from tables to columns to standard line-by-line questions. Although they can help streamline the process, follow up voir dire is essential in order to determine whether jurors' beliefs are so strong that they warrant excusal for cause.

Attorney-Conducted Voir Dire

While SJQs can be of great assistance in voir dire, attorney-conducted voir dire is critical. The formality of the courtroom and the respect afforded the judge make it difficult for people honestly respond to a judge's questions. [9] They tend to tell the judge what they believe the judge wants to hear.[10] As a result, knowing they are supposed to be impartial, it is very difficult for jurors to tell the judge they cannot be fair and impartial.

Although jurors are more forth-coming with attorneys, just the mere presence of the judge causes jurors to shift their answers to more conservative positions.[11] Women may be more prone to shifting their responses than are men.[12] In addition, judges may use language in a way that suggests the correct answers to their questions,[13] which enhances the tendency for jurors to conform their answers to the judge's preference.

Given the difficulties imposed by judge-conducted voir dire, it is far more preferable for attorneys to conduct voir dire.

Challenge-Focused Voir Dire

One of the reasons, besides time savings, judges are sometimes reluctant to permit lengthy attorney voir dire is the perception that attorneys just want to use voir dire to indoctrinate jurors.[14] While attorneys may want to educate jurors about the law or case facts, the primary goal of most attorneys today is "getting the bad jurors sent home" as trial lawyers Lisa Blue (also a psychologist) and Robert Hirschhorn plainly put it.[15]

Rather than argue their case, savvy attorneys try to identify biased jurors and help them admit that they are biased. Because it is difficult for jurors to admit their bias, attorneys often have to let jurors know being honest is only just. This is completely appropriate, given the law's guarantee of a fair and impartial jury and the role of voir dire in effecting that.

The next most important goal of voir dire is to elicit sufficient information to exercise peremptory challenges intelligently. Again, this has nothing to do with indoctrinating jurors. The focus is on jurors who may have a hidden or implicit bias that they fail to (or cannot) disclose.

Challenge-focused questioning is evident when attorneys ask for disclosure of views unfavorable to their own clients.

Adequate Time

If attorneys are to conduct voir dire in a way that yields information useful both for cause and peremptory challenges as is the parties' right[16], it is vital that they be given sufficient time for voir dire. Ten minutes is far too little and even a limitation of a few hours can serve as an artificial restriction that prevents full inquiry of biased jurors.

Appellate courts frequently reject appellate arguments based on retention of biased jurors because counsel failed to ask the right question that would elicit an admission of bias. Therefore, trial judges should keep in mind that liberal voir dire enables counsel to ask enough questions to detect bias in jurors and to make a sufficient appellate record.[17]

Judges are understandably concerned with efficiency, but justice should trump efficiency. As Blackstone wrote, "[L]et it be ... remembered, that delays, and little

inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters...."[18]

"Rehabilitation" of Partial Jurors

Neuroscience leads to another issue we should reconsider in the interests of justice: juror rehabilitation. When jurors indicate they have a leaning toward one party, the judge typically asks if the jurors can be fair, or whether they can set the opinion aside and decide the case on the law and the evidence. Commonly, jurors agree because they know the "right" answer, often to the detriment of one of the parties. [19] Therefore, judges should be careful in the way they phrase rehabilitation questions to avoid communicating their preferred response.[20]

In addition, judges need to be aware that jurors do not suddenly become impartial just by saying they can be. Biased people unconsciously interpret information in a biased fashion, even when given information that contradicts their biases.[21] Chief Justice Marshall recognized this truth in 1807. Regarding a juror who has a strong opinion, he wrote, "Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion...."[22]

Such people should be excused for cause. As Chief Justice Marshall wrote, "The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind."[23]

Conclusion

The purpose of voir dire has always been identifying biased jurors. And the Constitution requires impartial juries. Voir dire is the last opportunity for ensuring that right. When jurors tell the truth about their attitudes and beliefs, attorneys can assess their fitness for a particular case and, when appropriate, challenge them for cause. When judges acknowledge jurors' partiality and grant challenges for cause, the right to an impartial jury is effectuated and justice is served.

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[1] See Blackstone's Commentaries, Book III, Ch. 23, 394 ("A juror may himself be examined on oath of *voir dire*, *veritatem dicere")* and J.W. Jones, *A Translation of All the*

Greek, Latin, Italian, and French Quotations which Occur in Blackstone's Commentaries on the Laws of England, And Also in the Notes of the Editions by Christian, Archbold, and Williams, Vol. III, 197 (1823) ("Voir dire, veritatem dicere. To speak the truth.")

[2] *Id*., at 364.

[3] Propter affectum means "on account of partiality". Jones, *supra, n. 1.*

[4] Blackstone, *supra n. 1*, at 363.

[5] Isabelle Brocas and Juan Carillo, *The Neurobiology of Opinions*: *Can Judges and Juries Be Impartial*?, 86 S. Cal. L.Rev. 421 (2012–2013).

[6] See, e.g., Judge Mark W. Bennett, *General Essay: Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149 (2010).

[7] Courts vary in how they handle the questionnaires. In some locations, the parties can handle photocopying the completed questionnaires, relieving the court of the expense and burden of handling numerous questionnaires and multiple copies of each.

[8] Valerie P. Hans and 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 (2003); also see, e.g., Arthur H. Patterson and Nancy L. Neufer, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, Cornell Journal of Law and Public Policy 7, 97, 98-99 (1997) and Hubert S. Feild, *Juror background characteristics and attitudes toward rape: Correlates of jurors' decisions in rape trials*, Law and Human Behavior, Issue 2, 73, 85 (June 1978).

[9] Roger W. Shuy, *How a judge's voir dire can teach a jury what to say*, 6 Discourse & Society 207, 208, 219-220 (1995) (discussing the power asymmetry between judges and jurors and questioners and the questioned) and Susan E. Jones, *Judge versus Attorney Conducted Voir Dire*, Law & Human Behavior, Vol. 11, No. 2, 131, 143-144 (June 1987).

[10] Jones, *supra*. See also, Bennett, *supra*, at 160 ("As a district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can 'be fair.'")

[11] *Jones*, *supra n. 9*, at 144.

[12] *Id*. at 145.

[13] Shuy, *supra n. 9*, at 211-222. In the author's 20-some years of trial consulting, we have seen this occur frequently.

[14] Suggs, David and Sales, Bruce D. *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*," 56 Indiana L. J. Iss. 2, Article 2, 245, 250 (1981).

[15] Lisa Blue and Robert Hirschhorn, Blue's Guide to Jury Selection §§ 1:3 and 1:4, at 5 and 8 (2003).

[16] See, e.g., Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

[17] For a compelling argument on this point, see Howard M. Snyder, *How Arbitrary Voir Dire Limits Harm the Jury System*, 12 Arizona Attorney 12, 13-14 (October 2006).

[18] Blackstone, *supra n. 1*, Book IV, Ch. 27, 344.

[19] Patterson and Neufer, *supra n. 8*, at 99-103.

[20] For a discussion of juror rehabilitation and how to improve questioning, see, Christopher A. Cosper, Note: Rehabilitation of the Juror Rehabilitation Doctrine, 37 Ga. L. Rev. 1471 (2003).

[21] Patterson and Neufer, *supra n. 8*, at 104-105; Emily Pronin, Daniel Lin and Lee Ross, *The bias blind spot: Perceptions of bias in self versus others*, 28 Personality and Social Psychology Bulletin 369 (2002) and Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased assimilation and attitude polarization: The effects of prior theories on subsequently considered evidence,* Journal of Personality and Social Psychology, 37(11), 2098-2109 (1979) (Group deliberation can also result in attitude polarization); and Geoffrey P. Kramer, Norbert L. Kerr, and John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, Law and Human Behavior, Vol. 14, No. 5, 409, 413 (1990).

[22] United States v. Burr, 25 F. Cas. 49, 50 (1807).

[23] *Id.*